EXPLANATORY MEMORANDUM TO THE CHILDREN AND FAMILY COURT ADVISORY AND SUPPORT SERVICE (REVIEWED CASE REFERRAL) REGULATIONS

2004 No.2187

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 These regulations extend the functions of the Children and Family Court Advisory and Support Service (CAFCASS) from family proceedings to other proceedings, to allow an officer of CAFCASS to take court proceedings on behalf of a child following a referral from an Independent Reviewing Officer.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 In March 2002 the House of Lords delivered its judgment on two conjoined appeals, Re S (Minors)(Care Order: Implementation of Care Plan); and Re W (Minors)(Care Order: Adequacy of Care Plan) (2002) UKHL 10. The cases concerned the power of the court to monitor the discharge of the local authority's obligations (including implementation of the care plan) once a care order had been made. The court concluded that the courts have no general power to monitor the discharge of the local authority's function, but a local authority that failed in its duties to a child could be challenged under the Human Rights Act 1998. The most likely challenge would be under article 8 of the ECHR, relating to family life. However, the court also expressed concern that some children with no adult to act on their behalf may not have any effective means to initiate such a challenge. It described this as a "lacuna".

4.2 The provisions in the Adoption and Children Act 2002, making Independent Reviewing Officers (IROs) a legal requirement, are intended to remedy this problem. If the local authority is failing in its duty to the child, the IRO can seek a remedy locally or ultimately refer the case to CAFCASS to take appropriate court proceedings.

4.3 This is the first use of the powers under section 26(2C) of the Children Act 1989. During Parliamentary debates on the Adoption and Children Act 2002 (Hansard Commons 20 May 2002: Column 51) the Government undertook to bring forward regulations to allow CAFCASS to carry out its

functions in other proceedings in addition to family proceedings. This instrument relates to regulations made by the Department for Education and Skills (The Review of Children's Cases (Amendment) (England) Regulations 2004 (SI No. 1419)) and The Review of Children's Cases (Amendment) (Wales) Regulations 2004 (SI No. 1449 (W.149)).

5. Extent

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 Not applicable.

7. Policy Background

7.1 Under the Criminal Justice and Court Service Act 2000 CAFCASS perform functions in family proceedings. As the remedy in the cases referred to CAFCASS by IROs may not always fall within family proceedings, the functions of CAFCASS have to be extended, by regulations, to allow CAFCASS to act in other proceedings (such as civil proceedings).

7.2 The regulations extend the functions of CAFCASS to cases under section 7(1) of the Human Rights Act 1998, judicial review and other proceedings in relation to referrals from IROs. The regulations also set out what actions the officer of CAFCASS should take when a case is referred by an IRO and how the case should be handled, including reporting back on the outcome of any action taken and issuing court proceedings.

7.3 Family stakeholder groups (such as the Family Rights Group) have been consulted during the preparation of the regulations. The regulations have been developed in the light of consultees comments particularly to include timeframes. A Practice Note will be issued by CAFCASS shortly to flesh out the actions that CAFCASS will take when a case is referred by an IRO.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared as these regulations will result in limited impact on the private and voluntary sector. There will also be limited impact upon the public sector as current projections are less than 100 cases per annum, all of which will be brought before the Administrative Court and heard by experienced family judges.

9. Contact

9.1 Any enquires regarding the contents of this circular should be addressed to:

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