EXPLANATORY MEMORANDUM TO

THE FOSTERING SERVICES (AMENDMENT) REGULATIONS 2009

2009 No. 394

1. This explanatory memorandum has been prepared by the Department for Children, Schools and Families ("the Department") and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The Fostering Services (Amendment) Regulations 2009 ("FS(A) Regulations") make amendments to the Fostering Services Regulations 2002, S.I 2002/57, consequential on the introduction of an independent review mechanism ("IRM") for fostering. The IRM for fostering gives prospective and approved foster parents the option of applying to the Secretary of State for a review by an independent review panel of a qualifying determination made by a fostering service provider (i.e. a local authority or an independent fostering agency) in relation to the applicant's suitability to act as a local authority foster parent.

2.2 The FS(A) Regulations also amend the Fostering Services Regulations 2002 in relation to the constitution of fostering panels, the tenure of panel members and the power of fostering panels to seek information and assistance and legal or medical advice.

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

3.1 None.

4. Legislative Context

4.1 The Fostering Services Regulations 2002, S.I. 2002/57, regulate the conduct and operation of fostering service providers and make provision in relation to the placement of children in the care of a local authority under section 23 of the Children Act 1989 ("the 1989 Act").

4.2 Section 8(2) of and Schedule 1 to, the Children and Young Persons Act 2008 ("the 2008 Act") make various amendments consequential on and supplementary to the provisions of section 8, including a power to make regulations about an IRM for qualifying determinations relating to local authority foster parents.

4.3 Section 8(3) of the 2008 Act provides that until the coming into force of section 8(1), Schedule 2 to the 1989 Act has effect with the modifications specified in Schedule 2 to the 2008 Act. Those modifications include a power

to make regulations about an IRM for certain qualifying determinations relating to local authority foster parents.

4.4 The Independent Review of Determinations (Adoption and Fostering) Regulations 2009, made on the same day as the FS(A) Regulations, make provision for an IRM for qualifying determinations relating to local authority foster parents.

5. Territorial Extent and Application

5.1 The FS(A) Regulations apply to England only.

6. European Convention on Human Rights

6.1 As the FS(A) Regulations are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

Fostering panels

7.1 Regulation 24 of the Fostering Services Regulations 2002 provide for the establishment of fostering panels. The functions of a fostering panel (set out in regulation 26 of those Regulations) are (1) to recommend whether or not an individual is suitable to act as a foster parent[1] and to recommend the terms of that approval; (2) to recommend at a foster parent's first review and, if the fostering service provider ("provider") requests it, at subsequent reviews, whether the foster parent remains suitable and whether the terms of approval remain appropriate; and (3) to review the case and make fresh recommendations to the provider where the prospective or approved foster parent makes representations to the provider under regulation 28(8) or 29(9)[2]. The provider makes the final decision about whether to approve a person as a foster parent and the terms of approval.

7.2 The provider must establish at least one fostering panel consisting of no more than 10 members. Where a person who is registered under Part 2 of the Care Standards Act 2000 as the person carrying on a fostering agency is an individual, regulation 24(3)(b)(i) requires that individual to be a member of the agency's fostering panel; however, regulation 24(6) restricts the period for which a person may serve as a member of the panel to two consecutive terms not exceeding three years each. The Fostering Services Regulations 2002 came into force on 1 April 2002. Regulation 24(6A), inserted by the Fostering Services (Amendment) Regulations 2008, S.I. 2008/640, therefore permitted an individual who is a fostering panel member pursuant to regulation 24(3)(b)(i) and whose second consecutive term of office expires on or after 31st March 2008 to continue to hold office as a member of that fostering panel

[1] "Local authority foster parent" is defined in section 23(3) of the 1989 Act; the term includes foster parents approved by a local authority and those approved by an independent fostering provider.
[2] I.e. where the provider proposes not to approve them as a foster parent, or to terminate or amend the terms of an existing approval.

for a further period of up to twelve months. However, depending on the date on which the individual was appointed, that extension will expire on or after 1 April 2009.

7.3 The FS(A) Regulations address the conflict between regulation 24(3)(b)(i) and regulation 24(6) by removing the requirement, where the registered provider is an individual, for that individual to sit on the fostering panel. Instead, the panel member must be that individual or an employee of the fostering agency who is concerned with the management of the fostering agency, or, where that is not reasonably practicable, a person (who need not be an employee of the agency) who has experience in the provision of a fostering service. This will enable a representative from the provider (or someone with experience in the provision of a fostering service) to sit on the panel, but give a certain amount of flexibility as regards who that representative might be.

7.4 The FS(A) Regulations also amend the limits of tenure of fostering panel members. They extend the maximum period of office from two consecutive terms of up to three years to three terms of up to three years, whether served consecutively or not. This is similar to regulation 4 of the Adoption Agency Regulations 2005, S.I 2005/389, which sets out the maximum period of office for adoption panel members. However, unlike adoption panel members, the FS(A) Regulations permit an individual to be reappointed to the fostering panel after an interval of at least three years. This is because, unlike for adoption agency panels, the fostering panel provisions require certain individuals to be members of the panel (for example, where the provider is a partnership, at least one of the partners); the Regulations provide for the possibility of return to the panel in the interests of flexibility.

7.5 The FS(A) Regulations also introduce an express provision for fostering panel members to request from the provider information and assistance that they consider to be relevant and necessary. It introduces a parallel provision requiring providers to provide such information and assistance, as far as is reasonably practicable. The FS(A) Regulations also provide expressly that, in considering what recommendation to make to the provider, the fostering panel may seek legal or medical advice.

Independent Review Mechanism for Fostering

7.6 The FS(A) Regulations also make amendments consequential on the introduction of an IRM for qualifying determinations relating to foster parents under the Independent Review of Determinations (Adoption and Fostering) Regulations 2009. Those Regulations provide for applications to be made to the Secretary of State for the review by an independent panel of qualifying determinations (as defined in those Regulations) made by providers.

7.7 The FS(A) Regulations amend and restate regulations 28 and 29 of the Fostering Services Regulations 2002, and insert a new regulation 29A, consequential on the introduction of the IRM for fostering.

7.8 Regulation 28 provides for the approval of foster parents. Regulation 29 provides for the review and terminations of approval. The FS(A) Regulations amend and restate these regulations to require a provider who issues a notice to a person that it proposes not to approve them as a foster parent, or to terminate or amend the terms of an existing approval, (i.e. makes a determination) to advise that person that, within 28 days of the date of the notice, they may either make representations to the provider, which would require the provider to refer the case to its fostering panel for a recommendation (until now, this has been the only option available to a person for review of a determination), or they may submit an application to the Secretary of State for a review of the determination by an independent review panel.

7.9 If the determination is made because the person or a member of their household has committed a specified offence or been cautioned in respect of a specified offence and admitted to it (see regulation 27 of the Fostering Services Regulations 2002), the determination is not a "qualifying determination" within the meaning of the Independent Review of Determinations (Adoption and Fostering) Regulations 2009, and the provider does not need to notify the person that they may apply to the Secretary of State for a review.

7.10 If within 28 days of the date of the notice the person has not applied to the Secretary of State, or the provider has not received representations, then the provider may proceed to make their decision. However, if the person has applied to the Secretary of State, then the provider must make its decision taking into account the recommendation of its fostering panel (if any) and the recommendation of the independent review panel. If the person made representations to the provider, the provider must (as currently) refer the case to their fostering panel for a fresh recommendation, which must be taken into account by the provider's decision maker when they make their final decision.

7.11 New regulation 29A requires providers, within 10 working days of notification that a person has applied to the Secretary of State for review by an independent review panel of a determination, to send the Secretary of State certain documents and information. This includes any report or other documents that the provider referred to its fostering panel; any relevant information received by the provider after the date that documents were referred to the fostering panel; and the notice informing the individual of the determination.

8. Consultation outcome

Fostering panels

8.1 The amendments relating to the constitution of fostering panels and the tenure of fostering panel members were the subject of consultation with six key stakeholders. The consultation was by email as this was considered to be the most efficient way of consulting and obtaining views, because the changes affect only providers and foster parents, and do not affect the general public.

The stakeholders represented local authorities, foster parents, independent fostering agencies and Her Majesty's Chief Inspector of Education, Children's Services and Skills. All the stakeholders consulted provided a response.

8.2 The Department asked whether registered providers that are an individual should be required to have that individual sit on the fostering panel. The options presented were (1) retaining the requirement to sit on the panel and removing the requirement to step down after a maximum period of office, (2) not requiring membership on the panel, with flexibility for another senior manager to sit on the panel instead; (3) maintain the status quo. Three respondents preferred option two and one respondent felt either option 1 or 2 would be satisfactory. Views given were that option 2 gives the greatest flexibility and best assurance of turnover of panel membership necessary to ensure independent scrutiny of decisions. The FS(A) Regulations reflect option 2, in line with the views of stakeholders

8.3 The Department also asked what should be the maximum period of office on a provider's fostering panel and whether return to the panel should be allowed once this period has been served. The options presented were (1) align with adoption agency panels, which have a maximum tenure of three consecutive or non-consecutive terms of three years with no return after this period; (2) retain maximum tenure of two consecutive terms of three years, but allow return after three years; (3) as with option 2, but allow return after one year; (4) allow an indefinite period of tenure. Three respondents preferred option one and one respondent felt any of the options would be satisfactory. Of these respondents, two felt that following the maximum period of office, return to the panel should be allowed after three years. Views were that option 1 would increase flexibility, help recruitment, and ensure that financial investment in training has longer term benefits for the provider. The FS(A) Regulations reflect a mixture of option 1 and option 2

8.4 The amendments relating to fostering panels obtaining legal and medical advice, were consulted on alongside a four week public consultation on changes to introduce the IRM for fostering (the details of the consultation are given in the Explanatory Memorandum accompanying the Independent Review of Determinations (Adoption and Fostering) Regulations 2009). 46% of respondents to the consultation (vs. 37% against) were in favour of a medical member of the fostering panel. However, comments indicated that the main concern was that fostering panels could access medical advice. 80% of respondents were in favour of the panel being able to seek legal advice. A report of the consultation is available on the Departmental website at http://www.dcsf.gov.uk/consultations/index.cfm?action=conResults&consultationId=1581&external=no&menu=3.

Independent Review Mechanism for Fostering

8.5 The proposed introduction of an IRM for fostering was announced in the White Paper, *Care Matters: Time for Change*. It is part of a wider package of measures to improve the approvals process for foster parents and to encourage more people to come forward to foster. There was also an opportunity to

debate the IRM for fostering during the passage of the Children and Young Persons Act 2008 through Parliament.

8.6 The consultation undertaken in relation to the introduction of the IRM for fostering is set out in the explanatory memorandum accompanying the Independent Review of Determinations (Adoption and Fostering) Regulations 2009.

9. Guidance

9.1 A letter will be sent to providers which will set out the changes regarding fostering panels and actions they will need to take to prepare for implementation of the IRM for fostering.

10. Impact

10.1 The impact on the public sector (i.e. local authorities) of the changes to the fostering panel is minimal: The changes to the provisions for registered providers that are individuals will not affect local authorities; the changes to provisions on panel tenure (increasing the maximum term of office then allowing return to the panel after a three year gap) should have a small but positive impact by helping with recruitment to panels. The changes requiring providers to provide advice and assistance should their fostering panel request it should not be significant: Panel members already have the power to seek information and advice from their provider and the regulations state that the provision of information and assistance should only be if reasonably practicable. It is not thought that the express provision to seek legal and medical advice will place any additional substantive burdens on providers, as it is understood that in practice they do aid their fostering panel to seek such advice if requested currently.

10.2 With regard to the provisions concerning the maximum term of office on a fostering panel and the requirement to provide information and assistance to the fostering panel, the impact on business, charities or voluntary bodies (i.e. independent fostering agencies) is the same as for the public sector. The changes with respect to independent providers that are individuals will only affect a small number of agencies and the amendments are intended to enable a representative of the provider to sit on the panel, but give some flexibility as regards who that representative might be.

10.3 An Impact Assessment has not been prepared on the fostering panel changes, because they will not noticeably increase or decrease costs on the public, private, or third sectors.

10.4 The impact of the introduction of the IRM for determinations relating to fostering is set out in the explanatory memorandum accompanying the Independent Review of Determinations (Adoption and Fostering) Regulations 2009.

11. Regulating small business

11.1 The amendments to the Fostering Services Regulations 2002 in respect of fostering panels apply to all providers, including those that are small businesses (but not to small businesses generally). However, any impact on such providers should be positive, as the increase in the period of panel tenure, and allowance for return to a panel once the maximum tenure has been served, may make recruitment to panels easier for small independent fostering agencies.

11.2 The introduction of the IRM for qualifying determinations relating to fostering will similarly affect all providers, including those that are small businesses (but not small businesses generally). However, the impact on such providers should be minimal. The requirement to inform individuals of the option of seeking review of a qualifying determination by an independent review panel will be included in the notice that providers are already required to send; and the requirement to provide information and assistance to the independent review panel replaces the current practice of providing this information to the fostering panel. The impact of the introduction of the IRM for qualifying determinations relating to fostering is set out in the explanatory memorandum accompanying the Independent Review of Determinations (Adoption and Fostering) Regulations 2009.

12. Monitoring & review

12.1 Regular contact is maintained with key stakeholders representing providers, providing opportunity for any issues to be raised about the new arrangements for fostering panels.

12.2 Regarding the introduction of the IRM for determinations relating to fostering, the Department will gather evidence through the contractor running the IRM of their views on its implementation and the number of applications to the IRM. Using existing data collection on looked after children, the Department will monitor placement stability and outcomes for children and track improvements year on year as this policy, and others arising from the C*are Matters* White Paper, are implemented.

13. Contact

Louise Lawrence at the Department for Children, Schools and Families, Tel: 020 7273 5807 or email: louise.lawrence@dcsf.gsi.gov.uk can answer any queries regarding the instrument.