



BRIEFING PAPER

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The Adoption and Children (Coronavirus) (Amendment) Regulations

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Summary

Original Regulations, April—September 2020

[The Adoption and Children \(Coronavirus\) \(Amendment\) Regulations 2020](#) came into force on 24 April 2020, and many of its amendments expired on 25 September 2020.

The regulations temporarily amended 10 sets of regulations relating to children’s social care in England. The [Department for Education \(DfE\) said](#) the changes were intended to help local authorities to “prioritise the needs of children, whilst relaxing some administrative and procedural obligations...but maintaining appropriate safeguards” during the coronavirus outbreak.

A [debate](#) was held in the House of Commons on 10 June 2020. The Leader of the Opposition, Sir Keir Starmer, had tabled a prayer to annul the Negative Statutory Instrument as an early day motion ([Number 445](#)) on 4 May 2020. Upon being put to a [vote at the conclusion of the debate](#), the motion that a humble address praying the Statutory Instrument be annulled, was defeated.

Following a [consultation](#), the Government [confirmed its plans](#) for the majority of amendments to lapse on 25 September. The Government [said](#) that “the effect of coronavirus (COVID-19) on the children’s social care sector has not been as severe as initially feared and local authorities and providers have had to use the flexibilities rarely”.

Judicial Review of Original Regulations

The High Court considered a judicial review brought by the charity Article 39 against the Regulations in July 2020, [finding](#) that the DfE did not act unlawfully by introducing the changes. This was reversed on appeal, where the Court of Appeal [determined](#) in November 2020 “that the Secretary of State acted unlawfully by failing to consult the Children’s Commissioner and other bodies representing the rights of children in care before introducing the Amendment Regulations”. This decision related to the No.1 Regulations, which had expired in September 2020.

Consultation and extension, August—March 2021

Following a [consultation](#), the DfE said that it intended to amend 6 sets of regulations until 31 March 2021. These relate to medical reports in the adoption and foster care process, visits by social workers, Ofsted inspections and virtual visits. [The Adoption And Children \(Coronavirus\) \(Amendment\) \(No. 2\) Regulations 2020](#) were [laid](#) before the UK Parliament on 28 August 2020, with accompanying [explanatory memorandum](#).

These Regulations, made under negative procedure, came into force on 25 September 2020. In August 2020, the DfE [stated](#) it “has no plans to extend the[se] regulations beyond March 2021”.

Consultation and response on proposed extension to September 2021

In February 2021, the DfE announced a [consultation](#) on extending flexibilities in the No.2 Regulations to 30 September 2021, relating to medical reports, virtual visits and Ofsted inspections, and introducing a new position for adoption, in removing the need for a full medical examination of the prospective adopter but retaining the need for a medical report.

The Department [decided](#) to continue only with the proposals to extend the existing flexibilities on medical reports, virtual visits and Ofsted inspection cycles. The other proposals, the DfE [said](#), require “further reflection” and it would not “proceed with these additional flexibilities at this time”. New [Regulations](#) were laid on 9 March 2021.

1. *The Adoption and Children (Coronavirus) (Amendment) Regulations 2020*

1.1 Laying and consultation

These regulations were laid before Parliament on 23 April 2020, and came into force on 24 April.¹ The Government stated that it was not possible to adhere to the convention that negative statutory instruments should be laid in Parliament 21 days before they come into effect because “children’s social care resources are already stretched as a result of staffing shortages and an increased demand for services”.²

The Government has additionally said that a full public consultation on the regulations was not possible, but that it had consulted Ofsted, the Association of Directors of Children’s Services, the Local Government Association, Principal Social Workers and Practice Leaders in local authority children’s social care. The Children’s Commissioner was also informed.³

The [Children’s Rights Assessment](#) sets out how the regulations may impact on children and young people.

1.2 Content

Section 7 of the [explanatory memorandum](#) to the regulations provides the following summary of what the regulations did, and why:

Ensuring that vulnerable children are properly safeguarded and have their welfare promoted remains a top priority for Government. At the same time, the challenging context of the outbreak means that local authorities and partners may struggle to meet the full range of statutory duties relating to child protection, safeguarding and care at present due to administrative and procedural requirements set out in legislation.

The Department [of Education] has consulted informally with a variety of local authority stakeholders, including their representative body The Association of Directors of Children’s Services, and with Ofsted as regulator, and have informed the Children’s Commissioner. These consultations have helped identify which changes would be most helpful to local authorities during the outbreak. Feedback has been set out against the amendments within this section of the memorandum to provide clarity.

It is therefore necessary to temporarily amend 10 sets of regulations, related to children’s social care, to provide additional flexibility in meeting statutory obligations, whilst maintaining appropriate safeguards. The changes will affect local authorities, children’s homes, fostering services, adoption agencies and Ofsted inspections. Most changes are procedural; easing administrative

¹ [The Adoption and Children \(Coronavirus\) \(Amendment\) Regulations 2020](#)

² [Explanatory Memorandum to The Adoption and Children \(Coronavirus\) \(Amendment\) Regulations 2020](#), para 3.1.

³ [Ibid](#), paras 3.1, 10.1

burdens, allowing visits and contact to take place remotely and relaxing strict timescales where possible.⁴

The changes made by the regulations included [this is not an exhaustive list – section 7 of the explanatory memorandum provides more detail on the changes]:

- Relaxing the timescales under which representatives of the responsible local authority must visit a child in care and clarifying that such visits can take place by telephone or other electronic means.
- Relaxing timescales around the formalising of placement plans for looked after children and the deadlines for reviews of placements.
- Amending the standards that must be met by everyone providing residential care for looked after children – for example, requiring standards concerning delivery of care relating to health and development to be met “as far as is reasonably practicable”.
- Allowing local authorities to take more time to carry out reviews into complaints about the services they provide to children and young people.
- Revoking the minimum Ofsted inspection intervals. Ofsted continues to have powers to inspect with powers under the [Care Standards Act 2000](#).
- Extending the period within which a local authority must publish a written statement of action following an Ofsted inspection of its children’s services.
- Providing additional flexibility for local authorities and regional adoption agencies in the adoption process – for example, allowing DBS and medical checks on prospective adopters to be completed at a later stage of the process.
- Removing the requirement for adoption panels (which make recommendations to adoption agencies on whether potential adopters are suitable).
- Extending the permitted length of a single short break placement (where the local authority arranges for a child to stay with a foster carer but the parents remain responsible for their overall care) from 17 to 75 days.
- Making fostering panels optional rather than required. Fostering panels are set up to assess applications for potential foster carers and the ongoing suitability of existing foster carers, and to then make recommendations to the fostering service provide.

The regulations provided for the amendments to be in place until 25 September 2020 and for the Secretary of State for Education to keep them under continuous review.⁵ The explanatory memorandum states that the changes “are being made in the context of a public health emergency and there is no current evidence to suggest the amendments

⁴ [Ibid](#), paras 7.1-7.3.

⁵ This is the date by which the powers in the *Coronavirus Act 2020* are subject for parliamentary renewal. While the regulations are not made under powers in the *Coronavirus Act*, the Government has stated that they will mirror the renewal date.

will be necessary for a longer period of time.”⁶ The majority of these changes were not extended beyond 25 September 2020.⁷

1.3 Use of the provisions

In a written statement on 14 July 2020, the Minister, Vicky Ford, said that, since their introduction, the regulations were “rarely used” and the most frequently used were those relating to medical reports in the adoption and fostering process and virtual engagements with children and young people:

Our monitoring has shown that the majority of the regulatory flexibilities have been rarely used and only when needed in response to coronavirus.

[...]

Our monitoring data shows that the regulations are being used infrequently. Out of 128 local authorities we have spoken with in June and July, 87 have used at least one regulation, although many have only used them on a limited number of occasions and in a limited number of areas.

The most used related to the fostering and adoption regulations, notably allowing medical reports to be considered at a later stage in the adoption and fostering process though still prior to approval. This has minimised delays in approving adopters for children needing a new, forever, family. Similarly, relaxations around panels have allowed for the continued recruitment of foster carers and a continued functionality of processes.

Virtual engagement with children and families has often been used alongside face to face visits and, in some cases, this has resulted in greater levels of contact between children, young people, parents, and carers – and improved engagement from some young people.⁸

The Minister told the House in June 2020 that the Department had “been gathering information regularly on which of the regulations are being used and [...] are holding a monthly survey of local authorities”.⁹ A full statistical breakdown of the regulations used by the local authorities surveyed in June, July and August can be found in Annex B of the [Consultation response](#) published by the DfE.¹⁰

1.4 Expiration

Following a [consultation](#), the Government confirmed that the majority of the amendments made by these Regulations would expire at 25 September 2020.¹¹

⁶ [Explanatory Memorandum to The Adoption and Children \(Coronavirus\) \(Amendment\) Regulations 2020](#), para 6.4.

⁷ DfE, [Children’s social care: Government consultation response](#), August 2020, p5

⁸ Written Statement, [HCWS368 Children’s social care update](#), 14 July 2020

⁹ HC Deb, [Children and Young people](#), 10 June 2020, c 353

¹⁰ DfE, [Children’s social care: Government consultation response](#), August 2020, pp16-18

¹¹ [Ibid.](#), p5

1.5 Court of Appeal Judgement, November 2020

The High Court considered a judicial review brought by the charity Article 39 against the Regulations in July 2020, [finding](#) that the DfE did not act unlawfully by introducing the changes.¹²

This was reversed on appeal in November 2020, at which point the Regulations had expired. The Court of Appeal unanimously determined to:

Grant a declaration that the Secretary of State [for Education] acted unlawfully by failing to consult the Children's Commissioner and other bodies representing the rights of children in care before introducing the Amendment Regulations.¹³

The Court judgement says the DfE would have benefited from the consultation process:

[...] In the context of the pandemic, when faced with difficult decisions about how to protect children's social care services, it was surely right to seek a wide range of views so that the proposed amendments could be properly tested. Secondly, it was manifestly in the interests of the vulnerable children who would be most affected by the proposed amendments that those agencies and organisations representing the rights and interests of children in care should be consulted. Thirdly, given the range of regulations under review, and the potential impact of the proposed changes across the country, a wider consultation was clearly, in Lord Wilson's words, "reflective of the democratic principle at the heart of our society". Such consultations help to ensure protection against arbitrary decision-making.¹⁴

The decision was welcomed by the Children's Commissioner, Anne Longfield, who said she would be "seeking reassurances from the Department for Education about how this won't be repeated in the future".¹⁵ In response to the judgement, the DfE said "protecting vulnerable children has been at the heart of our response to the Covid-19 pandemic" and that:

We took swift action to bring in temporary changes during a national crisis, all of which have now expired. We will continue working with the children's commissioner and children's charities to provide the best possible support to vulnerable children."¹⁶

¹² [Removal of safeguards for children in care- judicial review given go ahead](#), Article 39, 26 June 2020; [High Court dismisses calls for children's social care exemptions to be scrapped](#), Cypnow, 7 August 2020

¹³ [2020] ECWA Civ 1577 Case No C/2020/1279, [The Queen \(on application of Article 39\), Appellant, and Secretary of State for Education, Respondent](#), 24 November 2020, para 90

¹⁴ [Ibid.](#), para 86

¹⁵ Children's Commissioner, [Statement on today's ruling by the Court of Appeal on removing safeguards for children in care](#), 24 November 2020

¹⁶ [DfE "unlawful" in consulting too narrowly on changes to children in care legislation](#), Community Care, 24 November 2020

2. *The Adoption and Children (Coronavirus) (Amendment) (No. 2) Regulations 2020*

2.1 Consultation

In her [written statement](#) to the House on 14 July, the Minister said that the Government intended to consult on extending the regulations (described in Section 2) in relation to medical reports, virtual visits and Ofsted Inspections.

- **Medical reports for foster carers or adoptive parents from a GP**

The Minister said that after children increasingly return to school and restrictions are eased, there may be an increased need for foster carers and potential adopters, whilst pressures on NHS services remain. The DfE proposes to extend provisions to allow more time for GPs and other health professionals to provide information to support the process of approving fosters and adopters.

- **Virtual visits**

It is proposed that provisions enabling virtual visits to occur in situations such as local lockdowns or where an individual or household has been required to self-isolate, should be continued.

- **Ofsted Inspections**

The consultation proposes that the suspension of the frequency regulation that sets out the minimum number of Ofsted inspections required in various settings, be extended to 31 March 2021. The Minister said that although full grade inspections were not expected to recommence until March 2021, Ofsted would carry out risk-based assurance visits to children's social care settings, based on the previous inspection judgement, the amount of time since the setting was last inspected and other relevant information held by Ofsted.¹⁷

A [consultation](#) was held from 16 July 2020 to 5 August 2020 and received 189 responses. The Government said most respondents were in favour of the proposals to extend individual regulations on medical reports, virtual visits, and the continued suspension of the regular cycle of Ofsted inspections of children's services providers. However, "many consultees also raised concerns in the way the [original] regulations were introduced, and many felt the regulations should not be extended and should be revoked immediately".¹⁸

A [Children's Rights Assessment](#) and [Equalities Impact Assessment](#) were published alongside the [Government response](#).

¹⁷ Written Statement, [HCWS368 Children's social care update](#), 14 July 2020; DfE, [Children's Social Care: Government consultation](#), 16 July 2020, pp10-13

¹⁸ DfE, [Children's social care: Government consultation response](#), August 2020, p4

2.2 Content

The Statutory Instrument temporarily amends 6 sets of regulations relating to children’s social care. The Government said this is to “help maintain delivery of children’s social care during the recovery stage of the outbreak and to support continued effective operation of children’s social care”.¹⁹ These relate to the provision of medical reports for potential adopters and foster carers; virtual visits, and the frequency of Ofsted inspections.

Section 7 of the [Explanatory memorandum](#) details the amendments made by the Regulations—below is a non-exhaustive list [a complete list of amendments and details of their implementation can be found in the Explanatory Memorandum]:

Virtual Visits of Looked after Children

7.6 The changes to regulations 28 and 48 allow social workers to conduct these visits “virtually” where appropriate. This could be via video conference, telephone, or any other electronic means.

7.7 The decision to allow the use of a virtual visit will have had to be carried out in accordance with any recommendations given by a nominated officer.

Stage at which Medical Checks are completed

7.11 The Adoption Regulations require the adoption agency to secure medical checks by the end of stage 1 of the assessment process. As a result of ongoing pressures on the NHS these checks may continue to take longer than usual to clear.

7.12 Therefore regulations 26 and 27 of the Adoption Regulations have been amended to allow the assessment process to progress to stage 2 without a medical report, as long as a medical check has been requested.

7.14 The Regulations continue to require a medical report to have been obtained (where necessary) and duly considered before a final decision is made.

Virtual Visits by the Registered Person

7.22 As part of the assessment of the services and facilities of a residential family centre, a registered person is required to conduct regular visits to provide assurance on the conduct on the centre, and to form an opinion on the standard of care provided including through interviews with residents and persons working at the residential family centre.

7.23 Regulation 25, which has been amended to allow such interviews to be held on a virtual basis, must only be used when face to face contact would be contrary to any guidance relating to the incidence or transmission of coronavirus published by Public Health England or the Secretary of State for Health and Social Care, or is not reasonably practicable for a reason relating to the incidence or transmission of coronavirus. Guidance will further

¹⁹ [Explanatory Memorandum to The Adoption and Children \(Coronavirus\) \(Amendment\) \(No..2\) Regulations 2020](#), para 2.2

explain that the circumstances in which Government envisages this being relevant include in the event of lockdown, self-isolation, or Public Health England and Government social distancing advice due to coronavirus (COVID-19)

Contact with Children and Young People via Virtual Visits

7.26 Regulation 22 provides for a child or young person to be visited by family members and social workers.

7.27 Regulation 22 has been amended to allow such interviews to be held on a virtual basis must only be used when face to face visits would be contrary to any guidance relating to the incidence or transmission of coronavirus published by Public Health England or the Secretary of State for Health and Social Care, or is not reasonably practicable for a reason relating to the incidence or transmission of coronavirus. Guidance will further explain that the circumstances in which Government envisages this being relevant include in the event of lockdown, self-isolation, or Public Health England and Government social distancing advice due to coronavirus (COVID-19)

Scheduling of Inspection and Visits

7.30 Under the 2015 Regulations Ofsted has to conduct inspections of the establishments and agencies in accordance with the frequencies as set out in regulation 27. 7.31 This instrument amends the *Adoption and Children (Coronavirus) (Amendment) Regulations 2020* to provide that the amendment to the 2015 Regulations expires on 31 March 2021 and not 25 September 2020. This means that the minimum frequency of inspections is suspended until 31 March 2021. In the interim, Ofsted will conduct assurance visits, inspections via a risk-based approach instead.

7.32 If there are concerns about a provider, Ofsted retains the ability to maintain oversight and to undertake any necessary regulatory action.²⁰

The Department said that allowing more time for health professionals to provide information to support the process of approving potential adopters and foster carers was a means of giving flexibility to NHS England.²¹ Flexibility in allowing virtual visits, the Department said, should “only happen when face to face visits would be contrary to public health advice, or where face to face visits would otherwise not be reasonably practicable as a result of coronavirus”.²²

Ofsted inspections

As stated in July 2020, Ofsted planned to carry out a phased return to inspections, which would include risk-based assurance visits to children’s social care settings from September 2020 to March 2021. These would be based on the previous inspection judgement, the amount of time since a setting was last inspected and other information Ofsted holds

²⁰ [Ibid](#), Section 7

²¹ DfE, [Children’s Rights Impact Assessment: Amendments to children’s social care during the COVID-19 pandemic](#), August 2020, pp1-2

²² DfE, [Children’s social care: Government consultation response](#), August 2020, p10

about the setting. Full-graded inspections were expected to recommence from March 2021.²³

In [August 2020](#), the DfE said amendments regarding Ofsted visits were intended to help it carry out visits “to as many settings as possible” and provide assurance to settings that it is concerned about or have not been inspected for some time.²⁴

Ofsted has published guidance on its plans for [assurance visits](#) (last updated December 2020). Ofsted has said that from January 2021 it will “resume focused visits to local authority children’s services. These visits will not result in a graded judgement”.²⁵

2.3 Use of the provisions

In the [consultation document](#) on extending the Regulations in February 2021, the Department stated that from 25 September to 24 November 2020 “over half of LAs [Local authorities] are using both the existing temporary flexibilities [relating to virtual visits and medical reports]. Out of 113 LAs that we have spoken to, 92 LAs have made use of the regulations.”.²⁶

2.4 Expiration and proposed extension

The Regulations provide for the amendments to be in place until 31 March 2020 and for the Secretary of State for Education to monitor the effectiveness of the amendments.²⁷

In the consultation response in August 2020, the Government said it “has no plans to extend the regulations beyond March 2021”.²⁸

It is possible for the Government to make another statutory instrument extending the expiration date, and a new consultation to extend the Regulations to September 2021 was launched in February 2021 (see section 3).

²³ DfE, [Children’s Rights Impact Assessment: Amendments to children’s social care during the COVID-19 pandemic](#), August 2020, p2

²⁴ [Ibid](#), p2

²⁵ Ofsted, [Social care plans from September 2020](#), last updated 3 December 2020

²⁶ DfE, [Children’s Social Care: Government consultation](#), 9 February 2021, p9; Annex

²⁷ [Explanatory Memorandum to The Adoption and Children \(Coronavirus\) \(Amendment\) \(No..2\) Regulations 2020](#), paras 6.4, 6.5

²⁸ DfE, [Children’s social care: Government consultation response](#), August 2020, p5

3. *The Adoption and Children (Coronavirus) (Amendment) Regulations 2021*

From 9 to 28 February 2021, the DfE held a [consultation on extending the flexibilities contained in the No.2 Regulations](#) until 30 September 2021.²⁹

3.1 Reasons for extension

The Department states that the pressures on the sector remain “significant” and the flexibilities made under the No.2 Regulations may need to continue into the Spring/Summer of 2021:

We have always been clear that these would remain in place only for as long as they were needed and would expire on 31 March 2021. However, the challenges from the coronavirus (COVID-19) pandemic remain significant, not least given the context of the new, more transmissible variants of the virus and an increase in infection rates. As such, we are seeking views on our proposal to extend a limited number of flexibilities in order to ensure that children and families can be supported in the best way possible in the circumstances.

There are likely to be circumstances in which some services will continue to face specific and exceptional challenges into the Spring/Summer. Continued availability of a small number of flexibilities, drawing on the experience and evidence gathering of the last few months, may still be needed, so we must be prepared for the potential additional demands that may still be placed on services.³⁰

3.2 Proposed content

The Government proposed extensions in three areas and an additional amendment in relation to medical reports in adoptions. The below section sets out the DfE’s proposals and reasons.

Medical Reports in adoptions

The [consultation document](#) proposed to extend current flexibilities to allow medical reports to be completed at any stage of the assessment process for both fostering and adoption.

The consultation proposed an additional amendment allowing changes to the requirement for a full medical examination of a prospective adopter and allowing the required medical report to be completed by a relevant healthcare professional, in addition to doctors (bold added):

For adoption, we are seeking views on an **additional amendment to the regulations**. The current requirement is that a medical report has to be provided by a registered medical practitioner following a full examination and covering the matters

²⁹ DfE, [Changes to the Adoption and Children \(Coronavirus\) \(Amendment\) \(No.2\) Regulations 2020](#), 9 February 2021; DfE, [Children’s Social Care: Government consultation](#), 9 February 2021

³⁰ DfE, [Children’s Social Care: Government consultation](#), 9 February 2021, p8

set out in Part 2, Schedule 4 to the *Adoption Agencies Regulations 2005*. We propose a two-fold amendment to this. Firstly, we propose to change the regulations to **enable the medical report to be completed by other relevant, appropriately qualified and registered healthcare professionals, such as nurses, where insufficient GP capacity is available.**

[...]

Secondly, we are considering whether to remove the need for a full examination. The requirement remains for the medical report to provide full details of the health of the prospective adopter and cover the matters as required by Part 2, Schedule 4 to the *Adoption Agencies Regulations 2005*. This information can be accessed via the prospective adopter's GP record, of which prospective adopters are entitled to request a copy. Other measures can be taken by nurses, in pharmacies or at home, as currently happens for virtual medicals. This would be a new position for adoption.

A medical report would still provide the same information currently required, ensuring the assessment and approval process remains thorough and performs an important safeguarding role.

These flexibilities should only be utilised in cases where usual practice is not possible due to pressures on the NHS resulting from the coronavirus (COVID-19) pandemic.³¹

Virtual Visits

The DfE proposed to continue to allow virtual visits in some circumstances, as set out in the earlier 2020 Regulations. It says this is in recognition of "some circumstances where face-to-face visits may be contrary to public health guidance and guidance on coronavirus, for example, if children or workers were required to self-isolate". The local authority would be required to record any virtual visit.³²

Ofsted Inspections of children's social care providers

The consultation also proposed to continue the suspension of the requirement for a minimum frequency of Ofsted inspections for all children's social care providers to 30 September 2021.

Ofsted's [Social care plans from September 2020](#) (last updated December 2020) states that it planned from January 2021 to "resume focused visits to local authority children's services. These visits will not result in a graded judgement".³³

In March 2021, the DfE and Ofsted said they were committed "to ensuring that routine inspection work commences for the 2021-22 inspection year from April, subject to COVID-19 Government guidance" and the safety of those in care and providing care.³⁴

The DfE will also "consult shortly on other potential changes to the frequency of Ofsted Inspections from 1 October".³⁵

³¹ [Ibid](#), pp11-12

³² [Ibid](#), p14

³³ Ofsted, [Social care plans from September 2020](#), last updated 3 December 2020

³⁴ DfE, [Children's social care: Government consultation response](#), 9 March 2021, p12

³⁵ DfE, [Children's Social Care: Government consultation](#), 9 February 2021, p16

3.3 Consultation outcome

Extension of existing provisions

In [response](#) to the consultation, the DfE said that it would continue with plans to extend the existing amendments, in relation to medical reports (for fostering and adoption), virtual visits and Ofsted inspection cycles.

The DfE said that these flexibilities will remain “in place for as long as they are needed” and would be reviewed in line with the UK Government’s [roadmap to recovery](#). It stated that “there are currently no plans to extend [the amendments] beyond 30 September 2021”.³⁶

The [new Regulations](#) come into force on 30 March 2021 and expire on 30 September 2021.

Decision not to proceed with new proposals regarding adoption

The consultation also included proposals to allow changes to the requirement for a full medical examination of a prospective adopter and allowing the required medical report to be completed by a relevant healthcare professional, in addition to doctors.

The Department [said](#) it had reflected on these proposals following the consultation, and that it had “decided to give this further reflection” and would not be proceeding with these additional changes “at this time”.³⁷

Some respondents to the consultation had raised concerns about the impact of the changes on safeguarding and the ability of other health professionals to perform medicals to the appropriate standard. The Department said that “due to the safeguarding implications and the permanent nature of adoption”, the “tight timescales to lay the regulations” meant it would not be proceeding with the additional proposals in the new regulations.³⁸

³⁶ DfE, [Changes to the Adoption and Children \(Coronavirus\) \(Amendment\) \(No.2\) Regulations 2020](#), updated 9 March 2021

³⁷ [Ibid](#)

³⁸ DfE, [Children’s social care: Government consultation response](#), 9 March 2021, pp8-9

4. Guidance for children's social care services

In May 2020 the DfE published [guidance for children's social care services](#), which provides more information on the changes made by the regulations. The most recent update to the guidance occurred on 9 March 2021.

The guidance sets out the following circumstances where a local authority, safeguarding partners and providers may want to make use of the flexibilities provided by the regulations in relation to virtual visits:

During periods of national lockdown, the use of virtual visits should be the exception and can be used as a result of public health advice or when it is not reasonably practicable to have a face-to-face visit otherwise for a reason relating to the incidence or transmission of coronavirus (COVID-19). This could include in the event of local or national restrictions, self-isolation or social distancing advice due to coronavirus (COVID-19) [...]

This does not provide blanket cover for all such visits to be held virtually. Wherever possible, visits should be held face-to-face. This can include considering whether it is possible to move the time or location of the meeting within the statutory timescales. [...]

All uses of this temporary flexibility must be recorded in individual case files. These records should include the reasons why a virtual visit was necessary, and the name of the nominated officer consulted. Local authorities and social workers should consider available guidance on the use of virtual visits such as that issued by the principal social worker network.³⁹

The "overarching approach" to making use of these flexibilities, the [guidance says](#), should include:

- Approval at chief officer level in local authorities and, where appropriate, top tier management level in other services and providers
- Properly recording the use, along with the reasons for doing so and communicating to the other safeguarding partners and providers
- Each local authority and provider recording the reason or reasons for use of a flexibility

Ofsted will note any use of these flexibilities and may use these records to inform engagement meetings with local authorities.⁴⁰

Further information on the use of the Regulations can be found in the DfE's [guidance for children's social care services](#).

³⁹ DfE, [Coronavirus \(COVID-19\): Guidance for children's social care services](#), 9 March 2021

⁴⁰ [Ibid](#)

5. Commentary and reaction

As of 28 September 2020, 63 organisations had called upon the UK Government to withdraw the regulations as part of a petition organised by the charity Article 39.⁴¹ The “Scrap SI 445” campaign steering group, which includes Article 39 and Just for Kids Law, reiterated its call in July 2020 in written evidence to the Education Select Committee for the original regulations to be revoked and for future legislation to be subject to parliamentary scrutiny.⁴²

Included below is commentary from a selection of third-sector organisations.

Adoption UK

In May 2020, Adoption UK, a charity for adopters, said that it welcomed the changes introduced specifically to mitigate delays in waiting times for children, such as removing the requirement for an adoption panel or allowing panels to meet virtually.⁴³ However, it opposed relaxing the requirement for adoption reviews where it was not reasonably practical to do so.⁴⁴

Article 39

In May 2020, Article 39, a charity campaigning for children in care, called upon the UK Government to withdraw the regulations and provide assurances that any future regulations are subject to consultation.⁴⁵ The charity also opposed the No. 2 Regulations.⁴⁶

The charity has argued that many of the changes “have been proposed before” and has raised concerns that the changes will “be made permanent once the effect of the suspensions are known”.⁴⁷

Article 39 submitted written evidence to the House of Lords Secondary Legislation Scrutiny Committee in May 2020 and Education Select Committee in June 2020.⁴⁸ It applied to the High Court for a judicial review of the regulations, which was considered in July 2020.⁴⁹ The [ruling](#) found that the DfE did not act unlawfully by introducing the

⁴¹ Article 39, [Scrap SI 445](#), accessed 28 September 2020

⁴² [Written evidence submitted by the “Scrap SI 445” campaign steering group, CIE0386](#), July 2020, paras 16, 17

⁴³ [Adoption UK written evidence to the Education Select Committee](#), CIE0164, June 2020, paras 17, 18

⁴⁴ [Ibid](#), paras 29, 30

⁴⁵ Article 39, [Article 39 threatens legal action over loss of protections for children in care](#), 7 May 2020

⁴⁶ [Children’s social care exemptions extended after consultation](#), Cypnow, 3 September 2020

⁴⁷ Article 39, [Ministers use COVID-19 to destroy children’s safeguards](#), 23 April 2020

⁴⁸ [Article 39 Statutory Instrument 445 Changes to legal protections for children: Briefing for Secondary Legislation Scrutiny Committee](#), May 2020; [Written evidence submitted by Article 39: The impact of Covid-19 on education and children’s services, CIE0290](#), June 2020

⁴⁹ Article 39, [Legal action launched to protect children in care](#), 5 June 2020

changes,⁵⁰ and the charity was subsequently granted an expedited appeal to be heard on 4 September 2020.⁵¹

As stated above (section 2.3), the Court of Appeal determined that the Secretary of State for Education had acted unlawfully when introducing the amendment regulations without sufficient consultation. In response to the Court's judgement, Article 39 said the judgment would ensure "that vulnerable children have a voice when decisions are made which affect them" and recognised the "fundamental importance" of the consultation process.⁵²

British Association of Social Workers (BASW) England

In April 2020, BASW England, a membership organisation for social workers, said that the regulations lack "a clear, documented and facilitated process for the rationale, structured introduction and delivering of the Regulations for local authorities". It drew comparisons with the introduction of changes to the *Care Act* enabled under the *Coronavirus Act 2020*:

The changes (known as 'Easements') were preceded by ethical guidance, practical guidance on criteria for applying the Easements and finally the requirement of a formal written declaration by the Director that the Easements would be adopted by the local authority. In contrast, none of these over-arching safeguards and standards are in place for children.⁵³

In a statement issued on 1 May, BASW England called upon the Government to withdraw the regulations and published a [letter](#) sent to the Secretary of State for Education, Gavin Williamson.⁵⁴

Children's Society

In submitted evidence to the Education Select Committee's [Inquiry on the Impact of COVID-19 on education and children's services](#) in May 2020, the Children's Society raised concerns that "the relaxation of standards appear to be open to local authorities irrespective of how they are coping during the Covid-19 crisis". It recommended that local authorities should only be allowed to implement the changes if "operational capacity falls beneath a certain level, and they can show such changes are necessary in order to respond".⁵⁵

The Fostering Network

The Fostering Network, a charity and networking organisation, published a [briefing on the SI and related guidance](#) relating to foster care in May 2020. On foster care, the charity said it was "concerned"

⁵⁰ [Removal of safeguards for children in care- judicial review given go ahead](#), Article 39, 26 June 2020; [High Court dismisses calls for children's social care exemptions to be scrapped](#), Cypnow Now, 7 August 2020

⁵¹ [Article 39 granted appeal over children's social care exemptions](#), Cypnow, 24 August 2020

⁵² Article 39, [Court of Appeal rules Education Secretary acted unlawfully in removing safeguards for children in care](#), 24 November 2020

⁵³ BASW, [Policy brief on The Adoption and Children \(Coronavirus\) \(Amendment\) Regulations 2020](#), 24 April 2020

⁵⁴ BASW, [BASW England urges Government to withdraw statutory instrument which "risks the welfare and rights of children"](#), 1 May 2020

⁵⁵ [Written Evidence submitted by the Children's Society, CIE0168](#), May 2020, para 2.5

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that the regulations would undermine safeguarding practices. It argued that the regulations should be seen as a “providing ‘options’ to be utilised as a last resort” and used only within an approach agreed by senior management, after a risk assessment, and in the “spirit” of the [principles](#) laid out by the Government on children’s services.⁵⁶

Just for Kids Law

Just for Kids Law, a charity working with children and young people, in May 2020 welcomed the “additional safeguards in the updated guidance to ensure that the new regulations on children’s social care are monitored by Ofsted and approved at the highest level of local government”. In July 2020, the charity said it was “still not convinced of the need to weaken vital legal protections and had called for the regulations to be “revoked without delay”.⁵⁷

⁵⁶ The Fostering Network, [Briefing on The Adoption and Children’s \(Coronavirus\) \(Amendments\) Regulations 2020 and related guidance](#), 20 May 2020, p4; DfE, [Coronavirus \(COVID-19\): Guidance for children’s social care services](#), 6 May 2020.

⁵⁷ [Rights group threatens DfE \[Department for Education\] with legal action over relaxation of statutory duties](#), Cypnow, 7 May 2020; Just for Kids Law, the Children’s Rights Alliance for England and the Youth Justice Legal Centre, [Written evidence COV0148](#), July 2020

6. UK Parliamentary Proceedings

In addition to a [debate](#) in the House of Commons on Wednesday 10 June 2020 and the ongoing House of Commons Education Select Committee inquiry into [The impact of covid-19 on education and children's services](#), the following proceedings are relevant to the Instrument.

6.1 Committee reports on No.1 Regulations

The first SI was considered by the House of Lords Secondary Legislation Committee and the Joint Select Committee on Statutory Instrument in May 2020.

The Joint Committee sought to draw “the special attention of both Houses to these Regulations on the grounds that they require elucidation in three respects and are defectively drafted in one respect.”⁵⁸ In response, the Department “proposes that as the amendments are only temporary, it will not correct the errors but liaise with Ofsted, which it expects ‘to take a pragmatic approach’.”⁵⁹

The House of Lords Committee expressed “regrets that the Children’s Commissioner, amongst others, was not consulted and that guidance was not published earlier.”⁶⁰ The Committee also said that the Explanatory Memorandum should have included greater detail and explanations of the changes.⁶¹ It called:

On the Department to be open and transparent in its assessment of any longer-term impact and lessons that may be learned, and to involve the Children’s Commissioner’s and other relevant organisations in this process. The House may wish to press the Minister for an assurance that this will happen.⁶²

The Joint Committee on Human Rights in September 2020 cited opposition to the Regulations from several organisations, including the Children’s Commissioner. The Committee questioned whether the measures were a “proportionate response”:

We question whether removing vital protections for children was a proportionate response to the challenges posed to the children’s social care system by Covid-19. The Government must justify its reasoning for the continuation of these powers, and they must only continue if they can be shown to be absolutely necessary and proportionate.⁶³

⁵⁸ Joint Committee on Statutory Instruments, [Twelfth Report of Session 2019-21](#), HC 75-xii/HL 64, 22 May 2020, para 3.1

⁵⁹ [Ibid](#), para 3.5

⁶⁰ House of Lords Secondary Legislation Scrutiny Committee, [Thirteenth Report of Session 2019-21](#), HL 57, 7 May 2020, introductory paragraph, para 35

⁶¹ [Ibid](#), paras 18, 23

⁶² [Ibid](#), para 39

⁶³ Joint Committee on Human Rights, [The Government’s response to COVID-19: Human rights implications](#), HC265/HL125, 21 September 2020, para 92-94.

6.2 Questions on provisions becoming permanent

The House of Lords Secondary Legislation Scrutiny Committee said in April that it was “fundamentally concerned about the changes potentially being made permanent by the Secretary of State. These are issues that the House may wish to explore”.⁶⁴

Appearing before the Education Select Committee on 22 April, the Minister, Vicky Ford, was asked by David Simmonds MP whether the DfE would seek to learn lessons from the suspension of certain statutory duties:

David Simmonds: [...] A review by the Department has found that some of statutory duties are leading to local authorities having to undertake activities that are not useful or purposeful, in particular, some of the reviews that are required under the statutory duties—help by foster carers, prospective adopters, the children in the care system—are found not to have improved their experience. Is the Department learning, and will it learn, from the suspension of any of those statutory duties, to see where it has exposed the fact that they were not leading to purposeful activity, with a view to dispensing with those statutory duties and freeing people up to do more useful things in future?

The Minister replied:

Vicky Ford: That is exactly the point, David, about why we are laying in place the statutory instrument in order to implement flexibility on certain statutory duties. We are focused on giving that flexibility on the lower risk areas in order to make sure that the experts on the ground can be focused on what they need to do now. It does need to be done in a risk assessed way [...]⁶⁵

In a DfE blog, posted on 1 May 2020, the Ms Ford had said that the changes “will remain in place only for so long as needed”.⁶⁶ In addition, the Secretary of State for Education told the House of Commons on 6 May 2020 that the regulations would not be continued once the outbreak is over:

This is a temporary measure that we have taken in response to concerns that people have raised about making sure they are able to provide the best care for the most vulnerable children. It is certainly not something that is going to be continued once we are through this crisis.⁶⁷

In her [written statement of 14 July](#), the Minister said that, subject to a short consultation, “the overwhelming majority of these regulations will expire as planned on 25 September”.

⁶⁴ House of Lords Secondary Legislation Scrutiny Committee, [Thirteenth Report of Session 2019-21](#), HL 57, 7 May 2020, para 40

⁶⁵ Education Select Committee, [Oral evidence: The impact of COVID-19 on education and children’s services, HC 254](#), 22 April 2020, Q24

⁶⁶ [Supporting vulnerable children](#), DfE Education in the Media Blog, 1 May 2020

⁶⁷ [HC Deb, 5 May 2020, c479](#)

6.3 Debates on whether the regulations introduce measures previously abandoned

During a private notice question in the House of Lords, the Labour Peer Lord Howarth of Newport argued that the Government had “used the emergency coronavirus legislation to make a major and highly controversial policy change of a nature which was previously explicitly rejected by Parliament in 2017”.⁶⁸

This echoed some commentary within the sector that the regulations are similar to provisions originally within the *Children and Social Work Bill*, which were subsequently withdrawn, and in a 2018 “myth busting guide” on children’s social care.⁶⁹

Clauses 29-33 of the original *Children and Social Work Bill* enabled local authorities to “test different ways of working with a view to achieving better outcomes under children’s social care legislation” and allowed the Secretary of State to “exempt a local authority in England from a requirement imposed by children’s social care regulation”.⁷⁰ These measures were considered in the House of Commons Public Bill Committee in January 2017 and withdrawn by the Government in March 2017.⁷¹

The DfE’s [Children’s social care statutory guidance myth busting](#) was withdrawn in March 2019, following criticisms and a campaign by social worker organisations and academics who claimed it was conflict with existing laws.⁷²

In response to Lord Howarth, the Minister, Baroness Berridge, said “that this is a minimal change to the procedural requirements in relation to children’s social care” and the legislation “is under review” and would fall on 25 September 2020 if not renewed by Parliament.⁷³

6.4 Committee reports on No. 2 Regulations

The second statutory instrument, [The Adoption and Children \(Coronavirus\) \(Amendment\) \(No. 2\) Regulations 2020](#), was considered by the House of Lords Secondary Legislation Committee in September 2020. The Committee welcomed the consultation on the No.2 Regulations:

⁶⁸ [HL Deb, 30 April 2020, c 284](#)

⁶⁹ [Changes to care responsibilities divide opinion among leaders](#), Children and Young People Now, 27 May 2020; [Williamson: Children’s Services leaders asked for changes to statutory duties](#), Children and Young People Now, 6 May 2020; Madeleine Whelan, [Adoption and Children \(Coronavirus\) Regulations 2020- A step too far, Family Law Week](#), 28 April 2020; Brid Featherstone and Anna Gupta, [Thinking about adoption in a pandemic: Why we need to be concerned about SI 445](#), British Association of Social Workers, 15 May 2020

⁷⁰ [Children and Social Work Bill \[HL Bill 57\]](#), Clause 29 (1) and (2)(a)

⁷¹ [HC Deb Public Bill Committee, 10 January 2017, cc165-176](#); [Minister U-turn over “bonfire of children’s rights”](#), BBC News, 2 March 2017

⁷² [Government withdraws social care ‘myth busting’ guide after legal challenge](#), Community Care, 25 March 2019; [Together for children campaign](#), 2016-2019

⁷³ [HL Deb, 30 April 2020, c 284](#)

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The Committee welcomes that, as part of the consultation on this instrument, DfE discussed its approach with the Office of the Children’s Commissioner, major children’s charities and others. We had criticised a lack of consultation on the earlier instrument. DfE says that a majority of respondents agreed with the proposals and that the changes will expire on 31 March 2021.⁷⁴

⁷⁴ House of Lords Secondary Legislation Scrutiny Committee, [Twenty-sixth report of Session 2019-21](#), HL 126, 17 September 2020, para 24

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