

**Explanatory Memorandum to:**

**The Regulated Fostering Services (Service Providers and Responsible Individuals) (Wales) Regulations 2019 and The Local Authority Fostering Services (Wales) Regulations 2018**

This Explanatory Memorandum has been prepared by the Health and Social Services Department and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

**Minister's Declaration**

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of:

- The Regulated Fostering Services (Service Providers and Responsible Individuals) (Wales) Regulations 2019
- The Local Authority Fostering Services (Wales) Regulations 2018.

I am satisfied that the benefits justify the likely costs.

Huw Irranca-Davies  
**Minister for Children, Older People and Social Care**

11 December 2018

## **PART 1**

### **1. Description**

In 2011 the Welsh Government published the white paper *Sustainable Social Services: A Framework for Action*, which set out an ambitious plan to create a new integrated and person-centred approach to social services provision in Wales. To achieve this new approach, in the last assembly term, the Welsh Government made two pieces of primary legislation: the *Social Services and Well-being (Wales) Act 2014* ('the 2014 Act') and the *Regulation and Inspection of Social Care (Wales) Act 2016* ('the 2016 Act').

The 2014 Act provides the legal framework for improving the well-being of people who need care and support, and carers who need support. Part 6 of the Act sets out social services functions in relation to looked after and accommodated children, including those who are placed in foster care. It also enables the Welsh Ministers to put in place regulations and issue codes of practice.

The 2016 Act reforms the regulation and inspection regime for social care in Wales, and provides the statutory framework for the regulation and inspection of social care services and the social care workforce. It also enables the Welsh Ministers to put in place regulations, publish guidance and issue codes of practice.

This Explanatory Memorandum relates to *The Regulated Fostering Services (Service Providers and Responsible Individuals) (Wales) Regulations 2019* and *The Local Authority Fostering Services (Wales) Regulations 2018*, which will come into force on 29 April 2019. These Regulations impose requirements on independent fostering service providers, and upon local authority fostering service providers, respectively.

### **2. Matters of special interest to the Constitutional and Legislative Affairs Committee**

There are no matters of special interest to the Constitutional and Legislative Affairs Committee.

### **3. Legislative background**

The powers enabling *The Regulated Fostering Services (Service Providers and Responsible Individuals) (Wales) Regulations 2019* to be made are contained in a number of sections within the 2016 Act. They are, as follows:

- Section 21(5) - the circumstances in which the Welsh Ministers (instead of service providers) may designate a responsible individual
- Section 27 – Regulations about regulated services
- Section 28 – Regulations about responsible individuals
- Section 30 – Regulations about service providers who are liquidated etc.

- Section 31 – Regulations about service providers who have died
- Section 45 – Regulations which provide for offences in the event of failure by a service provider to comply with specified requirements in regulations under section 27
- Section 46 – Regulations which provide for offences in the event of failure by a responsible individual to comply with specified requirements in regulations under section 28

These Regulations will be laid under the affirmative procedure.

Statutory guidance to accompany the Regulations (under section 29 of the 2016 Act), published for consultation at the same time, has been revised and is published in draft on the Welsh Government website, to aid scrutiny of these Regulations. The statutory guidance will be finalised and published in spring 2019.

<https://gov.wales/topics/health/socialcare/regulation/?skip=1&lang=en>

The powers enabling *The Local Authority Fostering Services (Wales) Regulations 2018* to be made are contained in sections 87 (regulations about looked after children), 92 (regulations about the placing of children with local authority foster parents) and 94A (regulation of the exercise of local authority functions relating to looked after and accommodated children) of the 2014 Act.

These Regulations will be laid under the negative procedure.

A code of practice to accompany the Regulations (under section 145 of the 2014 Act), published for consultation at the same time, has been revised and is published in draft on the Welsh Government website, to aid scrutiny of these Regulations. The code of practice will be finalised and laid before the National Assembly in February 2019.

<https://gov.wales/topics/health/socialcare/regulation/?skip=1&lang=en>

#### **4. Purpose and intended effect of the legislation**

The purpose of these two sets of Regulations is to ensure that independent fostering services providers and local authority fostering services provide services to the required standards to ensure that the well-being and safety of children and young people in foster placements is promoted and maintained, and that foster parents are appropriately supported.

#### **5. Consultation**

A 12 week public consultation ran from 24 May to 16 August 2018, seeking views on draft Fostering Services (Service Providers and Responsible Individuals) (Wales) Regulations 2019. This was accompanied by draft statutory guidance for

independent service providers and a draft code of practice for local authority providers.

27 responses were received to the consultation. The key changes made to the content of the draft regulations following consultation were:

- References to ‘child sexual exploitation’ were extended to include ‘child criminal exploitation’. This was added to cover other types of exploitation such as that associated with gangs and ‘county lines’ drug dealing.
- The new duty of candour was extended to cover local authority fostering service providers.
- The requirement on a local authority to appoint one of its own officers to be responsible for managing the fostering service was amended to refer to ‘an officer’. This will allow two or more local authorities to jointly appoint an officer who may be employed by only one of them to manage local authority fostering services across more than one authority, in line with the move towards more regional working set out in the National Fostering Framework for Wales.
- The requirement to provide all the listed policies and procedures to be in an appropriate format and language for children was amended, to exclude those policies which were not directly relevant to children – i.e. whistleblowing, supporting and developing staff, and staff discipline. Additionally, providers will be required to include information about relevant policies and procedures in the children’s guide to the service.
- The regulation on supporting children to manage their money was expanded so that providers have to ensure that there is adequate oversight and monitoring of savings which are made by foster parents on behalf of children, and that foster parents pass on all records of savings to the service provider at the end of the placement. This responds to concerns raised by the Public Services Ombudsman for Wales.
- The frequency of quality of care reviews was standardised at six months for both independent and local authority fostering providers.

Section 27(4) of the Regulation and Inspection of Social Care Act (RISCA) provides that “Before making regulations under this section the Welsh Ministers must—(a) consult any persons they think appropriate, and (b) publish a statement about the consultation.” To discharge this requirement, a summary of the responses, together with the Welsh Government’s analysis and conclusions, is being laid with this Explanatory Memorandum and can be found at: <https://beta.gov.wales/fostering-services-regulations>.

## PART 2 – REGULATORY IMPACT ASSESSMENT

### Independent fostering services providers

In respect of independent fostering services providers<sup>1</sup>, we have identified two main options:

- **Option 1:** as far as possible, replicate in regulations the requirements placed on fostering providers under the Fostering Service (Wales) Regulations 2003 and the relevant National Minimum Standards under the Care Standards Act 2000.
- **Option 2:** harmonise, so far as possible, the requirements on fostering providers and other services regulated under the 2016 Act, with bespoke and/or additional requirements as necessary.

**Preferred option:** Option 2 is the preferred option.

Under Option 2 requirements would, so far as practicable, be consistent across all regulated services, in line with the policy intent of the 2016 Act.

The 2016 Act made some fundamental changes to the way care and support services are regulated, inspected and delivered; it is therefore difficult to compare and contrast the regulations made under the 2000 Act and the proposed regulations under the 2016 Act. With regard to regulation, the intention of the 2016 Act was to create a consistent set of requirements that would apply across all regulated services, rather than each type of service having its own set of regulations and NMS. The benefit of this approach is that it moves away from focusing on minimum standards to an emphasis on achieving continual improvement.

The National Minimum Standards (NMS) for fostering services will, therefore, no longer apply. Instead, statutory guidance has been developed alongside the regulations to give further detail to regulated service providers about how they may comply with the requirements set out in the regulations. This guidance has been developed by Welsh Government and the cost has already been incurred.

Under Phase 2 of implementation of the 2016 Act, requirements were placed upon providers of care homes (including care homes for children), domiciliary care, residential family centres and secure accommodation. The key regulations were the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 ('the 2017 Regulations'). The 2017 Regulations provide the model for the regulations being made under Phase 3 for fostering, adoption, adult placements and advocacy services, with bespoke changes being made to each of the Phase 3 regulations as required to fit the particular characteristics of each service.

A significant difference affecting the 2017 Regulations and the fostering regulations to be made in 2018/2019 will be the fact that fostering services providers do not

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<sup>1</sup> 21 services are registered at present

directly provide care and support to children in foster placements on a day to day basis. Daily care and support is provided to such children by foster parents, who will have been assessed and approved by the fostering agency or local authority, but who are not employees of the agency or authority. This means that for example, some of the requirements on care homes for children will need to be modified for fostering providers. Another difference is that fostering services providers also provide support and training to foster parents.

### **Local authority fostering services providers**

In respect of local authority fostering services providers, we have identified two options:

- **Option 1:** as far as possible, replicate in regulations the requirements placed on fostering providers under the Fostering Service (Wales) Regulations 2003 and the National Minimum Standards under the Care Standards Act 2000.
- **Option 2:** place a new set of requirements on local authority providers which follow, so far as practicable and appropriate, the requirements being placed on independent service providers under section 27 of the 2016 Act (requirements on service providers), in line with the preferred option for regulated service providers above.

The requirements placed upon responsible individuals of regulated services under section 28 of the 2016 Act will not be relevant for local authority providers, as these are not a regulated service under the 2016 Act. Instead, the regulations place a requirement upon local authority providers to appoint a fostering services manager, setting out the requirements of that role. This role already exists and therefore the requirement does not carry any additional costs.

**Preferred option:** Option 2 is the preferred option.

The rationale for this is that it would not be desirable to have different regulatory frameworks for fostering services provided by independent fostering services providers and local authority providers, given that the outcomes both sectors are seeking to achieve for looked after children are the same and that the nature of fostering itself is the same. It is the same children that are being placed by local authorities, whether with their own fostering service or via an independent provider. Also, some of the improvements which the 2016 Act sought to drive in relation to regulated services, with their associated benefits, are also pertinent to local authority fostering services, and we want to ensure that any new requirements upon local authority providers are equally robust.

It is, however, accepted that there will be some key differences between the regulatory regime for independent providers and local authority fostering services. The main difference is that it would be inappropriate to try to replicate the responsible individual (RI) role within local authorities, given the different accountability structures within local authorities and the policy decision, taken when the 2016 Act was being developed, not to make local authority fostering services a regulated service.

## Requirements on service providers – general

For ***independent service providers***, the general requirements would include those relating to the statement of purpose, monitoring and improvement, the responsible individual, financial sustainability, policies and procedures, and the duty of candour.

For ***local authority providers***, the general requirements include requirements relating to the statement of purpose, monitoring and improvement, the local authority fostering manager, policies and procedures, and the duty of candour.

The main differences from the requirements in the 2003 Regulations are:

- *Statement of purpose*

These requirements will be placed upon ***independent service providers and local authority providers***.

Providers would be required to provide the service in accordance with the statement of purpose, keep the statement under review and revise it where appropriate.

Under the 2003 Regulations, providers have to provide a copy of the statement of purpose to the Welsh Government, and make it available upon request for inspection by staff, foster parents / prospective foster parents, children in placement and their parents. They must also notify the Welsh Government of any revision within 28 days.

The new regulations would impose a requirement to notify these persons of any revision to be made at least 28 days before it is to take effect. For ***independent service providers***, the placing authority will also have to be notified.

**Costs:** The requirement to notify in advance should have no additional cost for providers.

**Risks:** No risks have been identified.

- *Responsible Individual*

These requirements will be placed upon ***independent service providers***. Requirements relating to the responsible individual (RI) would include the need for the RI to be supported and appropriately trained, action to take when the RI fails to meet requirements placed upon them by the regulations, and what to do when the RI is unable to fulfil their duties. There would also be similar requirements on providers who are individuals and therefore also act as RI.

The role of the RI across the services regulated under the 2016 Act is much greater and attracts a higher level of accountability as compared to the equivalent role in the 2003 Regulations. Discussion of this role and its regulatory implications can be found below.

- *Local authority manager*

These requirements will be placed upon **local authority providers**. The existing requirement for a local authority to appoint one of its officers to manage the fostering service will remain. The manager would need to meet the general requirements set out in relation to fitness of staff at the service, and the local authority provider must ensure that the manager is supported to carry out their duties effectively, and undertakes appropriate training. The local authority provider must also take such action as is necessary in the event that the manager has not complied with a requirement, and put suitable arrangements in place when the manager is absent. Discussion of this role and its regulatory implications can be found below.

- *Policies and procedures*

These requirements will be placed upon **independent service providers** and **local authority providers**.

Providers will have to have policies and procedures in place covering:

- safeguarding
- appropriate use of control and restraint
- bullying
- absence
- medication and access to health services
- supporting and developing staff
- staff discipline
- complaints
- whistleblowing
- support for foster parents on how to help children manage their money.

In addition, **independent service providers** will have to have a policy and procedures in relation to placement and commencement of service. This will not be a requirement on **local authority providers** because they are the placing authority and will manage the placement in line with their duties under the Care Planning, Placement and Case Review (Wales) Regulations 2015.

The 2003 Regulations specify that providers must have in place policies and procedures in relation to safeguarding, acceptable measures of control, restraint and discipline, dealing with allegations of abuse and neglect, and what to do if a child is absent from a foster parent's home without permission.

**Costs:** There should be no significant additional costs in drawing up and implementing this longer list of policies and procedures, most of which are good practice which providers will already be doing. The Regulatory Impact Assessment for the Regulation and Inspection of Social Care (Wales) Bill estimated that it would take providers 4 working days (assuming the working week is 37 hours) to complete the annual return. The annual return, a requirement under Section 10 of the 2016 Act, contains a similar level of information as might be expected in a more complex policy or procedure, such as

safeguarding. Other policies or procedures are likely to be simpler. It is therefore estimated that the requirements above will entail a cost of up to £392 per policy for each setting (variable depending on the salary of the person producing the policy/procedure). The actual additional cost for an individual provider will depend on the provider and the policies and procedures they currently have in place. Additional commentary on key policies is provided under the relevant sections below.

**Risks/Benefits:** There are no identified risks. Benefits include improved accountability at senior level within the service and better support for staff through access to a more comprehensive range of policies.

- *Duty of candour*

These requirements would be placed upon ***independent service providers*** and ***local authority providers***.

The duty of candour would require providers to act in an open and transparent way with children in placement, their parents, foster parents and prospective foster parents, the authority where the child is placed (i.e. the area authority), and (for ***independent service providers***) the placing authority. This is a new requirement.

**Costs:** There should be no additional costs associated with this duty. Providers should already be acting in an open and transparent way with those to whom they provide services.

**Risks:** No risks have been identified.

#### Requirements on service providers as to the steps to be taken before providing care and support - suitability of the service

These requirements will be placed upon only ***independent service providers***. Providers would be required to determine that a placement with a foster parent is suitable to meet the child's needs. The determination would be drawn up in consultation with the child, their parents and the placing authority, and would need to take into account the child's Part 6 care and support plan under the 2014 Act, any other relevant assessments, any risks and various other relevant factors.

These requirements replicate the duty to secure welfare under the 2003 Regulations, but within the context of the framework for care and support set out in the 2014 Act.

This will not apply to ***local authority providers*** because they will be the placing authority for the child in line with their duties under the Care Planning, Placement and Case Review (Wales) Regulations 2015.

## Requirements on service providers as to the information to be provided to individuals on commencement of the provision of care and support

These requirements will be placed upon ***independent service providers*** and ***local authority providers***.

The requirements would require the providers to prepare a written guide to the service in a language and format suitable for children (of all ages and levels of understanding) and adults. It will need to be reviewed at least annually and updated as required. The guide will include a summary of relevant policies and procedures, as well as information on how to make complaints and raise concerns. The provider will also have to ensure that children receive support to understand the information provided.

These requirements go beyond the 2003 Regulations which require the fostering provider to prepare a children's guide only.

**Costs:** There may be some additional costs for providers in adapting the written guide for different audiences. It is, however, good practice to produce versions of the guide for children of different ages, and all fostering providers will already be producing information for foster parents, so the additional costs are likely to be minimal.

**Risks/Benefits:** No risks have been identified. The benefit would be to support improved accessibility of information to service users and other interested parties.

## Requirements on service providers as to the standard of care and support to be provided

The following requirements would be placed upon ***independent service providers*** and ***local authority providers***:

- *Standards of care and support to children*

Providers would be required to ensure that foster parents give care and support in accordance with the child's Part 6 care and support plan, and in a way that maintains, protects and promotes the safety and well-being of the child.

- *Information for children*

There would be similar requirements regarding the information children need to make and participate in day to day decisions about the way care and support is provided to them.

This is a new requirement, in line with the principle underpinning the 2014 Act and the 2016 Act that the new legislation will promote greater choice and control by children and adults who are receiving care and support.

- *Language and communication*

Providers would be required to take reasonable steps to meet the language needs of children, and ensure that children are provided with access to the communication aids and equipment they need.

This is a new requirement on the face of the regulations, although the importance of taking into account the language needs of children was already referred to in the National Minimum Standards (NMS 7 on valuing diversity, and NMS 8 on matching). The communication aids and equipment may be provided by the NHS, social services or via other means. There is no expectation that they will be provided by the fostering service: the duty is to ensure that the child is able to access these.

- *Respect and sensitivity*

There would be a new requirement around ensuring that children in placement are treated with respect and sensitivity.

- *Duty to promote contact*

The duty to promote contact in the 2003 Regulations would be retained. Contact arrangements would be in accordance with the child's Part 6 care and support plan and any relevant court order.

- *Compliance with foster care agreement*

There would be a new requirement for providers to monitor the foster parents' compliance with the foster care agreement. This is already implicit in the 2003 Regulations, where the agreement itself must contain information about the foster parents' compliance.

There would be additional requirements placed upon ***independent service providers*** in relation to:

- *Suitability of the placement*

There would also be additional requirements relating to the initial and ongoing suitability of the placement. These include ensuring that the foster parents are able to give care and support in accordance with the child's Part 6 care and support plan, and a requirement on service providers to give immediate notice to the placing authority if the placement no longer meets the child's needs.

These requirements reflect the emphasis in the 2014 Act on person-centred care and support, and are designed to complement the requirements upon placing authorities under the Care Planning, Placement and Case Review (Wales) Regulations 2015.

**Costs:** There will be no additional costs to providers in implementing these requirements.

**Risks/Benefits:** No risks have been identified. The purpose of these requirements (and therefore benefit) is to mitigate the risk of placement breakdown and to ensure that a child's care and support needs are met.

#### Requirements on service providers – safeguarding

These requirements will be placed upon ***independent service providers*** and ***local authority providers***.

The regulations would require service providers to put arrangements in place to ensure children are safe and protected from abuse, neglect and improper treatment. This includes what a provider must do when an allegation is made or evidence comes to light. In keeping with the approach taken in the 2016 Act, the new regulations will be more explicit about the overarching requirements – e.g. to put arrangements in place, and to ensure that safeguarding policies and procedures are operated effectively – but the detail will be similar to the 2003 Regulations. The regulations and guidance will reflect current best practice around safeguarding.

The requirements in respect of the use of control and restraint by foster parents, and the prohibition of corporal punishment, would be similar to those in the 2003 Regulations. However, there will be additional requirements for foster parents to be trained in any methods of control and restraint to be used, to make a record of any incident where control or restraint is used, and to notify the service provider of any such incident within 24 hours. The regulations will also specify what constitutes control and restraint in this context.

The requirement to have a procedure for when a child goes absent without permission would be retained. Also there would be a regulation requiring providers to have a policy on the prevention of bullying and procedures for dealing with it. This is currently covered in the NMS.

There would be an additional requirement making it clear that no child is to be deprived of their liberty in foster care without lawful authority. A parent of a child who is not competent may provide authority. 16 and 17 year olds without capacity may be subject to applications to the Court of Protection and to the High Court in exercise of the High Court's inherent jurisdiction.

**Costs:** No significant additional costs to providers in implementing these requirements have been identified, as providers are already required to provide support, training and information for foster parents under existing regulations.

**Risks/Benefit:** No risks have been identified. Putting these requirements in place will benefit service users through embodying best practice around safeguarding.

#### Requirements on service providers – access to health, education and other services

These requirements will be placed upon ***independent service providers*** and ***local authority providers***.

The requirements in the 2003 Regulations with regard to health and education would be maintained. The consultation suggested some changes which have been incorporated, each with a view to strengthening the current provisions. There are: including an explicit reference to a child's physical, mental and emotional health and development; requiring the provider to ensure that foster parents provide a child with access to optical services; and ensuring that children are supported to engage in play and recreational activities appropriate to their age, and to participate freely in cultural life and the arts.

**Costs:** There will be no additional costs to providers in implementing these requirements.

**Risks:** No risks have been identified.

#### Requirements on service providers – staffing

These requirements will be placed upon ***independent service providers*** and ***local authority providers***.

The requirements in the 2003 Regulations with respect to staffing would be maintained. These cover the fitness of staff, support and development of staff, and the need for a disciplinary procedure. The new regulations will place a greater emphasis on staffing requirements meeting children's care and support needs and personal outcomes, in line with the ethos of the 2014 Act and the 2016 Act.

The fitness requirement will be extended to volunteers as well as paid employees.

The regulations will reflect the new DBS arrangements, including allowing for the use of the update service.

There will be a new requirement to ensure that all employees and volunteers are provided with information about the service, and made aware of any codes of practice about the standards of conduct required of social workers published by Social Care Wales under the 2016 Act.

In addition, ***independent service providers*** will be required to adhere to the code of practice on the standards of conduct and practice expected of person employing social care workers, also under the 2016 Act.

**Costs:** No additional costs have been identified.

**Risks:** No risks have been identified.

#### Requirements on service providers – premises, facilities and equipment

These requirements will be placed upon ***independent service providers*** and ***local authority providers***.

The requirements in the 2003 Regulations with respect to premises will be retained. These apply to the premises from which the fostering service is operated. The new regulations will also place requirements on providers with respect to the premises, facilities and equipment used by foster parents in the provision of care and support. Service providers will have to put arrangements in place to ensure that these are suitable, safe and properly maintained, and ensure that foster parents are properly trained in the use of equipment. These requirements (except for equipment) are currently covered in the NMS (Standard 6).

**Costs:** No significant additional costs have been identified. Training foster carers in the use of equipment should already be good practice, in line with current requirements with respect of health and safety.

**Risks:** No risks have been identified.

### Requirements on service providers – other requirements

The following miscellaneous requirements will be placed upon ***independent service providers*** and ***local authority providers***.

- *Records*

The requirement to keep records of relating to children, employees and accidents for 15 years will be retained. Some amendments would be made to the relevant schedule, to reflect more up-to-date practice. There will be a specific requirement for a child's records to be returned to the placing authority at the end of a placement. The provider would also be required to keep a record of (i) all complaints and action taken, (ii) safeguarding referrals and the outcome, and (iii) incidences of the use of control and restraint. This strengthens the current requirements in the 2003 Regulations, which provides that these are matters to be monitored by the registered person.

- *Conflicts of interest*

There would be a requirement to have effective arrangements in place to identify, record and manage potential conflicts of interest.

- *Complaints*

Providers would be required to have in place a policy and procedures for dealing with complaints, including those made by children in foster placements, their parents and foster parents. These largely replicate existing requirements, except for some clarification and tightening up of procedures in the light of good practice that has developed since the original regulations in 2003.

- *Whistleblowing*

Providers would be required to put effective whistleblowing policies and procedures in place. This is a new requirement, reflecting the development of whistleblowing policy and practice since the 2003 Regulations were drawn up.

In addition, there will also be requirements placed upon ***independent service providers*** in respect of:

- ***Notifications***

The notification requirements would broadly remain the same as in the 2003 Regulations, with the following changes:

- the provider would no longer need to notify the Welsh Ministers of a serious illness of a child placed with foster parents (except infectious diseases)
- references to child prostitution have been removed, as this is covered by child sexual exploitation
- the references to exploitation have been expanded to include child criminal exploitation as well as child sexual exploitation.

**Costs:** No additional costs have been identified in respect of any of the above requirements. The changes simply update and tighten up procedures in the light of existing good practice.

**Risks:** No risks have been identified. All the changes to the existing regulations reflect good practice and are designed to mitigate risks to children and other beneficiaries of the service.

### Support for foster carers

These requirements will be placed upon ***independent service providers*** and ***local authority providers***.

The requirements on providers in relation to support, training and information for foster parents in the 2003 Regulations would be retained. However, there will be a new requirement to ensure that prospective foster parents also receive such training, information and advice as may be necessary. In line with the emphasis in the 2016 Act on continuous improvement, there will also be a new requirement to monitor and review the information, training, advice and support provided to foster parents under this regulation.

There will be a new regulation requiring providers to ensure that foster parents are appropriately supervised. At present this is dealt with under the NMS (Standard 22), and is not therefore a new requirement.

The policies and procedures which the service provider must ensure that foster parents are familiar with will be expanded to cover some areas currently covered in the NMS only.

The regulations will place a new requirement on providers to develop a policy and procedures to enable foster parents to provide support and assistance to children on how to manage their money. This includes ensuring that there is adequate oversight and monitoring of savings by the provider, and a requirement that foster parents pass

on all records of savings to the provider when a placement comes to an end. Supporting individuals to manage their money is a common requirement across regulated services under the 2016 Act, and in the case of looked after children the need for further provision on the use of savings was highlighted by a recent investigation by the Public Services Ombudsman for Wales. There are no requirements in relation to managing money or savings in the 2003 Regulations or NMS.

**Costs:** No significant additional cost pressures have been identified. Providers will already be providing information, advice and training to prospective foster parents, and it is very much in their interests to invest in recruitment and training to ensure fostered children are properly safeguarded. As indicated above, the cost of developing a procedure is not likely to exceed £392 per provider.

**Risks/Benefits:** No risks have been identified. The benefit is that investment in supporting foster carers will help mitigate the risks of placement instability and breakdown.

### Requirements on responsible individuals

These requirements will be placed upon *independent service providers*.

In the 2003 Regulations, where the fostering agency is an organisation, the 'responsible individual' is defined as 'an individual ... who is a director, manager, secretary or other officer of the organisation and is responsible for supervising the management of the fostering agency'. In the case of a fostering agency carried on by an individual, that person will also be the responsible individual. Under the current system the responsible individual must satisfy requirements as to fitness to perform that role, must from time to time carry out such training as is appropriate to ensure that he or she has the experience and skills necessary for carrying on the fostering agency, and must notify the Welsh Government if they commit a criminal offence.

Section 21 of the 2016 Act expands on the requirements as to who is eligible to be a responsible individual (RI).<sup>2</sup>

The new requirements would place greater responsibility on the RI within the service. The key additions to the RI role are set out below:

- *Visits*

There would be a requirement on the RI to visit the premises from which the service is provided, and meet with members of staff and children in placement at

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<sup>2</sup> The Regulation and Inspection of Social Care (Wales) Act 2016, section 21 states that to be eligible to be a responsible individual the individual must (a) where the service provider is an individual, be the service provider; (b) where the service provider is a partnership, be one of the partners; (c) where the service provider is a body corporate other than a local authority — (i) be a director or similar officer of the body, (ii) in the case of a public limited company, be a director or company secretary, or (iii) in the case of a body corporate whose affairs are managed by its members, be a member of the body; (d) where the service provider is an unincorporated body, be a member of the body;

least every three months. It is not expected that RIs would meet every child, but put arrangements in place to meet a representative sample.

- *Oversight of adequacy of resources*

The RI would be required to report to the service provider, on a quarterly basis, on the adequacy of the resources available to provide the service in accordance with the requirements in the regulations.

- *Other reports to the service provider*

The RI would also be required to report on any concerns about or significant changes to the management or provision of the service, or any concerns that the service is not being provided in accordance with the statement of purpose.

- *Engagement with children and others*

The RI would have responsibility for ensuring suitable arrangements are in place for obtaining the views of children in placement, their parents, foster parents, the placing authority, and staff employed at the service, on the quality of care and support provided and how it could be improved. This is currently a duty on the service provider only.

- *Compliance*

The RI would be responsible for ensuring that there are systems in place to record incidents and complaints, for the keeping of records, and that the policies and procedures are kept up to date. The RI would also have to prepare the statement of compliance to be included in the annual return under section 10(2)(b) of the 2016 Act.

- *Quality of care review*

The RI would have to ensure suitable arrangements are in place for monitoring, reviewing and improving the quality of care and support at least every six months. This is currently an annual requirement of the service provider.

- *Notifications*

The RI would also be required to make the following notifications:

- the appointment of a manager
- the expected absence of the appointed manager for 28 days or more, 7 days prior to the commencement of the absence
- the unexpected absence of the appointed manager, no later than 7 days after the commencement of the absence
- the unexpected absence of the appointed manager for 28 days or more where no prior notification has been given, immediately on the expiry of 28 days following the commencement of the absence

- return from absence of the appointed manager
  - interim arrangements where the manager is absent for longer than 28 days
  - someone other than the appointed manager is proposing to manage or is managing the service
  - the appointed manager ceases, or proposes to cease, managing the service.
- *Duty of candour*

The RI must act in an open and transparent way with children in placement, their parents, foster parents and the placing authority.

Placing greater responsibilities on the RI will support the policy intention of ensuring accountability for service quality and compliance is held at the most appropriate level within an organisation. By placing specific duties on the RI, the regulator can ensure that the provider takes an active interest in the services provided. Whilst managers and service providers will retain accountability for their own role, the statutory role of RI ensures that a clear chain of accountability is established, which includes the corporate responsibility of the board, the responsible individual and the service manager.

**Costs:** It is not anticipated that there will be significantly greater costs to providers in placing these requirement upon RIs. Many RIs are already very involved in their services and many will be undertaking the duties set out under this option already.

There are, however, some additional requirements which may result in some additional costs. These are:

- *Visits*

Using the ONS data from the Annual Survey of Hours and Earnings, which states that the gross hourly earnings for managers and directors in Social Services in 2017 was £19.29<sup>3</sup>, it is estimated that, assuming RIs spend most of their working day (8 hours) at a service during their visit, this would give a total cost, including on-costs, of £201 per visit. It is required that visits should take place at least every 3 months which would mean an annual cost of around £804 for each of the services. Similar would apply in relation to each visit to a child on placement; £201 for full day or £100 per half day.

- *Quarterly reporting on the adequacy of resources*

To comply with this requirement, the responsible individual should have systems and processes in place that provide information about the service and any areas that may need closer observation/consideration and/or improvement.

Service providers should already have governance systems in place to monitor the running of the service. This requirement ensures the responsible individual takes

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<sup>3</sup> This figure is then uprated by 30% to include on-costs.

greater ownership of the governance of the service and is proactive in reporting concerns to the service provider (this would not apply if the service provider is an individual). There may be a small increase in staff time to undertake this more formal reporting, however the cost should be negligible as there should already be systems in place.

- *Quality of care review every 6 months*

It is existing practice for providers to undertake an annual quality of care review. This duty would be placed on the responsible individual with the intention that it should be a responsive and on-going process rather than a one-off annual requirement.

The responsible individual must put suitable arrangements in place to establish and maintain a system for monitoring and improving the quality of the service. To complete this quality review the RI must take into account:

- the outcome of engagement with children in placement, parents, foster parents, placing authorities and staff employed by the service
- aggregated data on notifications, safeguarding matters, whistleblowing concerns and complaints
- any action taken in relation to complaints
- the outcome of any audit of the accuracy and completeness of records.

Where this requirement corresponds to the date on which the service provider's annual return is due, much of the information from the quality of care review can be used to complete the relevant section of the annual return in order to avoid unnecessary duplication.

Costs to service providers in submitting the quality of care review report are anticipated to be comparable to the submission of the annual report. There may be some additional initial costs in moving to six monthly reports, but the quality of care review process should become embedded in the ongoing quality assurance process the provider has in place.

The Regulatory Impact Assessment for the Regulation and Inspection of Social Care (Wales) Bill estimated that it would take providers 4 working days (assuming the working week is 37 hours) to complete an annual return. The annual return, a requirement under Section 10 of the 2016 Act, contains a similar level of information to the quality of care review but as the quality of care review draws from existing monitoring information this should not take as long to complete. A reasonable estimation for this would be more like 2 working days, therefore incurring a cost of around £196 for each service, every six months. As providers are currently required to undertake similar reviews on an annual basis, the additional cost (of moving to six-monthly) should only be £196 per annum. However, this figure will vary depending on the salary of the person undertaking the review and may vary according to the size of the provider.

**Risks:** Consideration was given to the risks regarding the increased RI role during Phase 2 of implementation of the 2016 Act. The same considerations are relevant to the new requirement with respect to the RIs of fostering services, as a common approach is being taken to RIs across all regulated services under the 2016 Act.

The relevant section from the RIA on the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 reads as follows:

The impact of the duties on RIs will, therefore, vary depending on the organisational model. During the consultation we became aware of risks regarding the duties as they relate to registered charities and RIs of larger organisations.

We were advised that, because trustees of charities (unincorporated bodies) are unpaid volunteers, they may not necessarily be willing, suitable or have the relevant expertise and understanding of the care and support service to take on the responsibility of the RI role. We were also advised that the option of paid officers/senior managers within the charity (which is where they suggest that the RI role should be placed) joining the board is not possible.

Larger organisations providing a number of regulated services in Wales have also identified challenges with the requirement for the RI to be a director. Their concerns focus on the duties being placed on RIs – including the requirement to visit the service – and the extent to which these duties can be delegated. They advised that the directors of larger organisations are too removed from the service and the provision of care and support services and may not be suitably experienced or qualified to carry out the duties of the RI effectively. Similarly, they advised that the number of services these organisations provide would make it impossible for the directors to carry out this role. Furthermore, they suggested that this may deter future investment in Wales. There is therefore a risk here in terms of the RI role being carried out properly, consistent with the policy intent.

This risk will be mitigated by applying a wide interpretation to the term ‘or similar officer’ so that this could include the Chief Executive or a very senior level employee. This would provide a pragmatic solution for both charities and larger organisations without overly compromising the policy intent. The RIs would still be designated as part of the registration of the service and therefore the service regulator will have the opportunity to test their suitability for this role. The regulator would ensure a consistency of approach and an appropriate level of seniority within the organisation by applying the following criteria:

- authority to hire and fire managers and any other staff working in care services;
- authority to set pay rates for all staff working directly within the care services;
- authority to decide on investment decisions for the care services;
- oversight of the health and safety within the relevant care services;
- accountability for determining assurance arrangements and setting any benchmarks.

The proposed approach set out in this advice, coupled with the amendments to the RI duties as set out in the draft regulations, is intended to provide a workable solution without compromising the policy intent.

This will ensure that the application and interpretation of section 21 of the 2016 Act by the service regulator is consistent, equitable across different types of organisations and consistent with the policy intent.

**Benefits:** the benefits of the requirements will be around securing better oversight of, and therefore greater accountability for, quality of service at senior level within the provider organisation, so driving service improvement.

### Duties of local authority managers

The following requirements will be placed upon **local authority providers** in respect of local authority managers:

- *oversight of adequacy of resources*
- *other reports to the local authority provider*
- *engagement with children and others*
- *duty to ensure there are systems in place to record complaints*
- *duty to ensure there are systems in place for keeping of records*
- *duty to ensure policies and procedures are up to date*
- *quality of care review*
- *support for raising concerns*

These requirements are the same as those placed upon the responsible individual (RI) of an independent service provider. Local authority managers will already be undertaking most of these duties already.

### Offences

These requirements will be placed upon **independent service providers**.

Section 45 of the 2016 Act is a regulation-making power which allows the Welsh Ministers to provide that it is an offence for a service provider to fail to comply with a specified provision of the regulations made under section 27 of the 2016 Act (duties on service providers). Section 46 is a regulation-making power which allows the Welsh Ministers to provide that it is an offence for a responsible individual to fail to comply with a specified provision made under section 28 (duties on responsible individuals). Breaches of these requirements can be dealt with via a criminal prosecution.

The offences under sections 45 and 46 are intended to ensure that there is a proportionate approach to the creation of offences to enable CIW to take criminal action when it is appropriate to do so – both when a breach is sufficiently serious and when there is enough evidence to meet the threshold to commence legal proceedings.

During Phase 1 of implementation of the 2016 Act, consideration was given as to whether to specify that breach of all the requirements in regulations under section 27 and 28 should be categorised as offences. This would have broadly replicated the

approach taken under the Care Standards Act 2000. It was decided that, for regulated services under the 2016 Act, the regulations would specify that breach of only the key requirements in regulations made under section 27 and 28 would be offences.

The regulations would therefore specify which requirements made under section 27 and 28 would give rise to offences if breached.

The **benefits, costs and risks** associated with this option were set out in the RIA<sup>4</sup> for the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017.

#### Service providers who are liquidated

These requirements will apply to ***independent service providers***.

Section 30(1) of the 2016 Act contains a power for Welsh Ministers to place requirements upon an appointed person. Section 30(2) states that an 'appointed person' means a person appointed as:

- (a) a receiver or administrative receiver of the property of a service provider who is a body corporate or a partnership;
- (b) a liquidator, provisional liquidator or administrator of a service provider who is a body corporate or a partnership;
- (c) a trustee in bankruptcy of a service provider who is an individual or a partnership.

The regulations would require an appointed person to give the Welsh Ministers notice, without delay, of when liquidators have been appointed and the reasons for it; and to inform the Welsh Ministers within 28 days of the appointment, of their intentions regarding the future operation of the service.

These are in line with the requirements already placed upon care homes, domiciliary care providers and other services regulated under the 2016 Act. An analysis of the **benefits, costs and risks** of this option are set out in the RIA for the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 (See footnote below).

#### Death of service provider who is an individual

These requirements apply to ***independent service providers*** who are individuals.

Section 31 of the 2016 Act gives the Welsh Ministers the power to make regulations placing requirements on a personal representative of an individual service provider who has died to notify the Welsh Ministers of the provider's death.

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<sup>4</sup> <http://www.assembly.wales/laid%20documents/sub-ld11204-em/sub-ld11204-em-e.pdf>

The regulations would also state that, where a service provider who is an individual has died, the personal representatives of the individual must, without delay, give written notification of the death to the Welsh Ministers, and within 28 days of the death, notify the Welsh Ministers of their intentions regarding the future operation of the service.

The regulation would also state that the personal representatives of the individual may act in the capacity of the service provider for a period not exceeding 28 days or for such longer period (not exceeding one year) as the Welsh Ministers may agree.

These provisions are in line with the requirements already placed in relation to individual providers of care homes, domiciliary care providers and other services regulated under the 2016 Act. An analysis of the **benefits, costs and risks** of this option are set out in the RIA<sup>5</sup> for the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017.

## Competition Assessment

The competition filter test	
Question	Answer yes or no
<b>Q1:</b> In the market(s) affected by the new regulation, does any firm have more than 10% market share?	Yes
<b>Q2:</b> In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
<b>Q3:</b> In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
<b>Q4:</b> Would the costs of the regulation affect some firms substantially more than others?	No
<b>Q5:</b> Is the regulation likely to affect the market structure, changing the number or size of firms?	No
<b>Q6:</b> Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
<b>Q7:</b> Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
<b>Q8:</b> Is the sector categorised by rapid technological change?	No
<b>Q9:</b> Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No

The filter test shows that it is not likely that the regulation will have any detrimental effect on competition; therefore a detailed assessment has not been conducted.

We do not consider it necessary to undertake a competition assessment for these Regulations since they will not affect the business sector in any significant way.

## Post implementation review

<sup>5</sup> <http://www.assembly.wales/laid%20documents/sub-ld11204-em/sub-ld11204-em-e.pdf>

As set out in the RIA for the Act the Welsh Government has two clear aims for the regulation and inspection of social care, the Act and as such these regulations. They are to:

- secure the well-being of citizens
- improve the quality of social care.

The Act makes provision for a number of key reporting mechanisms which will offer a set of clear evidence to inform the post implementation review and establish how successful the Act has been in achieving both of these aims. The reporting mechanisms include:

- annual returns from service providers
- annual reports from local authorities and the review of those reports as undertaken in the Annual Review of Performance and Evaluation of Performance by the service regulator
- the annual report from the Welsh Ministers in their role as the service regulator
- the annual report of the workforce regulator.

CIW will monitor the implementation of these Regulations following their coming-into-force date of 29 April 2019.