The Adoption and Children (Coronavirus) (Amendment) Regulations 2020, and a little bit of history.

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Reflecting on where you have been is a useful exercise. I don't mean that in the LinkedIn sense: I am not about to start posting pictures of hikers atop a mountain with the caption 'INSPIRATION', nor am I about to share how I woke up at 4am to drink a green tea carrot smoothie, do a Pilates class over an email before finally before settling down on an executive bean bag and making graphs. What I mean is that there is value in

contemplation and trying to understand where you are, before evaluating the present or the future.

This will, in the fullness of time, bring me nicely onto the ***Adoption and Children (Coronavirus) (Amendment) Regulations 2020.*** The regulations are a Statutory Instrument brought into force last week which amend and, importantly, relax legal protections for children in care.

So, stay with me.

Some History

But first, some history. Why do we protect children in this country? Ill treatment of children by their parents was recognised as a social problem in the mid-to-late 19th century. It was around this time that organisations like the NSPCC and Barnardo's cropped up to rescue the abandoned, neglected and ill-treated children. They led the way in encouraging parents to treat their children properly, and for Parliament to make sure that they did. 1889 brought the first Act of Parliament to protect children from ill treatment and punish those who did, the *Prevention of Cruelty to, and Protection of, Children Act 1889*. This was amended in 1894 to widen the definition of cruelty to include mental cruelty and to introduce the crime of denying medical treatment to a poorly child.

As time has gone on, the protections the law has afforded to children have increased. In 1908 *the Children's Act* introduced a register for foster parents and outlawed sexual abuse of children. *The Children and Young Persons Act 1932* introduced the first recognisable system of supervision for children who were at risk of harm, and in 1933, the *Children and Young Persons Act* introduced sweeping reforms of child protection, defined neglect and abuse, created a mandatory minimum age for working, and conceptualised an early version of the 'welfare principle' as we understand it today.

As time went on, measures were enacted to increase the protection for children. In the mid 1940's the death of 12 year old Dennis O'Neill at the hands of his foster father caused moral panic. Young Dennis had been starved for months – at 13 he weighed just four stone. *The Monckton Enquiry* criticised the local authorities involved with Dennis for their lack of oversight and communication, and soon after, the *Children Act 1948*, codified a series of reforms imposing wide ranging duties on Local Authorities, and establishing designated committees and officers in each local authority area.

Greater recognition of the extent and nature of child abuse became recognised during the 1960's, and American physicians led the way in examining patterns of injuries identified by paediatricians at a young age. These injuries, commonly found together, including fractures of different ages to long bones and subdural haematoma (a collection of blood under the skull), were caused by violent parents. Dr Kempe – a Polish paediatrician – called this 'Battered Child Syndrome'. *The Children and Young Persons Act 1963*, and an act of the same name in 1969 – reformed the law further and increased duties on local authorities.

Public awareness again increased in 1971 with the death of Maria Colwell. Maria had been removed from her mother under a court order, and fostered by her aunt and uncle. Maria's mother sought return of Maria after making significant changes to her life, and Maria was sent home to her, whereupon she was neglected and died of multiple injuries aged 7 and a half. This, however, was not before several referrals and calls to social services and the NSPCC about her safety. The social work professionals involved were heavily criticised, but it must be recognised that they operated within a legal framework for child protection

that was incomprehensible to most social workers and largely ineffective by today's standards.

As the 1980's came, child sex abuse was becoming a hot topic as awareness of this was growing throughout America in the 1970's. Public attention was drawn to the crisis in Cleveland in 1987. Briefly, in Spring 1987 the number of child sex cases diagnosed in Cleveland rose dramatically. Large numbers of children were admitted to hospital before being removed – with their siblings – from their parents for examination and protection. The health service, courts and social services struggled to deal with the volume of cases as they were occurring. As a result, co-operation between the police and social services broke down and investigating cases became very difficult. There was widespread disbelief about the nature of the diagnoses, and one particular form of diagnosis (called reflex anal dilatation) was controversial. A public inquiry was ordered under the chairmanship of Dame Elizabeth Butler-Sloss, then a High Court Judge. The report was a landmark, and set the tone for the way agencies were expected to collaborate and treat such cases, as well as making several recommendations to changes to child protection law and practice. At the same time came the *Review of Child Care Law (1985)* – led by leading experts and the Law Commission, with the input of several different government departments and 12 public consultations.

Framing the need for reform at this time was the death of Kimberley Carlisle. Kimberley, aged 4, was killed by her stepfather after he was refused access to the family home. These two reports led to the *Children Act 1989*, a seminal piece of child care legislation which is still in force today. The 1989 Act consolidated the entirety of public and private children law in England and Wales. The Act gave every child the right – and imposed on every local authority a duty – to protection from abuse and to have inquiries made as to their welfare. The language of the act was clear and unambiguous – something never achieved by the *Children and Young Persons Act 1969* and it's slightly softer drafting. The Act set clear parameters for the compulsory intervention by the state in family life, and rested on the principle that children are best looked after within their family. The seven routes for a child going into care were abolished, and replaced with one.

On the international stage, 1989 also brought the *UN Convention on the Rights of the Child*.

In 2007, the murder of Peter Connelly (known as Baby P) hit headlines for what was reported as perceived failures of Haringey CSC, again leading to a nationwide review of childcare. The death of Poppi Worthington prompted a serious case review in Cumbria and an IPCC investigation into the police.

Social work practice guidance was also consolidated with '*Working Together Under the Children Act*'. This established procedures to be followed in cases of child abuse and, in particular, death from child abuse. The guidance laid down good practice in every aspect of child social work. It was updated in 1999 as '*Working Together to Safeguard Children*' and exists in amended form today. In 1999, the *Protection of Children Act* was passed to prevent paedophiles working with children.

The death of Victoria Climbie in 2000 exposed wholesale failings in child protection. Climbie's story is a real tragedy: she was failed multiple times by social workers who failed to intervene during many opportunities as she was being brutally tortured by her great-aunt and her boyfriend. She was burnt with cigarettes, tied up for periods of over 24 hours and abused with bicycle chains, hammers and wire. *The Laming Inquiry* slated the processes that ultimately led to her death. This report led to *Children Act 2004* and the

'*every child matters*' initiative, as well as introducing for the first time a national database designed to hold information on all children in England and a Children's Commissioner. I've probably missed a few things, but this isn't intended to be an in-depth exposition of the history of child protection. I've just laid it out because as with all things it's important to understand the backdrop against which change occurs, and crucially to explain why I think that child protection matters.

I also don't say this because I am going to critically evaluate the 2020 regulations, nor provide a commentary on the rights and wrongs of each measure – I will leave that for the blogs and the papers. The aim of this post is to outline the changes because they are important for transparency, and so that they can be understood. As time has gone on, we as a society have taken measures to increase the protection we afford to children; sometimes this is to consolidate and pioneer, sometimes it has been reactive after some awful episode of abuse. Any change should be seriously considered.

The Adoption and Children (Coronavirus) (Amendment) Regulations 2020

Right – back to the *Adoption and Children (Coronavirus) (Amendment) Regulations 2020.* You can find them here. Unusually for a Statutory Instrument, the regulation is accompanied by an explanatory memo here.

The regulations make changes to the duties that local authorities have with regards to safeguarding children. These are temporary changes and the regulations give a date in September 2020 for them to lapse. This date can be extended, reviewed or simply removed. They were simply made by virtue of the Coronavirus Act 2020. Parliament did not need to approve them first.

I first read of these changes on the excellent Article 39 blog which provides a comprehensive exposition of the regulations and their changes. They found a little more prominence in *The Times* on Thursday 30 April 2020, under the headline 'Vulnerable children's services facing 'outrageous assault''.

The regulations make several changes. To my mind, the key changes are:

- Social work visits or meetings with children in care: these can now be electronically. The requirement for these to be completed every six weeks (or three months in a long term placement) is relaxed; instead social workers must visit "as soon is as reasonably practicable". A 'visit' can be by telephone, video-link or other electronic means.
- Looked after Child Reviews (unhelpfully called something different in almost every authority, wanting to appear modern and caring whilst at the same time abandoning the terminology of the act – rant over) will no longer take place every six months as previously required. Previously there would be a LAC review no later than 20 days after a child is received into care, then after 3 months and then every 6 months thereafter. These will now take place where "reasonably practicable". This is a substantial change, firstly because it reduces the regular oversight of the Independent Reviewing Officer (IRO) in all cases for which they are responsible – the IRO is a significant safeguard in the Looked After process. But also because LAC reviews have been a part of child protection since Dennis

O'Neill died in 1946. As Article 39 point out, attempts to change this have been strenuously resisted.

- A local authority can now approve a foster carer temporarily for 24 weeks instead of 16. The Care Planning Regulations 2010 are amended so that placement of this nature – usually in an emergency – no longer needs to be with a 'connected person' (usually a relative or friend). Assessments of these temporary carers no longer need to be undertaken within a time limit, but can be 'as soon as reasonably practicable'. This is a significant amendment. On the one hand, Schedule 4 of the 2010 regulations applies and therefore there is still a proper list of factors that require assessment in the situation where a child should be accommodated urgently in this way. Another plus point is, personally, I've never understood why a Regulation 24 placement should be limited to 16 weeks. It causes all sorts of problems within care proceedings which, upon expiry and the placement becoming 'illegal', normally results in the use of Section 38(6) of the Children Act 1989 and the court directing an 'assessment' of the child in the care of the relatives (Fudge, anyone?). But let us consider why Regulation 24 exists. It is to give a temporary home to children who are vulnerable – usually in pressing circumstances. Children placed under this part of the regulations don't require professional foster carers or the feeling of being 'in care', rather they need a safe and legal mechanism by which they can stay with somebody they know. This regulation does not (not can a Statutory Instrument) amend the Children Act 1989, section 22C, which lays down how looked after children are to be accommodated. This section requires that children are to live with parents unless it is not consistent with their welfare or be reasonably practicable. The Act then gives a hierarchy if the child can't live at home, first of which is that a child should live with 'an individual who is a relative, friend or other person connected with C, and who is also a local authority foster placement', and then a foster parent that does not fall within the 'connected person' category. It may be that this amendment is a convenience to allow urgent assessment of foster carers, but Section 22C and the spirit of the Children Act is clear. The effect of this amendment should be given close attention, and particular attention paid to whether or not there are resulting attempts to circumvent the law in this regard.
- Adoption and fostering panels are now not mandatory. At present, adoption panels exist to carefully scrutinise applications from potential adopters. Fostering panels review and approve foster carers based on their suitability. Measures have been taken to ensure – according to the explanatory notes – that adoptions can 'proceed swiftly'. The requirement for a placement plan and approval by an officer of a local authority is removed.

- Private fostering visits are now “as soon as reasonably practicable” and not within 7 days. This is what it says on the tin – a private arrangement to foster a child without the involvement of the local authority. Safeguards developed after the Climbie murder 20 years ago, one of which was a visit from a social worker once a local authority has been notified.
- Prospective foster carer assessments can proceed in the absence of health information or DBS checks (although these will still be needed later down the line).
- Scores of changes to Children’s Homes, including becoming a place of detention if the children are potentially infected with COVID-19 (at present a child can only be deprived of her liberty in certain circumstances, such as a Secure Accommodation Order or an order from the High Court authorising a deprivation), twice yearly OFSTED inspections of children’s homes abandoned, and the requirement to meet the care quality standards for children’s homes changed to ‘if reasonably practicable’.

These changes are not new suggestions. They have been put forward by Theresa May’s government in the 2017 Children and Social Care Bill. I recall that one commentator at the time referred to a ‘bonfire’ of children’s rights. Pressure from all angles led to Justine Greening dropping the proposed changes in 2017.

These regulations are also unusual in that the Department for Education are apparently publishing guidance to accompany the Statutory Instrument. As Belinda Bramhall highlighted on twitter, this is not unheard of (for example the Care Planning regs and the Special Guardianship regs came along with guidance) and it will be of interest to see whether the guidance is statutory guidance (which must be followed save for exceptional local circumstances that justify deviating from the guidance – see Re TG v Lambeth MBC [2011] EWCA Civ 526 or simply best practice.

Some responses

It may not surprise you to know that the changes have not been well received.

In some quarters they have been praised. The government explained that they were designed to ease mounting pressure on children’s services departments at a time of crisis. It is indeed true that many are in crisis, although I can speak only from experience.

In other quarters, they have not been praised. For starters, the regulations themselves are a masterpiece of obfuscation. They would, I suspect, have Sir Humphrey Appleby rubbing his hands with glee (bonus points for getting the reference). They amend various statutes and regulations so a standalone document makes little sense at all. Having made sense of it all, the director of Article 39, Carolyne Willow, commented that:

“Having spent hours going through the statutory instrument line-by-line, I haven’t been able to find a single new protection for children. The whole document is about taking away, diminishing and undermining what has been built up for children over many decades.”

There has also been a lack of consultation. Some of my friends at local authorities were aware of the regulations but it was news to me and indeed the Family Law Bar Association.

The Children's Commissioner, in an open letter, slated the regulations, highlighting regulations of particular concern. She said:
I appreciate that Local Authority children's services are likely to be experiencing challenging working conditions during the pandemic, and there are many inspiring examples of frontline workers going above and beyond the call of duty to keep children safe. Nevertheless, I do not believe that the changes made in these regulations are necessary– except perhaps for some clarifications (in guidance) about contact with children taking place remotely during the lockdown. Children in care are already vulnerable, and this crisis is placing additional strain on them – as most are not in school, less able to have direct contact with family and other trusted professionals, and facing the challenges of lockdown and anxiety about illness – all on top of the trauma they have already experienced. If anything, I would expect to see increased protections to ensure their needs are met during this period.

I would like to see all the regulations revoked, as I do not believe that there is sufficient justification to introduce them. This crisis must not remove protections from extremely vulnerable children, particularly as they are even more vulnerable at this time.

The British Association of Social Workers (BASW) observed:
"*There is an absence of a clear, documented and facilitated process for the rationale, structured introduction and delivering of the Regulations for local authorities… The risk is that significant changes are 'dribbled in' on a case by case basis with no explicit rationale either within or between local authorities…*
Some of the changes in the Regulations seem suspiciously close to the 'freedoms' that were in the original draft of the Children and Social Work Bill, clauses that were subsequently thrown out by a coalition of Parliamentarians, after a vigorous campaign by civil society groups and service users…
Looked after children and young people are among the most vulnerable in society. Hard won rights in law are not simply bureaucratic processes but exist to protect children and young people and promote their well-being."

These concerns have been echoed amongst my twitter friends. My colleague from a former Liverpool life and head of MSB's Family Law team Emma Palmer tweeted:

Emma Palmer@Evpalmer

The Adoption and Children (Coronavirus) (Amendment) Regulations 2020

Change has been thrust upon us with #coronavirus. I readily admit I do not have the answers. What I do have is a strong belief that children will die if phone calls replace child visits http://www.legislation.gov.uk/uksi/2020/445/made …

21
10:08 PM - Apr 27, 2020

Twitter Ads info and privacy

See Emma Palmer's other Tweets

A Principle Social Worker, Susan Ashmore, also tweeted:
https://twitter.com/SusanAshmorePSW/status/1253962332889325569
Jacqueline Thomas QC from Spire Barristers in Leeds noted in her note, "*the overwhelming reaction to the changes so far has been one of concern that such wide reaching steps can be taken without consultation or consideration, leaving the most vulnerable in society exposed to even greater risks of harm.*" She asked, poignantly, *"At a time when domestic violence is on the increase, and as the country wakes up to the news of the murder of two children over the weekend by a male said to be "known to them" is now really the right time to reduce safeguards and the visibility of vulnerable children even further*?"
The impact of these regulations will be unknown for some time. The National Youth Advocacy Service (NYAS) have called for the regulations to be scrapped completely; they say they have made more than triple the number of safeguarding referrals compared to this time last year. I know anecdotally that in Greater Manchester the number of paediatric safeguarding referrals is at 5% of what it would normally be. Reflecting this trend, the Guardian reported last week that only 5% of vulnerable children were attending school, despite their places being kept open for them. As anybody involved in Child Protection knows, schools are the eyes and ears of safeguarding. The harm suffered by these children continues, it's just that we can't see it. Overstretched and under-resourced local authorities will miss what goes on behind closed doors. Proactive social work is more important than ever.
The point of my history tangent was to reinforce the importance of scrutiny and discussion around measures which on the face of it seek to relax carefully developed protections. This should be done not with reference to where we are, but where we have been. The consequences of not learning from history and well stated, and unthinkable where the vulnerable are concerned.
We have a small favour to ask!

The Transparency Project is a registered charity in England & Wales run largely by volunteers who also have full-time jobs. We're working hard to secure extra funding so that we can keep making family justice clearer for all who use the court and work within it.
We'd be really grateful if you were able to help us by making a small one-off (or regular!) donation through our ***Just Giving page****.*
Thanks for reading!