



REPUBLIC OF KENYA

**MINISTRY OF LABOUR AND SOCIAL PROTECTION**

**REGULATORY IMPACT STATEMENT**

**ON**

**THE CHILDREN (FOSTER CARE PLACEMENT) REGULATIONS**

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*This Regulatory Impact Assessment (RIA) has been prepared by the Ministry of Labour and Social Protection pursuant to Section 6 and 7 of the Statutory Instruments Act (CAP 2A).*

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## **ABBREVIATIONS**

<b>Act</b>	Children Act (Cap 141) Laws of Kenya
<b>ACRWC</b>	The African Charter on the Rights and Welfare of the Child
<b>CCI</b>	Charitable Children Institutions
<b>Council</b>	National Council for Children's Services
<b>UNCRC</b>	United Nations Convention on the Rights and Welfare of the Child
<b>UNGA</b>	United Nations General Assembly

## **A. INTRODUCTION**

### **Regulatory Making Authority and the legal mandate**

The National Council for Children Services is a State Corporation established under the Children Act (Cap 141) Laws of Kenya, and performs its mandate within the State Department for Social Protection & Senior Citizen Affairs in the Ministry of Labour and Social Protection. Its mandate can be summarised as oversight, regulation, coordination, and advisory on all matters relating to children's affairs in Kenya.

The placement of foster care of children in Kenya is governed by the Children Act (Cap 141) in coherence with international conventions and is designed to protect the best interests of the child. It provides a pathway for vulnerable children to find permanent, loving homes, but the process is highly regulated to prevent child trafficking, exploitation, and other abuses. For effective implementation of the Act, it requires Regulations to address the gaps and challenges that have plagued the process of adoption in Kenya.

The Regulatory Making Authority is the Ministry of Labour and Social Protection in which the Cabinet Secretary responsible for matters relating to children's affairs has the power to make regulations on matters relating to foster-care placement, pursuant to section 181 of the Children Act (Cap 141).

## **B. BACKGROUND AND CONTEXT OF THE PROPOSED REGULATIONS**

### **Background**

Foster care provides a social and economic stability in the life of a child who may be denied or is unable to have a stable family support system. Fostering is not just about providing a place to stay for children in need, but also about offering a nurturing, stable, and supportive environment that promotes the child's well-being and future prospects. It promotes parental care with the goal of family reunification in the first instance. Foster care placement is temporary and aims to accommodate children in alternative, safe and nurturing family relationships while a long-term solution is sought. It operates under the framework of the Children Act (Cap 141) which sets out the conditions for foster care placement and the persons who qualify to foster children.

## **International context**

In an endeavour to progressively safeguard the rights and welfare of children and align to global child protection standards, Kenya ratified the United Nations Convention on the Rights of the Child (UNCRC) in 1990.

The UNCRC recognizes the family as a fundamental group of society and underscores its significance in the growth and well-being of all its members and especially children. It mandates States to protect families and accord them the support necessary for them to fully discharge their responsibilities and particularly towards children whose optimal growth and development is dependent on the happiness, love and understanding of family.

The UNCRC acknowledges that circumstances may arise from time to time that cause children to be separated from their families and in Article 9, states that such separation should be in the best interest of the child. The UNCRC further states institutional care should be considered as a solution to in these circumstances as a measure of last resort and urges states to explore alternative forms of family care. Foster Care is a form of alternative care that provides separated children with temporary parental/family care as the cause of their separation is established and addressed for possible reunification with their birth families or a more permanent alternative is found for them.

To bolster efforts by States in addressing the issue of children without parental care, the United Nations General Assembly (UNGA) in 2009, adopted Guidelines for the Alternative Care of Children. These Guidelines highlight Foster Care as a temporary form of alternative family care and urges States to make deliberate steps to embed this, and other forms of alternative family care, in the national legal and policy framework. Similarly, in 2019 the UNGA adopted a resolution focusing on the rights of children without parental care. This resolution was informed by overwhelming global evidence that institutional care does more harm than good to children and calls upon States to strengthen family care, prevent unnecessary separation of children from their families and end institutional care.

## **Regional context**

Kenya ratified the African Charter on the Rights and Welfare of the Child (ACRWC) in the year 2000. The ACRWC is a regional legal instrument that seeks to safeguard the rights and welfare of

children in Africa. It contextualizes the UNCRC to address the unique challenges that children in Africa face such as armed conflict, harmful cultural practices and natural calamities while upholding the African value system.

The Charter recognizes the significance of family in the life of a child and as a platform for the continuity of the African society and calls on States to deploy mechanisms that seek to preserve families. With the understanding that Africa experiences unique challenges that often cause separation of children from their families, the Charter makes provisions for the alternative care of children.

Article 25 provides that States shall ensure that a child who is separated from his or her parents, is at risk of separation, or whose family environment is a threat to their well-being shall be provided with alternative family care, which could include, among others, foster placement. The Charter emphasizes on adherence to the Best Interest of the Child as a key consideration in any matter concerning a child.

### **Domestic context**

Article 53 of the Constitution sets out the rights of children in Kenya and states that the best interest of the child is of paramount importance in all matters concerning them. It bestows parental responsibility upon the father and mother of a child in the first instance, in recognition of the family as the natural and fundamental unit of society. Article 43 of the Constitution guarantees the right to social security and further states that persons unable to support themselves and their dependents are entitled to social security

With regard to children deprived of parental care, section 12(7) of the Children Act considers foster care as a form of social security while Part XIII of the Act makes elaborate provisions for foster care placement. It defines two forms of foster care, that is, short and long-term; outlines the qualifications of a foster parent and assigns the Secretary Children's Services and Court, the powers to conduct foster care placement.

## C. REQUIREMENT FOR REGULATORY IMPACT STATEMENT

### Requirements of the Statutory Instruments Act

The Statutory Instruments Act (Cap 2A) is the legal framework governing the conduct of Regulatory Impact Statement in Kenya. Sections 6 and 7 require that *if a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation-making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument.*

The Statutory Instruments Act further sets out certain key elements that must be contained in the Regulatory Impact Statement namely:

- (a) a statement of the objectives of the proposed legislation and the reasons;
- (b) a statement explaining the effect of the proposed legislation;
- (c) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;
- (d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives; and
- (e) the reasons why the other means are not appropriate.

Section 5 of the Statutory Instruments Act, requires that a regulation-making authority to conduct public consultations drawing on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument and ensuring that persons likely to be affected by the proposed statutory instrument are given an adequate opportunity to comment on its proposed content.

### What is a Regulatory Impact Statement?

Regulatory Impact Statement is a systematic policy tool used to examine and measure the likely benefits, costs, and effects of new or existing regulations. A RIS is an analytical report to assist decision makers to arrive at an informed policy decision. As an aid to decision making, RIS includes an evaluation of possible alternative regulatory and non-regulatory approaches with the overall aim of ensuring that the final selected regulatory approach provides the greatest net public benefit. Typically, the structure of a RIS should contain the following elements:

- (a) title of the proposal;
- (b) the objective and intended effect of the regulatory policy;

- (c) an evaluation of the policy issue;
- (d) consideration of alternative options;
- (e) assessment of all their impacts distribution;
- (f) results of public consultation;
- (g) compliance strategies, and
- (h) processes for monitoring and evaluation.

The regulatory impact assessment is usually conducted before a proposed statutory instrument is passed, to provide a detailed and systematic appraisal of the potential impact of the new regulations and to assess whether the regulations are likely to achieve the desired objectives. The Regulatory Impact Statements promotes evidence-based policymaking as new regulations typically lead to numerous impacts that are often difficult to foresee.

From a societal viewpoint, the Regulatory Impact Statement should confirm whether a proposed regulation is welfare-enhancing, in that, the benefits will surpass costs. It therefore has objectives of improving understanding of the real-world impact of regulatory action, including both the benefits and the costs of action, integrating multiple policy objectives, improving transparency and consultation and enhancing governmental accountability.

#### **D. REGULATIONS UNDER THE ACT**

Section 181 of the Act grants the Cabinet Secretary responsible for matters relating to children's affairs the power to make regulations for the better carrying out of the provisions under Part XIII of the Act.

Part XIII of the Act makes elaborate provisions for foster care placement. It provides for the eligibility criteria for foster parents, assessment of application, restrictions on periods of foster care and the procedure for foster care placement.

## **E. PURPOSE OBJECTS AND OVERVIEW**

### **General objective**

The objective of these proposed Children (Foster Care Placement) Regulations is to provide a framework for the registration, to protect and nurture children in need of care and protection by providing a safe, healthy environment with wholesome support:

- (a) to promote long term parental care, with the goal of family reunification in the first instance;
- (b) accommodating children in alternative, safe and nurturing family relationships for long periods of time;
- (c) to provide social and economic stability in the life of a child or children who may be denied or unable to have a stable family support system; and
- (d) to promote family relationships in the context of Kenya's cultural, ethnic and community diversity. as provided for under the Children Act.

### **Specific objectives**

Specifically, the implementation of the regulations is intended to provide for:

- (a) the procedure for registration for foster parent;
- (b) the assessment of application
- (c) validity of the registration certificate
- (d) renewal of registration;
- (e) suspension and revocation of certificate;
- (f) replacement of lost destroyed or defaced certificate;
- (g) conditions for placement in foster care;
- (h) assessment of children for foster care placement
- (i) temporal placement in an emergency placement with a foster parent;
- (j) agreement for maintenance of foster child; and
- (k) supervision of foster parent.

## **F. PUBLIC PARTICIPATION**

Article 10 of the Constitution provides that public participation is a principle of national governance. This constitutional power entitles the people of Kenya to unfettered access to the process of making public decisions through their involvement.

Section 6 of the Statutory Instruments Act (Cap 2A) provides that the regulation making authority shall undertake consultations before making the statutory instrument particularly where the proposed instrument is likely to have a direct, or a substantial indirect effect on a community or part of the community.

As part of the efforts to ensure an inclusive development of the proposed Regulations, a Technical Working Group was constituted with membership drawn from the Council and key stakeholders with varied expertise. The Council engaged in extensive consultations with various stakeholders and the public. This participatory approach enabled the Technical Working Group to gather diverse perspectives and insights for a comprehensive and effective policy framework.

### **Engagement with key stakeholders**

Pursuant to section 5 of the Statutory Instruments Act (Cap 2A), the Ministry identified key stakeholders, being foster care parents, Adoption Societies CCI Managers and the Directorate of Children's Services, who are likely to be affected by the proposed Regulations. Consultative engagement was held on 5<sup>th</sup> September 2023 at Lilian Towers. Their input was important in understanding the best practices, and areas requiring interventions.

### **Selection of Clustered Regions and Rationale**

To ensure a balanced and representative consultation process, strategic selection of specific regions based on key factors was done, including:

1. Clustering regional boundaries to ensure comprehensive coverage of all counties in Kenya, while optimizing available resources and addressing financial constraints effectively. This strategic approach enhanced accessibility, promoted equitable service delivery, and maximized impact within the allocated budget.

2. Accessibility and Stakeholder – Locations that could accommodate both in-person and online participation were considered to maximize engagement.

The clustered regions ensured a broad and inclusive consultation process, reflecting diverse views from different parts of the country. Below is the schedule that was put up in the different websites and newspapers.

REGION (CLUSTERED COUNTIES)	VENUE	DATE	TIME
<b>Cluster 1</b> – (Uasin – Gishu, west- Pokot, Turkana, Trans – Nzoia, elgeyo-Marakwet, Nandi, Bungoma	<b>Eldoret</b> - <i>Home Craft Centre</i>	29 <sup>th</sup> – 30 <sup>th</sup> May, 2024	9am – 4pm
<b>Cluster 2</b> – Isiolo, Marsabit, Samburu, Meru, Tharaka – Nithi & Embu	<b>Meru</b> – <i>Kamunde Hall</i>	29 <sup>th</sup> – 30 <sup>th</sup> May, 2024	9am – 4pm
<b>Cluster 3</b> – Migori, Kisumu, Homabay, Vihiga, Busia, Siaya, Nyamira, Kisii & Kakamega	<b>Kisumu</b> - <i>Mama Grace County Hall</i>	29 <sup>th</sup> – 30 <sup>th</sup> May, 2024	9am – 4pm
<b>Cluster 4</b> – Narok, Bomet, Nyandarua, Nyeri, Nakuru, Baringo, Laikipia, Kericho & Nairobi	<b>Nakuru</b> - <i>Shaabab Social Hall</i>	29 <sup>th</sup> – 30 <sup>th</sup> May, 2024	9am – 4pm
<b>Cluster 5</b> – Taita –Taveta, Kwale, Kilifi, Lamu, Tana- River, Kitui, Makueni, & Mombasa	<b>Mombasa</b> – <i>Tononoka Social Hall</i>	29 <sup>th</sup> – 30 <sup>th</sup> May, 2024	9am – 4pm
<b>Cluster 6</b> – Kiambu, Muranga, Kirinyaga, Machakos, Kajiado, Garissa, Wajir & Mandera	<b>Murang'a</b> - <i>ACK Mother's Union</i>	29 <sup>th</sup> – 30 <sup>th</sup> May, 2024	9am – 4pm

<b>Cluster 7:</b> Other Stakeholders, CSOs, ACIK, Adoption Societies	<b>Nairobi – Kariokor</b> <i>Social Hall</i>	<b>29<sup>th</sup> – 30<sup>th</sup> May, 2024</b>	<b>9am – 4pm</b>
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## Collection of Public Memoranda

The advertisement for public participation was published on *My Gov.* newspaper, the Ministry of Labour and Social Protection website and the National Council for Children's Service website, running for 14 days from 14<sup>th</sup> May 2024 to 27<sup>th</sup> May 2024. The Notice was additionally circulated on various social media platforms.

To facilitate public participation effectively, written submissions were invited from individuals, institutions, and organizations. Members of the public were encouraged to share their views, feedback, and recommendations through the email address provided. This approach allowed stakeholders to provide detailed input at their convenience, ensuring that as many voices as possible were heard in the Regulations review process.

## Modes of Public Engagement

The consultation process utilized both online platforms and physical public forums to ensure accessibility for all stakeholders.

- Online Engagement** – Virtual meetings and email submissions allowed participants from different locations to contribute their views without geographical limitations. This method facilitated broader participation, especially for those unable to attend physical meetings.
- Public Forums** – Physical meetings were held in select regions to engage directly with community members, local leaders, and key stakeholders. These forums provided an opportunity for in-depth discussions and clarifications.

The employment of this hybrid approach ensured that participation was inclusive, accommodating both digital and in-person engagements.

## **G. APPROACHES AND METHODOLOGIES**

This Part considers whether these proposed Regulations are the best form of government action pertaining to matters relating to foster care placement. The Statutory Instruments Act (Cap 2A) requires a regulator to carry out, early in the regulatory process, an informed comparison of a variety of regulatory and non-regulatory policy measures, considering relevant issues such as costs, benefits, distributional effects and administrative requirements. Regulation should be the last resort in realizing policy objectives. There are alternatives, which could come in handy in dealing with certain aspects of social security. The options considered under this part are as follows:

- (a) **maintaining the status quo** where there are no regulations;
- (b) **application of administrative measures** or non-regulatory measures; and
- (c) regulatory measure through the **foster care placement of the proposed Regulations**

The impact assessment involved evaluating the costs and benefits of implementing the Regulations based on the policy options outlined above. A policy change is considered desirable if it will result in real or potential improvement. This is determined by accumulating its direct and indirect benefits and costs. Based on this philosophy, policy guideline options present strengths and weaknesses and therefore may result in ineffective implementation of the Act. For instance, issuing policy guidelines or administrative measures without regulations would certainly occasion a sub-optimal result because of limited options for enforcement.

Providing a regulatory option is more practical and sounds effective. However, it is worth noting that all the options were considered and it was found necessary that the regulations to oversee foster care placement be formulated in order to effectively implement the Act as enacted in 2022.

### **The Alternatives**

#### **1. Option One: The Status Quo**

Maintaining the status quo means that there are no formal regulations for foster care placement. This means that the foster care placement will continue to operate informally. This will result in inconsistencies in the administration of foster care placement, leaving children vulnerable to

exploitation or inadequate care. The Children Act (Cap 141) requires that Regulations for foster care placement be developed to regulate the practice.

## **2. Option Two: Application of administrative measures**

This is a non-regulatory measure which, if applied, will depend on the goodwill of public officers to implement the provision of the Act. Administrative oversight would include increased government monitoring, issuance of guidelines, and enhanced reporting requirements for those providing foster care placement. Administrative measures do not have the force of law and may be challenged in court of law. These Regulations seek to streamline foster care placement.

## **3. Option Three: Adopting the proposed regulations**

The development and adoption of these proposed Regulations will ensure full implementation of the Act and more so to regulate foster care placement.

**The table below outlines the potential costs and implications associated with each option:**

	<b>Option</b>	<b>Possible costs</b>	<b>Possible direct benefits</b>	<b>Key implications</b>
1.	Status Quo	Minimal operational costs  Risks of inefficiencies persist	No disruption to current operations  Maintains existing system familiarity	May allow existing gaps in the system to continue
2.	Adoption of administrative measures	Moderate costs for training, oversight and monitoring	Improved foster care practices without legal changes	Partial effectiveness due to limited enforcement  Lack uniformity and legal enforceability

3.	Adoption of proposed regulations	Higher costs for enforcement, compliance and training	Standardized procedures  Stronger child protections	Clearer accountability and better long-term outcomes
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### Cost-Benefit Analysis

The impacts of the Proposed Regulations can be categorized as follows:

Gap / Problem/Issue	Proposed reform from regulations	Estimated costs (KES)	Justification for costs	Estimated benefits (KES)	Justification for benefits
<b>Financial</b>					
Lack of centralized records	Create a Foster Care Register and case file system <b>Regs. 23–25 – Records &amp; Case Files</b>	Kes 10M setup and 5M per year (IT, data management )	Secure record-keeping system	Enables data-driven planning and audits	Strengthens oversight and transparency
<b>Legal</b>					

Outdated foster care Rules still in effect	Repeal Foster Care Rules, 2001; align with Children Act(Cap 141) <b>Reg. 29 – Repeal of 2001 Rules</b>	N/A (included in legal review budget- however if cost is required then nominal administrative cost (e.g., Kes 1–2M for gazettement, consultations, etc.), however, the current <b>assumption</b> is that this reform rides on existing structures.)	Legislative cleanup and harmonization	Consistent, modernized legal framework	Eliminates contradictions with Children Act
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#### Economic

Unequal access to foster care services	Decentralize and require county-level service reporting <b>Reg. 26 – Access to Services &amp; Decentralization</b>	Kes. 20M (county training, ICT tools)	Capacity building for counties	Equitable services and inclusion	Expands reach to underserved areas
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#### Social

Unregulated foster care activities risk child safety and legal inconsistency	Require all foster care arrangements to comply with the Act and the Regulations <b>Reg. 4 – Restriction of foster care</b>	Kes. 15M (drafting, consultations, dissemination)	Development of legal framework and training	Reduced unlawful placements among 20,000+ fostered children	Supports accountability and reduces rights violations
Lack of standardized eligibility and assessment of foster parents	Establish eligibility and assessment procedures for foster parents <b>Regs. 5–8 – Eligibility and Assessment</b>	Kes. 30M per year (vetting, home visits, training)	Vetting and follow-up personnel and logistics	Safer placements, fewer disruptions	Improves caregiver quality and child safety

Unclear eligibility criteria for children	Set eligibility criteria for children needing foster care <b>Reg. 6 – Eligibility Criteria for Children</b>	Kes 5M (tools, training, admin)	Screening for appropriate placement	Better targeting support to 3.6M vulnerable children	Reduces misplacement, improves efficiency
No structured emergency or temporary placements <i>(Social)</i>	Introduce emergency/temporary care and pre-approved caregivers <b>Regs. 15, 18–19 – Emergency/Temporary Placements</b>	Kes 20M (training, logistics)	Train emergency caregivers and protocols	Faster, safer emergency care	Reduces trauma and institutionalization
Weak supervision of foster parents	Require quarterly home visits and supervision <b>Reg. 17 – Supervision of Foster Parents</b>	Kes 15M per year (staff, transport, tools)	Follow-up and child welfare monitoring	Increased placement stability	Reduces breakdowns and promotes safety

## Risk Identification and Mitigation Strategies

Risk identification	Risk description	Mitigation strategies	Expected outcome of mitigation strategy	
1.	Inadequate foster parent screening	Insufficient assessment of foster parents' capacity may lead to unsafe placements.	Implement stringent vetting processes, background checks and strengthen reference checks	i. Improved placement stability ii. Enhanced child protection
2.	Prolonged temporary placements	Emergency placements under exceeding set time without full approval.	i. Enforce strict timelines for assessments and require monthly reviews. ii. Extensions should be done; case-to-case and must be approved.	i. Reduced drift in temporary placements ii. Faster transitions to stable care iii. Faster, more efficient

			iii. Streamline foster care application and approval processes	placement of children into safe caring environments
3.	Psychological and emotional well-being of foster children	Children in foster care may experience trauma, emotional distress, or difficulty adjusting.	Provide mandatory counseling and psychological support services for foster children and parents	i. Improved foster parent capacity to manage behavioral challenges. ii. Smoother transitions for foster children
4.	Financial strain on foster families	Insufficient income verification may compromise care quality for fostered children.	i. Verify economic stability during registration ii. Provide stipends for foster parents	i. Improved quality of care and stability for foster children ii. Reduced financial stress on foster families
5.	Inadequate oversight and monitoring	Limited capacity to monitor all foster care placements effectively	i. Quarterly inspections of all foster care placements ii. Establish a digital tracking system iii. Allocation of additional resources for social workers	Improved supervision of foster care arrangements and better accountability.
6.	Fraudulent foster care placements	Risk of individuals misrepresenting information to gain custody of children for illegal purposes	Established a centralized database for tracking applications	i. Enhanced child protection ii. Reduced cases of fraudulent foster placements

## **H. COMPLIANCE AND IMPLEMENTATION**

It is crucial to establish how adherence to and execution of the proposed Children (Foster Care Placement) Regulations will be ensured. The Council is responsible for evaluating the strength of the institutional framework that will enforce the regulation and for developing effective implementation strategies.

The enactment of the proposed Regulations should foster the coordination of all stakeholders both in the private and public sector. These Regulations will be carried out within the current national legal and institutional framework in order to achieve the objectives of foster care placement set out under section 170 of the Act and promote the placement of the child in their own social-cultural environment. The Council, in consultation with the Cabinet Secretary for Labour and Social Protection will oversee the implementation.

In developing the proposed Regulations in compliance with legal requirements based on the analysis above, the following points are evident:

1. The Council will develop plans and allocate resources to bring the Children (Foster Care Placement) Regulations to fruition. The Regulations outline a clear mechanism for integrating partners and government agencies into the system, which is intended to enhance the efficiency and transparency of placing children in foster care and ensure the protection of children;
2. The proposed regulations also require timely reunification with biological parent(s) or movement toward permanent care solutions such as adoption when in the child's best interest;
3. To ensure accountability and compliance, a centralized foster care Registry will be established to maintain records of all approved foster families, placements, and case progress. Monitoring mechanisms include routine home visits by caseworkers, psychosocial support for foster families, and child feedback assessments; and

4. As regards the Regulatory-Making Authority and the legal mandate, section 181 of the Children Act (Cap141), authorizes the Cabinet Secretary to establish Regulations to implement the Act. Consequently, the Cabinet Secretary holds the necessary legislative power to propose these Regulations.

## **I. CONCLUSION**

The proposed Regulations are necessary in the operationalization of the Children Act (Cap. 141) and the actualization of the best interests of the child and is therefore the preferred option. It is clear that the benefits and impact of developing these Regulations by far outweigh any estimated cost of its implementation.

## **J. RECOMMENDATION**

In view of the assessment elucidated above and particularly that the proposed Regulations will facilitate effective implementation of the Children Act (Cap 141), it is recommended that the Children (Foster care Placement) Regulations be adopted.