

# ADOPTION AND CHILDREN ACT 2002

---

## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 3 -Miscellaneous and Final Provisions

##### *Chapter 1 – Miscellaneous*

##### *Section 123: Restrictions on advertisements etc.*

304. *Section 123* is a restatement and amendment of section 58 of the Adoption Act 1976. Section 58 of that Act restricts the publication of advertisements indicating that the parent or guardian of a child want that child to be adopted, that a person wants to adopt a child, or that persons other than adoption agencies are willing to make arrangements for the adoption of a child. *Section 123*, which is a United Kingdom wide provision, goes further than this. It imposes a new restriction on the distribution of such advertisements, on advertisements that a person is willing to remove a child from the United Kingdom for the purpose of adoption, and on the publication and distribution of information about how to make arrangements for the adoption of a child.
305. *Subsection (1)* provides that a person must not publish or distribute an advertisement or information to which this section applies. *Subsection (2)* provides that this section applies to an advertisement that the parent or guardian of a child wants the child to be adopted, that a person wants to adopt a child, that a person is willing to take specific steps to arrange an adoption, as set out in *section 92*, or that a person is willing to remove children from the United Kingdom for the purposes of adoption. *Subsection (3)* states that this provision also applies to information about how to do anything which, if done, would constitute an offence under *sections 85 or 93* and the mirror provisions of the Adoption (Scotland) Act 1978 and the Adoption (Northern Ireland) Order 1987, and to information about a particular child as a child available for adoption.
306. *Subsection (4)* defines publishing and distribution. This provision covers all forms of publication and distribution, including electronic means such as the internet. *Subsection (5)* provides that this section does not apply to publication or distribution by or on behalf of an adoption agency. Under *subsection (6)* the Secretary of State may by order make any amendments of this section necessary to take into account developments in technology relating to publishing or distributing advertisements or other information by electronic or electro-magnetic means.
307. Any such order cannot be made without being approved by both the House of Commons and the House of Lords. Before exercising the power provided by *subsection (6)* the Secretary of State must, under *subsection (8)*, consult the Scottish Ministers, the Department of Health, Social Services and Public Safety (in Northern Ireland) and the Assembly. *Subsection (7)* provides that the Secretary of State may make regulations to prescribe that a body outside the United Kingdom is for the purposes of section 123 to be treated as a United Kingdom adoption agency if it corresponds in its functions to a United Kingdom adoption agency. As a consequence, such a body would not then be considered to be acting in contravention of section 123 if it were to advertise in

the United Kingdom. *Subsection (9)* also provides that an adoption agency includes a Scottish or Northern Irish adoption agency.

### ***Section 124: Offence of breaching restrictions under section 123***

308. *Section 124* sets out that it is an offence to breach *section 123(1)*. *Subsection (2)* provides a defence. *Subsection (3)* provides for the penalty on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both.

### ***Section 125: Adoption and Children Act Register***

309. *Subsection (1)* of *section 125* enables the Queen to make an Order in Council enabling the Secretary of State to establish and maintain a register to be known as the Adoption and Children Act Register. The register will cover England and may also cover Wales and/or Scotland. It will contain details of children who are suitable for adoption and prospective adopters who have been approved to adopt a child. This information will be used to suggest adoptive families for children in cases where a local match is not suitable for the child, or cannot be found within an agreed period of time. The register will also contain additional prescribed information about such people in respect of events occurring to them after their inclusion in the register (see *subsection (1)(b)*). This provision may be used, for example, to enable the register to record information about the stability of adoptive placements.
310. *Subsection (2)* enables the Order to apply any of the provisions in *sections 126 to 131* with or without modification for the purpose of finding persons with whom children may be placed for purposes other than adoption. This provision may be used to extend the remit of the register to cover children needing other types of permanent placements, such as special guardianship.
311. The register will not be open to public inspection or search and the Order will make provision about retention of information in the register. Information will be held on the Register in any form the Secretary of State considers appropriate, but is most likely to be held electronically.

### ***Section 126: Use of an organisation to establish etc. the register***

312. *Section 126* deals with delegation of the Secretary of State's function under *section 125*. *Subsection (1)* enables the Secretary of State to delegate his function of establishing and maintaining the register to an organisation defined by *section 131(1)(a)* as including either a public body or a private or voluntary organisation. It also enables that organisation to release information entered in or compiled from information entered in the register on the Secretary of State's behalf. Where the Secretary of State enters into an agreement with an organisation under *subsection (1)* he may issue general or special directions in respect of the way in which the organisation operates the register (see *subsection (3)*). *Subsection (2)* enables the Secretary of State to make payments to the organisation in respect of this arrangement.
313. *Subsection (4)* provides that where the Secretary of State delegates his function of establishing and maintaining the register to an organisation under *subsection (1)* or he issues general or special directions to such an organisation under *subsection (3)* he must first obtain the agreement of Scottish Ministers, if the Register applies to Scotland, and of the National Assembly for Wales, if the Register applies to Wales. *Subsection (5)* provides that, where the Secretary of State delegates his function to such an organisation under *subsection (1)*, the references to the registration organisation in the remaining provisions dealing with the register are to that organisation.

***Section 127: Use of an organisation as agency for payments***

314. *Section 127* provides that the Order in Council may enable an organisation maintaining the register on the Secretary of State's behalf to act as an agent for the payment or receipt of sums payable by adoption agencies to other adoption agencies. This could be used, for example, to enable the organisation to manage the payment of "inter-agency fees" (see paragraph 50 above) between adoption agencies in respect of matches suggested by the register.
315. The Secretary of State may issue general or special directions in respect of the way in which the organisation is to perform the functions under this section (*subsection (2)*). If the Secretary of State issues such directions he must first obtain the agreement of Scottish Ministers, if this provision applies to Scotland, and of the National Assembly for Wales, if this provision applies to Wales (*subsection (3)*).

***Section 128: Supply of information for the register***

316. *Section 128* deals with the supply of information to the Secretary of State or the registration organisation for entry in the register. The Order in Council will set out the type of information which must be passed by adoption agencies to the Secretary of State or the registration organisation for inclusion in the register, and the time, form and manner in which that information must be given. *Subsection (3)* provides that the Order may require adoption agencies to pay a fee to the Secretary of State or the registration organisation in respect of information to be entered on the register. Such a fee would contribute towards the administrative costs of placing information on the register and would not include any element of profit. *Subsection (4)* clarifies that these requirements are subject to the parties to whom the information relates consenting to inclusion of the information on the register. Where the information relates to a child, the Order will set out who may consent to the sharing of the information on the child's behalf.

***Section 129: Disclosure of information***

317. *Section 129* provides that information maintained on the register may only be disclosed by the Secretary of State or the registration organisation in accordance with the statutory provisions and on any prescribed terms and conditions. Under *subsection (5)(a)* any information may be released from the register with the consent of the Secretary of State.
318. Under *subsection (2)* prescribed information held on the register may be given either to an adoption agency which is looking for suitable adoptive parents with whom to place a child, or to an adoption agency acting on behalf of approved adoptive parents who wish to adopt a child. Under *subsection (4)* the Order in Council will set out the steps which adoption agencies must take upon receipt of this information.
319. *Subsection (3)* enables information either held on the register or compiled from information held on the register to be passed to prescribed categories of persons for statistical or research purposes and other prescribed purposes. *Subsection (5)* also enables any prescribed information to be passed to Scottish Ministers, if the register applies to Scotland, and to the National Assembly for Wales, if the register applies to Wales. *Subsection (7)* enables fees to be charged in respect of information given to adoption agencies under *subsection (2)* or in respect of information given to prescribed categories of persons for statistical or research purposes, or other prescribed purposes, under *subsection (3)*. Disclosure of information otherwise than in accordance with the provisions set out in this section is an offence, punishable on summary conviction by up to three months' imprisonment or a fine not exceeding level 5 on the standard scale, or both.

***Section 130: Territorial application***

320. *Section 130* makes provision in respect of the territorial application of the provisions on the Adoption and Children Act Register. *Subsection (1)* sets out that in this group of

*These notes refer to the Adoption and Children Act 2002  
(c.38) which received Royal Assent on 7th November 2002*

sections the term “adoption agency” means a local authority in England or a voluntary adoption agency whose principal office is in England. *Subsection (2)* sets out that an Order in Council made under *section 125* can provide for any requirements imposed on English adoption agencies to apply to Scottish and/or Welsh local authorities and voluntary adoption agencies. This enables the Adoption and Children Act Register to be extended to Scotland and/or Wales. *Subsection (4)* sets out that an Order made under *section 125* can apply the provisions in *section 127* on the use of the Register as an agent for the payment of fees between adoption agencies to adoption agencies in Scotland and/or Wales.

### ***Section 131: Supplementary***

321. *Section 131* provides general interpretation in respect of the provisions in *sections 125 to 130*. *Subsection (3)* clarifies that any action taken by the Secretary of State or the registration organisation which might otherwise be an offence under *sections 93 to 95* is not an offence where the action was authorised or required to be done by virtue of these provisions.
322. *Subsection (4)* sets out that an Order made under *section 125* is subject to the affirmative resolution procedure. *Subsections (5) to (7)* set out that where the register applies to Scotland, a draft of the Order must be approved by the Scottish Parliament, and where the register applies to Wales, a draft of the Order must be approved by the National Assembly for Wales.

### ***Section 132: Amendment of the Adoption (Scotland) Act 1978: contravention of sections 30 to 36 of Adoption and Children Act 2002***

323. *Sections 30 to 36* of the Act provide for restrictions on the removal of a child who has been placed for adoption. Contravention of these restrictions will be a criminal offence in England and Wales and will be liable to prosecution in England or Wales. *Section 132* makes similar provision in Scotland under the Adoption (Scotland) Act 1978, so that if a person commits an offence in England and Wales under the removal and recovery provisions in *sections 30 to 36* of the Act he can be prosecuted in Scotland.

### ***Section 133: Scottish restriction on bringing children into or out of United Kingdom***

324. *Section 133* amends sections 50 and 50A of the Adoption (Scotland) Act 1978. *Subsection (1)* amends section 50 of the Adoption (Scotland) Act 1978 which places restrictions on taking children out of the United Kingdom for adoption. It removes the exemption of parents, guardians and relatives of the child from the restrictions. It also adds a new subsection (4) to section 50 to enable regulations to be made providing for the restrictions to apply with modifications or not to apply if the prospective adopters are parents, relatives or guardians of the child (or one of them is) or the prospective adopter is a step-parent. The new subsection 50(4) also enables regulations to prescribe conditions which must be met if the restrictions are not to apply or to apply with modification. The first set of regulations to be made under subsection 50(4) are to be subject to the affirmative resolution procedure.
325. *Subsection (2)* amends section 50A of the Adoption (Scotland) Act 1978 to impose restrictions on British residents bringing or causing someone else to bring a child habitually resident outside the British Islands into the United Kingdom with the intention of adopting the child in the United Kingdom, unless the person complies with prescribed requirements and meets prescribed conditions. It also makes it a criminal offence for a British resident to bring or cause someone else to bring a child habitually resident outside the British Islands who he has adopted within the last six months into the United Kingdom, unless he complies with prescribed requirements and meets prescribed conditions. A person would be liable on summary conviction to up to six months’ imprisonment or a fine not exceeding the statutory maximum (currently

£5,000), or both, or, in the event of the case being referred to the Crown court, to up to twelve months' imprisonment or an unlimited fine, or both.

326. It is intended that regulations will require the British resident to be assessed and approved as suitable to adopt by a United Kingdom adoption agency prior to bringing a child into the United Kingdom.
327. The restrictions in section 50A as amended do not apply if the child is intended to be adopted under a Convention adoption order (*subsection (3)*), as the provisions in the Hague Convention will apply in such circumstances. Subsection (10) of section 50A provides a power to make regulations to specify that the restrictions do not apply where the prospective adopters are parents, guardians or relatives of the child (or one of them is) or the prospective adopter is a step-parent of the child where any prescribed conditions are met. Subsection 50A(11) provides that the first set of regulations to be made under this power are to be subject to the affirmative resolution procedure.

#### ***Section 134: Amendment of Adoption (Scotland) Act 1978: overseas adoptions***

328. *Section 134* makes similar provision to *section 87* in relation to Scotland. It enables Scottish Ministers to make an order specifying the adoption orders which will be recognised in Scotland. It is intended to review which countries' adoption orders will be recognised in the United Kingdom. This section allows Scottish Ministers to specify clear criteria that must be met for a country to be included on the revised "designated list".

#### ***Section 135: Adoption and fostering: criminal records***

329. The new Criminal Records Bureau (CRB) has been established under the Police Act 1997 to provide (amongst other things) for a system for vetting those who work with children, and a "one stop shop" to simplify and speed up that process.
330. The intention is that criminal record checks (known as Standard Disclosures) and enhanced criminal record checks (known as Enhanced Disclosures) should be available through the CRB on both prospective foster and adoptive parents and other adults in the same household as them.
331. Criminal record certificates cover both spent and unspent convictions, and cautions, reprimands and warnings. Enhanced criminal record certificates also include "soft information" from local police records which the chief officer of police considers relevant. This would include relevant matters which did not lead to a conviction. The process would also include a check of lists maintained by the Department of Health and the Department for Education and Skills of persons considered unsuitable to work with children, under the "one-stop shop" arrangement under the Protection of Children Act 1999. Such checks for the purpose of determining the suitability of persons to act as foster parents and adoptive parents are already specifically provided for under sections 113 and 115 of the Police Act 1997.
332. *Subsection (1)* provides that Part 5 of the Police Act 1997, which covers certificates of criminal records, is to be amended. *Subsections (2) and (3)* amend sections 113 and 115 of the Police Act to make it absolutely clear that adoptive parents, foster parents and other adults in the same household are all eligible for checks under sections 113 and 115 of the Police Act 1997.

#### ***Section 136: Payment of grants in connection with welfare services***

333. *Section 136* amends section 93 of the Local Government Act 2000, which enables the Secretary of State to pay grants to local authorities in England and the National Assembly to pay grants to local authorities in Wales for welfare services. The provisions in *section 136* clarify that grants may be paid contributing to the provision of welfare services, or in connection with welfare services, as well as for their direct

provision. *Subsection (4)* explicitly recognises that the Treasury must approve the proposed terms and conditions of any grant made under section 93 of the Local Government Act 2000, in addition to its amount and the manner of payment, before the grant is made.

### ***Section 137: Extension of the Hague Convention to British Overseas Territories***

334. *Section 137* enables provisions giving effect to the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption to be extended to any British Overseas Territory by Order in Council.
335. Article 45 of the Hague Convention allows the Convention to extend to British Overseas Territories at the same time as the United Kingdom ratifies the Convention or later. For the Convention to be extended to any territory that territory must have the necessary legislation implementing the Convention in place. *Section 137* allows an Order in Council to make any provision in respect of any British Overseas Territory that would put in place the legislation necessary to allow the Convention to be extended to that territory. In particular, *subsection (2)* permits provisions corresponding to the Adoption (Intercountry Aspects) Act 1999 and regulations made under section 1 of that Act (which will be used to give effect to the Convention in England, Wales and Scotland) to be made in respect of any British Overseas Territory.
336. *Subsections (3) to (7)* amend the British Nationality Act 1981 to ensure that where the Convention has been extended to any British Overseas Territory, a child adopted overseas under a Convention Adoption Order may acquire automatic British Overseas Territory Citizenship. British Overseas Territory Citizenship will be automatically granted if at least one of the adopters is a British Overseas Territory Citizen and, in the case of a joint adoption, both adopters are habitually resident in the United Kingdom or the relevant British Overseas Territory.

### ***Section 138: Proceedings in Great Britain***

337. The usual time limit for the prosecution of summary only offences (all offences under the Act are summary only offences except those provided for by *sections 83 and 85*) under the Act is six months after the commission of the offence (see section 127(1) of the Magistrates' Courts Act 1980). However, in some cases offences may not come to light immediately, for example where they are uncovered by an inspection or in the case of the private adoption of a baby or an infant until the child needs to be enrolled for primary school education. In those cases where it is possible that it will take some time for an offence to come to the attention of the authorities the time limit has been extended. In the case of offences committed under *sections 9, 59, 93, 94, 95 and 129, section 138* therefore extends the time limit to six years after the commission of an offence. Proceedings may be brought within six months of the date the prosecutor had sufficient evidence to warrant bringing the proceedings.

## ***Chapter 2 - Final Provisions***

### ***Section 140: Orders, rules and regulations***

338. *Section 140* provides that all subordinate legislation such as regulations, orders and rules made by the Lord Chancellor, the Secretary of State, the Scottish Ministers, the Assembly or the Registrar General under the Act is to be made by statutory instrument. A default order made under *section 14* and a commencement order made under *section 148* is not to be subject to any parliamentary scrutiny. Any statutory instruments made under sections *92(6), 94 or 122(6)* (respectively amendments to list of prohibited steps, restrictions on reports and amendments to restrictions on advertising in light of advances in technology) or other instruments which amend primary legislation are subject to the affirmative procedure. In addition, regulations made under *section 9* which include provision for ensuring that adoption agencies give proper regard to the

need for stability and permanence in the relationship of a couple in determining their suitability to adopt (as set out in [section 45\(2\)](#)) will be subject to the affirmative resolution procedure

339. Specific provision is made in section 86 to provide that the statutory instrument containing the first set of regulations is to be subject to the affirmative resolution procedure and for [section 140\(2\)](#) not to apply to that instrument. [Section 140\(2\)](#), and therefore the negative resolution procedure, will apply to subsequent statutory instruments containing regulations to be made under [section 86](#).
340. All other subordinate legislation except an Order in Council or subordinate legislation made by Scottish Ministers, the National Assembly for Wales and the Northern Ireland Assembly will be subject to the negative resolution procedure. An Order in Council made under [section 125](#) which relates to the Adoption and Children Act Register will, by virtue of [section 131](#), be subject to the affirmative resolution procedure in each of the countries to which the Register is to apply. An Order in Council under [section 137](#) is subject to the negative resolution procedure in line with the provisions in the British Nationality Act. Subordinate legislation made by the Scottish Ministers, the National Assembly for Wales and the Northern Ireland Assembly will be subject to the scrutiny of those administrations. Where the subordinate legislation is made jointly by the Secretary of State and the Assembly it will be subject to parliamentary scrutiny in the Westminster parliament.

#### ***Section 141: Rules of procedure***

341. [Section 141](#) enables the Lord Chancellor to make rules to deal generally with all matters of procedure. This section provides in particular for rules to say where and to whom notice is given of hearings for placement and adoption orders. [Subsection \(3\)](#) provides that this notice must state the date and place of the application and that the person to whom notice is given need not attend the hearing, unless they wish to attend or the court requires it.
342. [Subsection \(4\)](#) makes provision as to whom that notice must be given. For applications for placement and adoption orders this is every person who can be found whose consent is necessary or could be dispensed with under [sections 21 or 47](#). In these cases rules may prescribe that where such a person cannot be found another relative must be given such notice.
343. For applications to vary or revoke a placement order, notice should be given to each party whose consent to the placement order was necessary (or would have been required but for the dispensation provisions); for applications for an adoption order where advance consent has been given, notice should be given to each parent or guardian unless they have stated that they do not wish to be provided with such notice.

#### ***Section 144: General interpretation, etc.***

344. [Section 144](#) provides general interpretation. One of the important definitions in this section is the definition of “appropriate Minister.” This is defined as in relation to England, Scotland or Northern Ireland, the Secretary of State and in relation to Wales the National Assembly for Wales. [Subsection \(4\)](#) provides a definition of a “couple”. This definition applies solely for the purposes of the Act and does not impact on other legislation. A couple means a married couple or two people, whether of different sexes or of the same sex, living as partners in an enduring family relationship. The latter does not include two people where one person is the other’s parent, grandparent, sister, brother, aunt or uncle ([subsection \(5\)](#)). [Subsection \(6\)](#) provides that the relationships set out in [subsection \(5\)](#) include relationships of the full or half blood and also include the relationship of an adoptive parent with his adopted child, or his former adopted child. The wording at the end of [subsection \(6\)](#) makes clear that adoptive relationships other than those set out in [subsection \(6\)\(b\)](#) are not included in the list at [subsection \(5\)](#). [Subsection \(7\)](#) provides a definition of “partner” for the

*These notes refer to the Adoption and Children Act 2002  
(c.38) which received Royal Assent on 7th November 2002*

purposes of this Act. A person is a partner of the child's parent if the person and the parent are a couple but the person is not the child's parent.

***Section 145: Devolution: Wales***

345. *Section 145* provides that the references to the Adoption Act 1976 and the Children Act 1989 in Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 are to be treated as referring to those Acts as amended by this Act. *Subsection (3)* omits the reference to section 9 of the Adoption Act 1976 from the National Assembly for Wales (Transfer of Functions) Order 1999. The entry is not needed because of the amendment to section 9 of the Adoption Act 1976 made by paragraph 4 of Schedule 4 to this Act. *Subsection (4)* provides that the functions under sections 9 and 9A of the Adoption Act 1976 exercisable by the National Assembly for Wales are to be treated as if they were made exercisable by an Order in Council under section 22 of the Government of Wales Act. This ensures that the appropriate parliamentary procedures in the National Assembly for Wales are applied to regulations made by the National Assembly for Wales under sections 9 and 9A of the Adoption Act 1976.