

**EXPLANATORY MEMORANDUM TO THE ADOPTION INFORMATION
AND INTERMEDIARY SERVICES (PRE-COMMENCEMENT ADOPTIONS)
REGULATIONS 2005**

2005 No. 890

1. This explanatory memorandum has been prepared by the Department for Education and Skills and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005 are made by virtue of the powers at section 98 of the Adoption and Children Act 2002. The Regulations apply to all adoptions where the adoption order was made prior to 30th December 2005. The Regulations therefore apply to around 875,000 adoptions that have taken place since the Adoption of Children Act 1926. The Regulations prescribe a framework within which new registered bodies – adoption support agencies – and adoption agencies will be able to operate an intermediary service to facilitate contact between adopted adults and their adult birth relatives.

2.2 The Regulations confer functions on registered adoption support agencies and adoption agencies that are willing to provide intermediary services. These are referred to in the Regulations as “intermediary agencies”. The Regulations also confer functions on the Registrar General and the courts, setting out the circumstances in which these bodies are to be able - or required - to disclose information to each other. The Regulations provide a framework within which intermediary agencies may, on application from an adopted adult or an adult birth relative of that person, act as intermediaries and, with the informed consent of the subject of the application, facilitate contact between them. Where consent is not given, the Regulations prohibit an intermediary agency from disclosing any information which reveals the current identity or whereabouts of the subject.

2.3 It is only possible to speculate how many may choose to exercise their right to apply for an intermediary service under section 98 of the Act although demand for services is likely to be high. Therefore, the Regulations are drafted in such a way as to give initial priority to adoptions which took place prior to 12th November 1975. This recognises the needs of those, such as elderly birth relatives for whom this may be the last chance to establish contact with someone from whom they have been separated by adoption, to have priority access to services. It will also help adoption support agencies, adoption agencies, the Registrar General and the courts manage the demand from applicants for this new service.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 The 2002 Act modernises entirely the existing legal framework for domestic and inter-country adoption. This statutory instrument is one of a series of statutory instruments to be laid to implement the core provisions of the 2002 Act. The legislative and policy background for the core provisions of the 2002 Act are set out on the overarching explanatory memorandum on the implementation of the 2002 Act that was laid before Parliament on 2 March 2005. A copy of that memorandum is attached.

4.2 In February 2000, the Prime Minister announced that he would lead a thorough review of adoption policy and practice. He commissioned the Performance and Innovation Unit (PIU) to carry out a review of adoption and make recommendations to the Government for future action. The PIU reported in July 2000 and made a number of recommendations to Government, including several related to changes in adoption legislation.

4.3 In December 2000, the Department of Health published a White Paper "Adoption – a New Approach" which took on board many of the PIU's recommendations. Paragraph 6.44 of the White Paper acknowledged that "all adopted people should be able to find out about their family history if and when they wish to do so". Based on this, the Government made a specific commitment to legislate to set out what should be contained in adoption agency files to which an adopted person will have access, and the circumstances in which they may have access to that file.

4.4 When the Adoption and Children Bill was first introduced, it therefore made provision for a framework governing the disclosure of adoption information by adoption agencies. However, this framework only applied to adoptions that took place after implementation of the Act and it was never intended that this framework should apply to adoptions made before the Act was commenced. Many in the adoption community thought that the Bill did not go far enough and some campaigned for a similar framework to apply to all past adoptions, all the way back to the Adoption of Children Act 1926. Given the large numbers of adoptions that have taken place since 1926 (approximately 875,000) the Government was concerned that adoption agencies could be faced with a wave of applications from people seeking contact with relatives from whom they were separated by adoption. The Government's principal concern was that adoption agencies would be overburdened with requests for intermediary services and that their resources would be diverted from their main priority of finding adoptive families for those vulnerable children currently in the care system.

4.5 However, following a concerted lobby campaign by stakeholders in the intermediary services field, the Bill was amended to provide a second legislative framework in respect of past adoptions. This framework, enshrined at section 98 of the 2002 Act, enabled intermediary services to be provided by new bodies - adoption support agencies – in respect of which a person was registered under Part 2 of the Care Standards Act 2000 to provide such services. To accommodate the wishes of some adoption agencies currently providing intermediary services, a flexible approach was taken in developing the Regulations which enables adoption agencies to provide an intermediary service in respect of those adoptions they arranged. However, there is no statutory requirement for adoption agencies to do so for the reasons given at paragraph 4.3 above.

4.6 These Regulations will apply to any adoption which took place prior to the 30th December 2005. The corresponding regime for the disclosure of information by adoption agencies about adoptions on or after 30th December 2005 is set out in the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005.

5. Extent

5.1 These Regulations apply to England only.

6. European Convention on Human Rights

6.1 Not applicable.

7. Policy background

7.1 The Children Act 1975 enabled adopted people, on reaching age 18, to obtain a copy of their original birth certificate and, if they wished, to seek information from the adoption agency about their origins and family history. Similar provisions have never been afforded to birth parents or relatives. Over the past 20 years there has been a growing lobby of birth relatives, mainly birth mothers, to be given an opportunity to seek information about a son or daughter who had been placed for adoption. Many of these people were young mothers who relinquished babies for adoption in the second half of the last century because of the social climate that prevailed at the time, the stigma of being unmarried and the lack of support from their own families.

7.2 Society and adoption practice has moved on significantly since the 1970s. Secrecy has been replaced by transparency and openness. To reflect this, since the early 1990s some adoption agencies have sought to respond to the needs of birth mothers and other birth relatives by offering an intermediary service. This means they would make an approach to the adopted adult to inform them of the birth relative's interest, either directly or through the adoptive parents. It would be for the adopted person to decide if they wished to exchange information or even have direct contact.

7.3 Over the last 20 years intermediary services have developed in an unstructured and disparate way with no national regulated standards or safeguards. Practice has been inconsistent. Section 98 of the 2002 Act and the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) 2005 bring such services within a regulatory framework for the first time. The Department has undertaken extensive consultation with adoption agencies and other key stakeholders in developing the draft Regulations and supporting guidance. The Regulations and guidance were published in draft for consultation on 1 April 2004. The consultation closed on 31 July 2004. The Regulations take careful account of the views received from the adoption community, including the views of adopted people, adoptive parents and birth relatives of adopted people.

7.4 The Regulations include a number of important safeguards to reflect concerns raised by some stakeholders during consultation. First, the Regulations are based on persons giving their informed consent to their details being passed on and therefore take careful account of a person's right to privacy. Where consent is not given the Regulations make it an offence for an intermediary agency to pass on any information which may reveal the identity or whereabouts of an adopted person. Second, the Regulations recognise that some adopted adults have no wish to have contact with a former relative or to be approached by an intermediary agency on their behalf. Therefore, the Regulations include a provision which would enable an adopted person to register a formal veto with the adoption agency thereby preventing any approach from an intermediary agency. This could be an absolute veto or a qualified veto which would enable an approach to be made in specified circumstances. Finally, the Regulations require an intermediary agency to consider certain issues before deciding whether to proceed with an application. It must have particular regard to the welfare on the adopted person in deciding whether to proceed, or continue proceeding, with an application.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 The impact on the public sector relates to 150 local authority adoption agencies in England. The impact on the voluntary sector relates to 31 voluntary adoption agencies and a number (as yet unknown) of registered adoption support agencies in England. There will also be an impact on the Registrar General and the courts in respect of the disclosure of adoption information from the Registers and court files respectively.

8.3 A copy of the full Regulatory Impact Assessment for the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005 is attached to this Memorandum.

9. Contact

Paul Jeff at the Department for Education and Skills, tel: 020 7972 4880 or e-mail: paul.jeff@dfes.gsi.gov.uk can answer any queries regarding the instrument.

EXPLANATORY MEMORANDUM TO THE IMPLEMENTATION OF THE ADOPTION AND CHILDREN ACT 2002

1. This explanatory memorandum has been prepared by the Department for Education and Skills and is submitted voluntarily.

Description

2. This is an overarching explanatory memorandum which explains the context of the Adoption and Children Act 2002¹ (“the 2002 Act”), and relates to a series of Statutory Instruments, as set out in paragraphs 14 and 15, which are intended to be made and laid during 2005 to implement the 2002 Act.

Matters of special interest to the Joint Committee on Statutory Instruments

3. Three of these Statutory Instruments will be subject to the affirmative resolution procedure. These are The Restriction on the Preparation of Adoption Reports Regulations 2005, The Suitability of Adopters Regulations 2005 and an Order to be made under section 142 of the 2002 Act to amend the statutory adoption pay provisions as a consequence of unmarried couples being able to apply to adopt jointly.

Legislative background

4. Following a review of adoption law carried out by the Department of Health between 1991 and 1993, a draft Adoption Bill was published in 1996. The Bill was generally well received, but was never introduced into Parliament. In February 2000, the Prime Minister announced that he would lead a thorough review of adoption policy. He commissioned the Performance and Innovation Unit (PIU) to carry out a review of adoption and make recommendations to the Government for future action. The PIU review reported in July 2000 and made a number of recommendations to Government, including several related to changes in adoption legislation.
5. In December 2000, the Department of Health published a White Paper *Adoption: a new approach*, which took on board many of the PIU recommendations. The Government made a commitment to legislate in 2001 to ‘overhaul and modernise the legal framework for adoption.’²
6. The Adoption and Children Bill was subsequently introduced in 2001, and received Royal Assent in November 2002. The 2002 Act:

¹ 2002 c.38.

² *Adoption: a new approach*, White Paper, December 2000, p.25.

- aligns adoption law with the relevant provisions of the Children Act 1989³ to ensure that the child's welfare is the paramount consideration in all decisions relating to adoption;
- places a duty on local authorities to maintain an adoption service, including arrangements for the provision of adoption support services;
- provides a new right to an assessment of needs for adoption support services for adoptive families and others;
- sets out a new regulatory structure for adoption support agencies (requiring them to be registered under the Care Standards Act 2000⁴);
- enables the appropriate Minister to establish an independent review mechanism in relation to qualifying determinations made by an adoption agency;
- makes provision for the process of adoption including new measures for placement for adoption with consent and placement orders;
- provides for adoption orders to be made in favour of single people, married couples and, for the first time, unmarried couples (amended by the Civil Partnership Act);⁵
- provides for a new framework designed to ensure a more consistent approach by adoption agencies in respect of access to information held about adoptions which take place after the 2002 Act comes into force;
- provides for a new regulatory framework within which intermediary agencies (registered adoption support agencies or adoption agencies) will be able to assist adopted adults to obtain information about their adoption and facilitate contact between them and their adult birth relatives, where the person was adopted before the 2002 Act came into force;
- provides additional restrictions on bringing a child into the UK in connection with adoption;
- provides for restrictions on arranging adoptions and advertising children for adoption other than through adoption agencies;
- makes provision enabling the Secretary of State to establish a statutory Adoption and Children Act Register to suggest matches between children waiting to be adopted and approve prospective adopters; and
- amends the Children Act 1989 to introduce a new special guardianship order, intended to provide permanence for children for whom adoption is not appropriate.

7. The 2002 Act provides the framework for the new approach to adoption, which is to be complemented by secondary legislation.

³ 1989 c.41.

⁴ 2000 c.14.

⁵ The definition of couple in section 144(4) of the 2002 Act has been amended by the Civil Partnership Act 2004 (2004 c.33) to include a civil partnership.

Early implementation

8. In accordance with commitments made by Ministers during the passage of the 2002 Act through Parliament, the 2002 Act included provisions to amend the existing Adoption Act 1976⁶ to enable important elements of the new adoption framework to be implemented in advance of the full implementation of the 2002 Act (see Schedule 4 of the 2002 Act).
9. In June 2003 the Intercountry Adoption (Hague Convention) Regulations 2003⁷ and Adoption (Bringing Children into the United Kingdom) Regulations 2003⁸ came into force. These Regulations put in place the necessary provisions to give effect to the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption concluded at the Hague on the 29 May 1993 (“the Hague Convention”) and provide an increased level of protection to children coming into the UK from other countries.
10. The first phase of the adoption support services framework was implemented on 30 October 2003 when the Adoption Support Services (Local Authorities) (England) Regulations 2003⁹ came into force. These Regulations give adoptive families an entitlement to receive an assessment of their adoption support needs and give birth relatives an entitlement to receive an assessment in relation to support for contact arrangements. They also require local authorities to make arrangements for the provision of a range of adoption support services, including financial support, and to appoint an adoption support services adviser to act as a first port of call for enquiries and signpost families to services.
11. The independent review mechanism in respect of qualifying determinations made by adoption agencies, where they consider that a prospective adopter is not suitable to be an adoptive parent and does not propose to approve him as suitable to be an adoptive parent was introduced in April 2004 when the Independent Review of Determinations (Adoption) Regulations 2004¹⁰ came into force.
12. As the early implementation relates to the current Adoption Act 1976 scheme for adoption, similar provision in secondary legislation needs to be made in the context of the 2002 Act scheme for adoption in respect of those elements of the Act which have been implemented early.
13. The annex summarises the position regarding implementation of

⁶ 1976 c.36.

⁷ SI 2003/118.

⁸ SI 2003/1173.

⁹ SI 2003/1348.

¹⁰ SI 2004/190 as corrected, and as amended by SI 2004/1081 and 2004/1868.

amendments to the Children Act 1989 made by the 2002 Act which relate to areas other than adoption and special guardianship.

Implementation

14. The statutory instruments necessary to implement the 2002 Act are to be made in two main stages. The first series of statutory instruments will be as follows, and each will be accompanied by an individual explanatory memorandum setting out the detail of the SI, and a regulatory impact assessment:
- **The Adoption Agencies Regulations 2005** will provide for the duties agencies will have in relation to arranging adoptions under the 2002 Act, including agency arrangements for adoption work, considering whether a child should be placed for adoption, approval of prospective adopters and whether a particular child should be placed with prospective adopters.
 - **The Adoptions with a Foreign Element Regulations 2005** will provide additional requirements for, and set out additional procedures in relation to, the adoption of children from abroad by British residents and the adoption of children in England and Wales by persons resident abroad. This includes adoptions falling within the scope of the Hague Convention and non-Convention adoptions.
 - **The Suitability of Adopters Regulations 2005 (affirmative)** will prescribe the matters which must be taken into account by an adoption agency in preparing reports on and determining the suitability of a person wishing to adopt a child.
 - **The Restriction on the Preparation of Adoption Reports Regulations 2005 (affirmative)** will specify who may prepare reports in specified circumstances in connection with adoption.
 - **The Adoption Support Services Regulations 2005** will build on the framework established through the 2003 Regulations, widening the pool of people entitled to an assessment of their need for adoption support services and extending the list of adoption support services that local authorities are required to maintain to explicitly include services to assist with disruption. The 2005 Regulations also further refine the process for assessment of need and for the planning and review of service provision as well as further clarifying the role of the adoption support services adviser.
 - **The Adoption Support Agencies Regulations 2005** together with accompanying national minimum standards issued under section 23 of the Care Standards Act 2000 will govern the management and general operation of adoption support agencies, including making provision for their registration.
 - **The Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005** will apply to adoptions made after the 2002 Act came into force and will provide adoption agencies with a framework within which they are required to consider certain issues, such as the adopted person's welfare, before making a determination as to whether to disclose sensitive identifying

information which would identify persons affected by an adoption.

- **The Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005** will enable registered adoption support agencies and adoption agencies to operate a regulated intermediary service so that adults adopted before the 2002 Act comes into force can obtain information about their adoption and contact between adopted adults and their adult birth relatives can be facilitated where appropriate.
- **The Adopted Children and Adoption Contact Registers Regulations 2005** will prescribe the form of entry in the Adopted Children Register, requirements etc. in relation to registrable foreign adoptions, information for the purposes of the Adoption Contact Register and for obtaining information from the registers and information about adopted persons and their relatives for the purposes of the Adoption Contact Register.
- **The Special Guardianship Regulations 2005** will prescribe the list of special guardianship support services which local authorities are required to maintain, the process for assessing special guardianship support needs, and requirements in respect of the planning, delivery and review of special guardianship support services. The Regulations will also prescribe the matters that local authorities are required to include in the report that the court must receive before it can make a special guardianship order.

15. The second series of statutory instruments will be as follows:

- **The Independent Review of Determinations (Adoption) Regulations 2005** will provide for the continued operation of an independent review mechanism in respect of qualifying determinations made by adoption agencies under the new scheme for adoption.
- **Adoption Agencies (Prescribed Fees) (England) Regulations 2005** will provide that fees may be charged by adoption agencies for their services in certain circumstances, for example, fees local authorities may charge for the preparation and assessment of prospective adopters who wish to adopt a child who is not resident in this country.
- Regulations made under section 108 of the 2002 Act regarding corresponding provisions in the Channel Islands and the Isle of Man. This will allow us to make the new adoption system work with the adoption system in the Channel Islands and the Isle of Man, for example in terms of mutual recognition of orders.
- Regulations made under section 87 of the 2002 Act prescribing the requirements that ought to be met by an adoption for it to be an “overseas adoption”. An overseas adoption is an adoption of a description specified in an order (to be made under section 87), being a description of an adoption effected under the law of any country or territory outside the British Islands. The status of children adopted under an overseas adoption is recognised by

virtue of section 66 of the 2002 Act.

- **Non-Agency Adoptions Regulations 2005** will prescribe the local authority responsible for assessing the suitability of prospective adopters and providing a report to the court where the child is already living with the applicants and they give notice of their intention to apply for an adoption order, such as foster carers or relatives of the child and require the local authority to carry out CRB checks in respect of the applicants.
- Regulations making provision for any necessary consequential and transitional provisions.
- Regulations under section 2(2) of the European Communities Act 1972 to ensure the 2002 Act is consistent with Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services.
- An order (affirmative) made under section 142 of the 2002 Act will amend the statutory adoption pay provisions as a consequence of unmarried couples being able to apply to adopt jointly.

16. The intention is that all of the SIs set out in paragraphs 14 and 15 above will come into force on 30 December 2005.

17. As noted above, the White Paper recommended the establishment of a statutory adoption register – the Adoption and Children Act Register – for which provision was made in the 2002 Act. This provision is not being implemented at present. Ministers have decided to continue with a non-statutory register for the next three years. This will give a stronger evidence base on which to assess the effectiveness of a non-statutory register and the desirability of moving to a statutory register.

Extent

18. Regulations will apply either in England only or in England and Wales. Each individual explanatory memorandum will set out the application of each statutory instrument.

Policy background

19. The total number of adoption orders made in England has declined from 5,657 in the year ending 31 December 2001, to 4,479 in 2003. At the same time, the number of adoptions in respect of looked after children in England has increased from 3,400 in the year ending 31 March 2002, to 3,700 in 2004. The number of applications to adopt a child from overseas processed by the DfES has remained relatively steady at around 300 each year (330 in year ending 31 December 2004).

20. The PIU review of adoption in 2000 and the White Paper *Adoption: a*

new approach identified some key problems which meant the needs of looked after children were not consistently being met, including:

- wide variation by councils in the use and practice of adoption;
- to the detriment of children, the adoption process was widely seen as prone to delay, with clear concerns over the consistency, quality and clarity of the process;
- a lack of consistency in the law;
- the review mechanism for those applying to adopt was seen as unfair and not impartial;
- little support was available for adopters; and
- delays in the court processes over adoption.

21. Implementation of the 2002 Act will fulfil the Government's intention to reform adoption law and implement the proposals in the 2000 White Paper which require legislation. The overriding aim of improving the adoption service and promoting greater use of adoption will be furthered by the implementation of the SIs.

Public Consultation

22. There has been extensive public consultation upon the adoption procedures set out in the regulations. The explanatory memorandum to accompany each statutory instrument will give further details of the public consultations.

23. Five consultation packages on draft regulations and draft guidance to be made under the 2002 Act were published in 2003 and 2004. A further consultation document will be issued in early 2005 to cover the key draft SIs in the second series set out in paragraph 15 above which introduce the final changes. The numbers of respondents for each package are listed below. The overall number of written responses was 422.

- Arranging Adoptions and Assessing Prospective Adopters – (115 responses)
- Adoption Reports and Adoptions with a Foreign Element – (50 responses)
- Access to Information (including the Registrar General's functions) – (124 responses)
- Adoption Support and Adoption Support Agencies (75 responses)
- Care Planning and Special Guardianship (58 responses)

24. The responses to these documents together with the information gathered at 14 regional consultation events and 15 focus groups and numerous other meetings held earlier in the year have informed the development of the Regulations and implementation arrangements. The explanatory memorandum in relation to the individual SIs will provide more detail.

Impact

25. Each Statutory Instrument will have a regulatory impact assessment attached.

Contact

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FULL REGULATORY IMPACT ASSESSMENT (RIA) FOR THE ADOPTION INFORMATION AND INTERMEDIARY SERVICES (PRE-COMMENCEMENT ADOPTIONS) REGULATIONS 2005

TITLE OF PROPOSAL

The Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005.

PURPOSE AND INTENDED EFFECT OF MEASURE

Objective

These Regulations prescribe a new framework within which new registered bodies – adoption support agencies – and adoption agencies will be able to operate intermediary services to facilitate contact between adopted adults and their adult birth relatives.

The Regulations are to be made under section 98 of the Adoption and Children Act 2002 and apply to all adoptions where the adoption order was made prior to 30th December 2005 – the date of full implementation of the 2002 Act.

Background

There is currently no primary or secondary legislation governing the provision of intermediary services. Since the Children Act 1975, adopted people have had the right, on reaching age 18, to obtain a copy of their original birth certificate. They have also been able to seek information from the adoption agency about their family history and origins. Similar provisions have never before been afforded to birth relatives. Many birth relatives, particularly birth mothers, have campaigned for a change in the law so that they have similar rights to those of adopted people to obtain the information needed to search for their adopted son or daughter.

Since the early 1990s some adoption agencies have sought to respond to the needs of birth mothers and other birth relatives by offering an intermediary service. This means they would make an approach to the adopted adult to inform them of the birth relative's interest, either directly or through the adoptive parents. It would be for the adopted person to decide if they wished to exchange information or even have direct contact. However, these services have never before been subject to regulation.

When the Adoption and Children Bill was first introduced, it made provision for a framework governing the disclosure of information by adoption agencies. However, this framework only applied to adoptions that took place after full implementation of the 2002 Act. It was never intended that this framework should be apply retrospectively. Many in the adoption community thought that the Bill did not go far enough and following a concerted lobby campaign by key stakeholders the Bill was amended to provide a second framework in respect of past adoptions.

This new framework, enshrined at section 98 of the 2002 Act, enabled intermediary services to be provided by adoption support agencies registered under Part 2 of the

Care Standards Act 2000 to provide such services. To accommodate the wishes of some adoption agencies currently providing intermediary services, a flexible approach was taken in developing the Regulations which enabled adoption agencies to provide an intermediary service in respect of those adoptions they arranged. However, there is no statutory requirement for adoption agencies to provide such services as the Government would not wish to see the resources of adoption agencies diverted from the key priority of finding adoptive families for those vulnerable children currently in the care system.

The Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005 will apply to any adoption where the adoption order was made prior to 30th December 2005. The Regulations confer functions on registered adoption support agencies (ASAs) and those adoption agencies that wish to provide intermediary services. These are referred to in the Regulations as “intermediary agencies”. The Regulations also confer functions on the Registrar General and the Courts, setting out the circumstances in which these bodies are to be able – or required – to disclose information. The Regulations provide a framework within which intermediary agencies may, on application from an adopted adult or an adult birth relative of that person, act as intermediaries and, with the informed consent of the subject of an application, facilitate contact between them. Where consent is not given, the Regulations prohibit an intermediary agency from disclosing any information which reveals the current identity or whereabouts of the subject. The Regulations therefore take careful account of a person’s right to privacy.

The corresponding regime for the disclosure of information by adoption agencies about adoptions on or after 30th December 2005 is set out in separate regulations, the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005.

Risk Assessment

In the absence of any primary or secondary legislation, intermediary services have developed in an unstructured and disparate way with no national regulated standards or safeguards. Practice has been inconsistent across those agencies that provide services. These Regulations bring intermediary services within a regulatory and inspection framework for the first time. The risk of not implementing these regulations is that essential safeguards, checks and balances would not be in place to protect the welfare of adopted people and birth relatives. It would also mean that intermediary services would continue to operate outside a regulatory framework and significant variations in service provision would be the norm.

The Regulations also include a number of important safeguards to protect the welfare and wishes of all those involved in an adoption. First, the Regulations are based on persons giving their informed consent to their details being passed on and therefore take careful account of the right to privacy. Where consent is not given, the Regulations expressly prohibit intermediary agencies from passing on any information which could reveal the identity or whereabouts of an adopted person. Second, the Regulations recognise that some adopted adults have no wish to have contact with a former relative or to be approached by an intermediary agency on their

behalf. The Regulations therefore include a provision which would enable an adopted person to formally veto any approach by an intermediary agency. Third, the Regulations require intermediary agencies to consider certain issues before deciding whether to proceed (or continue proceeding) with an application. It must have particular regard to the welfare of the adopted person in reaching this decision.

OPTIONS

Option 1

Do nothing and rely on current arrangements. This is not an option. Existing legislation makes no provision in respect of intermediary services. The Adoption and Children Act 2002 has already been passed, and now needs to be implemented through regulations if Parliament's intentions are to be delivered.

Option 2

Bring forward regulations for England under the Adoption and Children Act 2002 that are less prescriptive than currently drafted. A simpler, less prescriptive set of regulations would not provide sufficient checks and balances that are needed to properly safeguard sensitive identifying information about adopted people and their birth relatives. It would also not deliver the fundamental safeguards promised by Ministers during the passage of the Bill. The regulations set out a comprehensive framework geared towards safeguarding information and protecting the welfare and wishes of all those involved in an adoption. Removing some of these would open gaps in the framework and ultimately undermine the safeguards that are currently in place.

Option 3

Bring forward regulations for England under the Adoption and Children Act 2002 as drafted. This will deliver Ministerial commitments to Parliament to set out in secondary legislation the detail of how the scheme will operate. It will also ensure that existing inconsistencies in practice and availability of services are tackled and that a balanced and workable scheme is put into place.

COSTS AND BENEFITS

Business sectors affected

The regulations will affect 150 local authority adoption agencies and 31 voluntary adoption agencies in England. The regulations will also affect an as yet unknown number of organisations that intend to register with the Commission for Social Care Inspection as adoption support agencies to provide intermediary services. It is estimated that there are currently 60-100 unregulated independent providers of adoption support services in England. Not all of these provide intermediary services but some will wish to register as adoption support agencies to provide services under section 98 of the 2002 Act.

Benefits

Option 1

There are no perceived benefits.

Option 2

The only possible benefit of this option would be that intermediary agencies could operate more flexibly within the regulatory framework. For example, a more relaxed framework would enable intermediary agencies to exercise greater discretion as to how they use the sensitive information about individuals they hold (or obtain). This would be less burdensome but it would remove the important and necessary safeguards promised by Ministers during the passage of the Bill. It could potentially undermine a person's right to privacy and would also perpetuate existing variations in practice.

Option 3

This option is the most effective way of delivering the provisions at section 98 of the 2002 Act and the commitments made by Ministers during the passage of the legislation. It is the only way of ensuring that sensitive information about individuals involved in an adoption is properly safeguarded and only disclosed in appropriate circumstances – i.e. with the informed consent of the individual the information relates to. This is the first time that intermediary services have been brought within a regulatory framework and it is important to provide the clarity and consistency of approach that agencies and service users are seeking.

Some of the particular benefits of individual regulations are set out below:

Regulation 3 – Provision of intermediary services

This regulation enables intermediary services to be provided by either (a) a registered adoption support agency; or (b) an adoption agency. The regulation takes on board the views expressed by stakeholders during consultation on the regulations. Some adoption agencies currently provide intermediary services as they consider they are best placed to provide these services in respect of the adoptions they arranged. Most expressed a wish to continue to provide services and this regulation enables them to do so. Section 8(2) of the 2002 exempts adoption agencies from the burden of having to dual-register as adoption support agencies although they will be required to notify the registration authority of their intention to provide services under section 98 of the 2002 Act.

Regulation 5 – Applications that may be accepted

This regulation delivers the commitments made by Ministers during the passage of the Bill to give priority to applications where the adoption took place prior to 12th November 1975. This recognises the needs of those, such elderly birth relatives, to have priority access to services. It also helps adoption agencies, adoption support agencies, the Registrar General and the courts to manage demand for this new service. The regulation is drafted in such a way as to provide for flexibility. Intermediary

agencies will be able to accept applications in respect of adoptions that took place after 12th November 1975 but only where they have the spare capacity to do so.

Regulation 6 – No obligation to proceed if not appropriate

This regulation provides an intermediary agency with the discretion not to proceed (or continue proceeding) with an application where it considers it would not be appropriate to do so. The regulation also prescribes the factors that the intermediary agency must have regard to in reaching this decision. It ensures that the welfare of the applicant, the subject of the application and other persons who may be affected by the application is given due weight in the agency's decision. The regulation also includes specific measures to protect the welfare of any person under the age of 18. For example, regulation 6(4) requires that the intermediary agency must not continue proceeding with an application where it discovers that the subject of the application is under 18 years of age.

Regulation 7 – Consent of subject to disclosure

This regulation prohibits an intermediary agency from disclosing any identifying information (as defined by regulation 7(4)) without having first obtained the informed consent of the person that the information is about. This is an essential safeguard which recognises a person's right to privacy. It will be welcomed by those persons involved in an adoption who have no wish to be traced or to have their details passed on to a former relative.

Regulation 8 – Veto by an adopted person

This regulation accommodates the wishes expressed by many adopted people (and adoptive parents) during consultation on the regulations. The regulation recognises that some adopted people have no wish to have contact with former relatives or to be approached by an intermediary agency on their behalf. It therefore enables an adopted person to register a formal veto with the adoption agency that arranged their adoption. This would prevent any approach being made by an intermediary agency. The regulation includes the flexibility to register an absolute veto or a qualified veto which would enable an approach to be made in certain circumstances specified by the adopted person such as those involving medical grounds. This is an essential safeguard which will be welcomed by those adopted adults who have no wish to have an intermediary agency intervene in their lives.

Regulation 10 – Counselling

This regulation places a duty on the intermediary agency to provide information about the availability of counselling to any person making an application or any person who is the subject of an application. Regulation 10(3) requires the intermediary agency to secure the provision of counselling where a person has requested it. The regulation recognises the important role that counselling has to play in helping people come to terms with important information about their background and a possible reunion with a former relative. It ensures that those people who request counselling receive the ongoing support and advice they need.

Regulation 12 – Contacting the appropriate adoption agency

This regulation applies where an intermediary agency receives an application and it is not the adoption agency that arranged the adoption – “the appropriate adoption agency”. It requires the intermediary agency to first establish if an adoption agency was involved in the adoption and, if so, to take reasonable steps to contact that agency. The intermediary agency must then seek the views of the adoption agency as to whether the application is appropriate. The adoption agency will hold the case file for the adoption and it may have information available to indicate that it would not be appropriate to proceed further with the application. It is an additional safeguard intended to ensure that the intermediary agency has the information available to it to make an informed judgement as to whether to proceed (or continue proceeding) with an application. This is an additional safeguard intended to protect adopted people (or birth relatives) who may be potentially vulnerable such as those who were placed for adoption as a result of abuse or neglect.

Regulation 17 – Offence

This regulation makes it a criminal offence for an intermediary agency to disclose identifying information (as defined by regulation 7) in contravention of these regulations. Proceedings may be brought by the registration authority. It is intended to ensure that sensitive identifying information is properly safeguarded by intermediary agencies and only disclosed in accordance with the regulations. It is an important measure to give service users the assurance that confidential information about them will be properly safeguarded and disclosed with their informed consent.

Quantifying and valuing the benefits

The benefits of this new regulatory framework will not manifest themselves in monetary terms. The value will be seen in providing an improved and more consistent service to adopted people and birth relatives to that which currently exists. Service users will have the assurance that those agencies providing intermediary services will have to be registered with the registration authority and will be inspected against agreed national standards. Service users can also be assured that sensitive information held about them will be properly safeguarded and that it’s inappropriate disclosure will now be a criminal offence.

Demand for intermediary services is likely to be high. There is currently a high level of unmet need. The main beneficiaries are likely to be those birth relatives who see section 98 of the 2002 Act as a final chance to establish contact with a child who was relinquished for adoption many years ago. The Regulations are arranged in such a way as to give initial priority to adoptions which took place prior to 12th November 1975. This recognises the needs of those, such as elderly birth relatives for whom these Regulations may offer a last chance to establish contact with someone from whom they have been separated by adoption, to have priority access to services. It will also help the registered adoption support agencies, adoption agencies, the Registrar General and the Courts manage the demand from applicants for this new service.

Costs

There is no impact on businesses. The proposals would impact mainly on those organisations that wish to register as adoption support agencies to provide intermediary services or those existing adoption agencies that choose to provide intermediary services. There will be a lesser impact on 150 local authorities, 31 voluntary adoption agencies, the Registrar General and the courts in assessing and providing information to intermediary agencies to assist them in processing an application. The potential costs of the Regulations are outlined broadly below.

Option 1

None.

Option 2

Intermediary agencies would be likely to incur fewer costs if operating within a less prescriptive regulatory framework. For example, intermediary agencies would not be required to go to the same lengths to trace an individual to seek their consent to the disclosure of identifying information. However, such savings need to be viewed in context. Monetary savings would be made at the expense of removing the essential safeguards in the existing regulations.

Option 3

Compliance costs for business, charities and voluntary organisations

The main cost implications for providing this new service will be for intermediary agencies. There is no precedent in this country for the provision of this service and thus it is very difficult to make an accurate prediction of the level of demand and the associated resource implications. Current independent providers of intermediary services will be required to register as adoption support agencies with the Commission for Social Care Inspection. There will be costs associated with achieving registration. These are covered in more detail in the RIA for the Adoption Support Agencies Regulations 2005.

There have been approximately 875,000 adoptions since the Adoption of Children Act 1926. When the numbers of birth parents and other relatives are considered, there could potentially be as many as 2 million people who might have an interest in applying for services or who could be the subject of an application under these regulations. There is likely to be an initial surge of applications from those people who have been waiting for the regulations to come into force and it is expected that this will then subside. Some stakeholders have suggested that the initial surge could amount to around 20-30,000 applications. That is why Ministers announced in Parliament that the scheme will be phased in giving initial priority to adoptions where the adoption order was made prior to 12th November 1975. This has been achieved by virtue of regulation 5 and will help intermediary agencies, adoption agencies, the Registrar General and the courts manage demand.

Intermediary agencies will shoulder most of the duties in the regulations. The main cost implications in processing an application will be incurred in (a) seeking to

establish the appropriate adoption agency, where the applicant does not have these details and (b) tracing the subject of the application to seek their consent to the disclosure of information. This will require the intermediary agency to engage in research work, to seek the disclosure of information from the adoption agency, the Registrar General or the courts, to contact individuals and possibly to gather additional information. For example, the intermediary agency may need to purchase birth, death or marriage certificates from the Registrar General in order to establish a person's current identity. Where an application concerns an adoption that took place many years ago there is likely to be scant information available on the adoption case file. Tracing an individual in these cases is likely to be resource intensive. Regulation 18 sets out a fee structure whereby adoption agencies, the Registrar General and the courts may charge an intermediary agency a fee to cover any costs incurred in providing information.

Regulation 18(1) provides that an intermediary agency may charge the applicant a fee it determines to be reasonable in connection with processing an application. A fee may be charged to any person seeking an intermediary service from an intermediary agency, including an adopted person. Therefore, where the agency incurs costs in obtaining information from an adoption agency, the Registrar General or the court, or in securing the provision of counselling, these may be recovered from the applicant.

Concerns were expressed by some stakeholders during consultation on the regulations about the long-term resourcing of this area of service provision. These focused on those potential service users on low incomes who were unable to self-fund their applications. When the Government agreed to legislate in respect of past adoptions it was made clear that the provision of intermediary services would not be funded centrally. Those that had lobbied for legislative change accepted this stance and acknowledged that careful thought would need to be given to ensuring that those who were unable to self-fund would still be able to have reasonable access to services. The Government did agree, however, to make available grant funding to pump-prime the expansion of intermediary services and to help build capacity so that any infrastructure would be self-sustaining in the long term. The Government is currently considering an application for grant funding for a project which will establish a small group of leading stakeholders to devise a means of ensuring that all potential users of intermediary services will be able to access services irrespective of their ability to pay.

Costs to Government

There will be no cost to central Government. The regulations will result in some additional costs to local authority adoption agencies. A local authority adoption agency will be required to assist an intermediary agency by providing its views as to the appropriateness of an application and disclosing information from the adoption case file. These costs will be recoverable. Regulation 18(4) provides that "an adoption agency may charge an intermediary agency such fee as it determines is reasonable for providing information or giving its views in accordance with a request under regulation 12".

Any additional costs incurred by local authorities also need to be seen in the context of increased funding for adoption services. Local authorities in England have received

an overall 42.9% total increase in children's social services resources between 1996-97 and 2003-04. This includes £66.5m over the three years 2001-02 to 2003-04 delivered mainly through the Quality Protects grant to secure sustained improvements in adoption services, fund the White Paper implementation agenda and meet the costs of implementing the National Adoption Standards. This funding has been mainstreamed from 2004-05 into the children's services baseline.

In addition, during the passage of the Adoption and Children Bill the Government made a commitment to make available up to £500,000 over the three years 2003-04 to 2005-06 to pump-prime the development of intermediary services and to build capacity.

SMALL FIRMS' IMPACT TEST

Vulnerable children and others involved in adoption need to be protected. Domestic and international laws seek to protect the rights of children and reduce the risk of child trafficking. The Adoption and Children Act 2002 replicates the Adoption Act 1976 in preventing any organisation making arrangements for adoption from making a profit. To be approved as a voluntary adoption agency, the organisation must be a not-for-profit voluntary organisation.

There is some impact for those small firms that wish to register as an adoption support agency to provide intermediary services under section 98 of the Act. This is not considered to be significant and centres on accommodating the cost of registration. This issue is covered in more detail in the RIA for the Adoption Support Agency Regulations 2005. Some current unregulated providers of tracing and intermediary services operate for profit. Regulation 18 provides that an intermediary agency may charge service users a fee in connection with the processing of an application under the regulations. This fee is limited to a fee which the intermediary agency determines to be a reasonable amount.

The Government has also considered the impact of these regulations on small voluntary adoption agencies. There is no statutory requirement on adoption agencies to provide intermediary services in accordance with these regulations. Where a voluntary adoption agency chooses to provide intermediary services in respect of those adoptions it arranged, it may recover any costs it incurs by virtue of regulation 18. This regulation permits an intermediary agency to charge the applicant a fee it determines is reasonable in connection with the processing of an application. Fees will apply irrespective of whether the applicant is an adopted adult or an adult birth relative of that person.

COMPETITION ASSESSMENT

As stated earlier, intermediary services are currently unregulated. It is difficult to predict the likely demand for services or the numbers of current unregulated providers of intermediary services that will wish to register as adoption support agencies to operate. There is no requirement on local authorities or voluntary adoption agencies to provide intermediary services. Some will choose not to and will make arrangements with registered adoption support agencies to provide services on their behalf. Any element of competition is therefore limited to an as yet unknown number of registered

adoption support agencies. It is estimated that there are currently 60-100 independent providers of adoption support services. It would not be unreasonable to estimate that around 30-40% of these would wish to register as adoption support agencies specifically to provide services under section 98 of the 2002 Act.

ENFORCEMENT AND SANCTIONS

Local authorities, voluntary adoption agencies, adoption support agencies and the Registrar General will be required to comply with these regulations. The Commission for Social Care Inspection (CSCI) will be the registration authority and will inspect compliance with these regulations.

Current unregulated providers of intermediary services will be required to register as adoption support agencies to provide services in accordance with these regulations. Local authorities and voluntary adoption agencies are exempt from registration as adoption support agencies by virtue of section 8(2) of the 2002 Act. Those that wish to provide intermediary services will be required to notify the registration authority of their intention to do so. These services will be inspected as part of the agency's routine inspection by the Commission.

The regulations include an offence provision to safeguard against the inappropriate disclosure of identifying information. Where an intermediary agency breached the offence provision, regulation 17 provides that the agency will be liable on summary conviction to a fine not exceeding level 5 of the standard scale. Proceedings will be brought by the registration authority. An offence may also be grounds for the registration authority to cancel the agency's registration. Where a local authority adoption agency disclosed information in breach of these regulations, the offence may be dealt with under the default power provided for the appropriate Minister at section 14 of the 2002 Act. These powers may be applied where a local authority has failed, without reasonable excuse, to comply with any of the duties imposed by the Act.

CONSULTATION

The Department for Education and Skills has consulted with other key Government interests including the National Assembly for Wales, the Department for Constitutional Affairs and the Office for National Statistics in its development of the Regulations.

These regulations were issued for full public consultation in the document *Draft Regulations and guidance for consultation: Access to Information and Registrar General's Functions* on 1 April 2004. The consultation closed on 31 July 2004. 123 written responses were received to the consultation in England. The Department also held an event for key stakeholders to discuss the draft regulations. There has been ongoing consultation with key stakeholders as the regulations have been developed.

The consultation document posed a number of questions in relation to the RIA. Of the 84 responses to a question which asked whether respondents agreed with the assessment of the likely impact of the draft regulations, 15% agreed, 2% thought the assessment too high, 66% thought the assessment too low, and 17% expressed no view.

However, the answer to this question needs to be set in context. Intermediary services are being brought within a regulatory framework for the first time. Agencies are used to exercising their discretion in relation to the disclosure of identifying information. Practice varies from agency to agency. The Regulations impose new duties and functions on intermediary agencies in order to ensure that practice is consistent and that safeguards are in place to guarantee that sensitive information is properly protected. Agencies will now be required to take certain steps before being able to disclose sensitive identifying information. These checks and balances are essential to ensure that the welfare and wishes of adopted people and birth relatives is properly protected and that identifying information is only disclosed with their consent.

In finalising the regulations the Department conducted another short informal consultation in February 2005 with some of the stakeholders who had attended the main consultation event. Ten detailed responses were received, and further changes have been made to refine and improve the regulations.

SUMMARY AND RECOMMENDATION

When the Adoption and Children Act 2002 was passing through Parliament, Ministers responded to the lobby campaign by stakeholders to legislate in respect of past adoptions by amending the Bill to provide a second legislative framework. Ministers promised to bring forward regulations setting out the detail of how the scheme for providing intermediary services would operate. These regulations fulfil that commitment.

Our recommended approach is Option 3, to bring forward the regulations as drafted. This option delivers commitments made by Ministers during the passage of the legislation. It takes careful account of the views submitted by those in the adoption community. Option 3 establishes a legal framework within which information may be shared between adoption agencies, adoption support agencies, the Registrar General and the courts for the purposes of tracing persons and seeking their consent to the disclosure of identifying information. This option takes careful account of a person's right to privacy and includes a range of checks and balances designed to ensure that the welfare and wishes of all those separated by adoption law are properly protected. Ultimately, option 3 provides for a consistent approach for the provision of intermediary services and for appropriate sanctions in those cases where agencies breach the regulations.

MINISTERIAL DECLARATION

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Filkin..... Date.....22nd March 2005.....

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