

EXPLANATORY MEMORANDUM TO
THE DISCLOSURE OF ADOPTION INFORMATION (POST-
COMMENCEMENT ADOPTIONS) REGULATIONS 2005

2005 No. 888

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 Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005 are made by virtue of the powers at sections 56-64 of the Adoption and Children Act 2002. The Regulations apply to all adoptions where the adoption order is made on or after 30th December 2005.
 - 2.2 The Regulations prescribe the information that adoption agencies must keep in respect of a person's adoption, the length of time for which it must be kept, the information that adoption agencies must disclose to adopted adults on request and the information that adoption agencies may disclose to adopted people, birth relatives and others.
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 Secrecy shrouded adoption for much of the 20th Century. Most adopted people were babies or infants when they were adopted. Many were never told of their adoption. Many had birth siblings that they never knew about. It was not until the Children Act 1975 that adopted people were given access to their birth records and the opportunity to find out more about their former families.
 - 4.3 The right for an adopted person to have access to his or her birth

records on reaching age 18 was consolidated in section 51 of the Adoption Act 1976. Nothing more was said in primary legislation. The Adoption Agencies Regulations 1983 and the accompanying statutory guidance, introduced in May 1984, gave adoption agencies a measure of discretion to disclose the information they held as they thought fit. However, the statutory guidance provided little advice on when it might be appropriate or inappropriate to disclose sensitive information which identified individuals. Unsurprisingly, practice varied from agency to agency and adopted people, adoptive parents and birth relatives were inevitably confused by inconsistent practice.

4.4 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.

4.5 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.

4.6 Sections 56-64 of the Adoption and Children Act 2002, together with the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, set out the new framework for managing adoption information in relation to persons once they have been adopted. This framework specifies which information must be kept, the time for which it must be kept (100 years) and the circumstances in which information may be disclosed. It also provides a procedure for dealing with applications for the disclosure of information from adopted people and others. The overarching intention of the new framework is to ensure greater consistency in the information that adoption agencies keep and the way in which that information is disclosed to adopted people and others.

4.7 The new framework in sections 56-64 of the 2002 Act and these Regulations will not affect adoptions that have already taken place before the Regulations come into force. The Adoption Agencies Regulations 1983 will continue to have effect as regards the retention, storage, disclosure and transfer of those records. Existing statutory guidance about the way this information should be disclosed will be strengthened. An adopted person will also maintain their right, on reaching age 18, to apply to the Registrar General for the information needed to obtain their original birth record (Schedule 2 of the 2002 Act). Additionally, the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005 prescribe a framework in respect of all adoptions made before 30 December 2005 whereby registered agencies will be able to operate an intermediary service to

facilitate contact between adopted adults and their adult birth relatives.

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 Current secondary legislation and statutory guidance issued in May 1984 provides that an adoption agency “may disclose information in its possession, as it thinks fit for the purposes of carrying out its functions as an adoption agency”. This gives adoption agencies the scope to disclose information to, for example, an adopted person about his background or to a birth parent about the progress of the adopted child, without disclosing his new identity or whereabouts. However, providing adoption agencies with such a wide discretion has inevitably led to inconsistent practice across the country in respect of the retention, safeguarding and disclosure of information. In some cases, adoption agencies have passed on identifying information without having first consulted the person who would be identified.

7.2 In addition to the information held by adoption agencies, an adopted person currently has the right, by virtue of section 51 of the Adoption Act 1976, to apply to the Registrar General for the information necessary to obtain a copy of his or her original birth certificate.

7.3 Society and adoption practice has moved on significantly since the 1976 Act. Transparency and openness have replaced secrecy. Very few babies are now placed for adoption. The current average age of an adopted child is 4½ years. Most adoptions involve very vulnerable and, in some cases, damaged children who were placed into the care system as a result of abuse or neglect by their birth families. Therefore, the new legislative regime for the disclosure of information reflects the increased culture of openness in adoption but recognises that checks and balances are essential to safeguard the welfare, wishes and interests of all concerned.

7.4 Under the new framework at sections 56-64 of the 2002 Act, the adoption agency will be the main “gateway” for access to information, including birth record information. The adopted adult will no longer have the direct route of access to the Registrar General for access to birth record information. Although section 51 of the 1976 Act has generally worked well, the Government was concerned that the Registrar General did not have sufficient information about the adopted person or his birth family to be sufficiently well placed to reach a decision about withholding this information particularly where there was a possibility of a serious crime being committed. The adoption agency is considered to be best placed to disclose sensitive identifying information, to seek the views of interested parties and to arrange

for the provision of counselling.

7.5 The framework for the disclosure of information contained in sections 56-64 of the 2002 Act and the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005 provides adoption agencies with a systematic and clear process for taking forward an application for the disclosure of identifying information from their records. The framework delivers the Government's following policy objectives:

- To deliver consistency of approach in respect of the records kept by adoption agencies about a person's adoption.
- To ensure a more consistent approach to the information that adopted people receive about their background, given that they have a right to access this information when they reach age 18.
- To provide adoption agencies with a clear 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 identifying information.
- To give adoption agencies the discretion, in exceptional circumstances, to override a person's views about whether identifying information should be disclosed or withheld.
- To balance the agency's exercise of discretion by providing a right to request an independent review of the agency's determination.

Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 The main impact on the public sector relates to 150 local authority adoption agencies and 31 voluntary adoption agencies in England.

8.3 A copy of the full Regulatory Impact Assessment for the Disclosure of Adoption Information (Post-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:
 - aligns adoption law with the relevant provisions of the Children

¹ 2002 c.38.

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

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 amendments to the Children Act 1989 made by the 2002 Act which

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.

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 DISCLOSURE OF ADOPTION INFORMATION (POST-COMMENCEMENT ADOPTIONS) REGULATIONS 2005

TITLE OF PROPOSAL

The Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005.

PURPOSE AND INTENDED EFFECT OF MEASURE

Objective

These regulations prescribe the information that adoption agencies must keep in respect of a person's adoption, the length of time it must be kept for, the information that adoption agencies must disclose to adopted adults on request and the information that adoption agencies may disclose to adopted adults, birth relatives and others.

The regulations are to be made under sections 56-64 of the Adoption and Children Act 2002. The Regulations apply to all adoptions where the adoption order was made on or after 30th December 2005 – the date of full implementation of the 2002 Act.

Background

Current secondary legislation and statutory guidance issued in 1984 provides that an adoption agency "may disclose information in its possession, as it thinks fit for the purposes of carrying out its functions as an adoption agency". This gives adoption agencies the scope to disclose information to, for example, an adopted person about his or her background or to a birth parent about the progress of the adopted child (without revealing his or her new identity or whereabouts). However, providing adoption agencies with such a wide discretion has inevitably led to inconsistent practice across the country in respect of the retention, safeguarding and disclosure of information. In some cases, adoption agencies have passed on identifying information without having first consulted the person who would be identified by the disclosure.

In addition to the information help by adoption agencies, an adopted person currently has the right, by virtue of section 51 of the Adoption Act 1976, to apply to the Registrar General for the information necessary to obtain a copy of his or her original birth certificate.

Sections 56-64 of the 2002 Act, together with these regulations, prescribe a new framework for managing adoption information in relation to persons once they have been adopted. The framework prescribes the information that adoption agencies must keep, the time for which it must be kept (100 years) and the circumstances in which it may be disclosed. The framework also provides a clear procedure for dealing with applications for the disclosure of information from adopted people, birth relatives and others. The framework

delivers the Government's following policy objectives:

- To deliver consistency of approach in respect of the records kept by adoption agencies about a person's adoption.
- To ensure a more consistent approach to the information that adopted people receive about their background, given that they will have a right to access this information when they reach age 18.
- To provide adoption agencies with a clear and systematic 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 identifying information.
- To give adoption agencies the discretion, in exceptional circumstances, to override a person's views about whether identifying information should be disclosed or withheld.
- To balance the agency's exercise of discretion by providing a right to request an independent review of the adoption agency's determination.

The new framework in sections 56-64 of the 2002 Act and these regulations will not affect adoptions that have already taken place before the regulations come into force. The Adoption Agencies Regulations 1983 will continue to have effect as regards the retention, storage, transfer and disclosure of those records. Existing statutory guidance will be strengthened in respect of the way this information should be disclosed. An adopted person will maintain their right, on reaching age 18, to apply to the Registrar General for the information needed to obtain a copy of their original birth record (Schedule 2 of the 2002 Act). Additionally, the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005 prescribe a framework in respect of all past adoptions whereby registered agencies will be able to operate an intermediary service to facilitate contact between adopted adults and their adult birth relatives.

Risk Assessment

Both the Prime Minister's review of adoption and the subsequent White Paper – "Adoption a New Approach", published in 2000, underlined the value of adoption for children who might otherwise remain in the care system. The White Paper also acknowledged that all adopted people should be able to find out about their family history and origins if and when they wish to do so. Similarly, birth parents should have the opportunity to tell their story.

With the wholesale reform of primary adoption legislation by the Adoption and Children Act 2002 comes the need to reform the secondary legislation so that it keeps in step with the new Act and provides for the particular safeguards necessary within the new legal framework. Society and adoption practice has also moved on significantly since the 1976 Act and its associated secondary legislation. Transparency and openness have replaced secrecy and stigma.

Very few babies are now placed for adoption. The current average age of an adopted child is now 4½ years. Most adoptions involve very vulnerable and, in some cases, damaged children who were placed into the care system as a result of abuse or neglect. Therefore, while the new legislative regime reflects the culture of increased openness in adoption, it also recognises that checks and balances are essential to properly safeguard the welfare of adopted people and others involved in the adoption.

Under the new framework in the 2002 Act and these regulations, the adoption agency will become the main gateway for access to information, including birth record information. An adopted adult will no longer have the direct route of access to the Registrar General for access to birth record information (currently provided by section 51 of the 1976 Act). Although section 51 has generally worked well, the Government was concerned that the Registrar General did not have sufficient information about the adopted person or his birth family to be sufficiently well placed to reach a decision about withholding birth record information where there was a possibility of serious crime being committed. The adoption agency is therefore considered to be better placed to disclose sensitive information, to seek the views of interested parties, and to arrange for the provision of counselling.

The current system does not serve the interests of adopted people or their birth relatives well. Not implementing these regulations would mean that the Government would not fulfil its commitment to deliver a more consistent framework for the disclosure of adoption information. It would mean that sensitive information about a person's adoption could continue to be disclosed inappropriately. This may not only be distressing to those concerned but could even place individuals at risk of harm. Not implementing the regulations would also mean that key parts of the 2002 Act would not be implemented and essential safeguards to protect the welfare and wishes of adopted people, birth relatives and others would not be put into place.

OPTIONS

Option 1

Do nothing and rely on current arrangements. This is not an option. Existing secondary legislation is outdated and does not reflect the circumstances in which adoption now takes place. 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. Again, this is not an option. A less prescriptive set of regulations would not provide sufficient checks and balances that are essential for a framework that seeks to provide for access to information while at the same time ensuring that safeguards are in place to protect sensitive identifying information from being disclosed

inappropriately. It would also not deliver the fundamental safeguards promised by Ministers during the passage of the Bill.

Option 3

Bring forward regulations for England under the Adoption and Children Act 2002 as drafted. This option is the most effective way of delivering the findings of the Adoption White Paper and the new provisions in the 2002 Act. The regulations provide a workable framework within which adoption agencies have clarity about the information they must keep and how it may be disclosed. The regulations also provide a clear and systematic process for taking forward an application for the disclosure of information. This process provides for the agency to consider certain issues – such as the views of persons identified by the disclosure of information – before making a determination as to whether to disclose that information.

COSTS AND BENEFITS

Business sectors affected

The regulations will affect 150 local authority adoption agencies and 31 voluntary adoption agencies in England.

Benefits

Option 1

There are no perceived benefits.

Option 2

The only possible benefit of this option would be that adoption agencies could operate more flexibly within the regulatory framework. A more relaxed regulatory framework would not require adoption agencies to seek the views of any person identified by the disclosure of information. This would be less burdensome but would remove an important and necessary safeguard. Second, this option would not provide the clarity and consistency of approach that many adoption agencies are seeking.

Option 3

This option is the most effective way of delivering the provisions at sections 56-64 of the 2002 Act and the commitments made by Ministers during the passage of the Bill. The regulations provide a framework within which adoption agencies have clarity about the information they are required to keep and the way in which it may be disclosed. The framework requires adoption agencies to consider certain issues, including the adopted person's welfare, before deciding whether to disclose identifying information. It effectively balances the interests and wishes of all those involved in the adoption triangle.

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

Regulation 4 – Information to be kept about a person’s adoption

This regulation prescribes a standard package of information about a person’s adoption that must be retained by the adoption agency. It will eliminate existing inconsistencies in the information that adoption agencies keep about a person’s adoption. This will also ensure greater consistency in the information that adopted people receive about their background, as they will have a right to apply for this information on reaching age 18.

Regulation 6 – Preservation of section 56 information

This regulation increases the time for which adoption agency must be kept by agencies from 75 years to 100 years. It reflects both increased life expectancy and covers the possibility of children of adopted people seeking information from the agency, potentially many years after the adoption has taken place.

Regulation 11 – Agreements for the disclosure of protected information

This regulation provides for a written agreement to be made between the adoption agency, the adoptive parents or the birth parents (or other significant persons in the adopted child’s life such as a former carer) as to the sharing of protected information. It will enable persons to formally record their views as to the disclosure of identifying information about themselves. Where such an agreement existed, it would release the adoption agency from the general duty of having to seek the views of any person identified by the disclosure of information, where that person had already given their prior agreement to the disclosure.

Regulation 15 – Independent review

This regulation provides for an independent review mechanism. This is intended to balance an adoption agency’s exercise of discretion in relation to the disclosure of identifying information. Where an agency makes a qualifying determination, this regulation provides the person affected with a right to request an independent review of that determination. This is a safeguard to help ensure that an agency’s discretionary powers in respect of the disclosure of information are not used inappropriately.

Regulation 17 – Duty to secure counselling

This regulation places a duty on the adoption agency to provide, or secure the provision of, counselling services where a person has requested it. This regulation recognises the important role that counselling has to play in helping people to deal with the disclosure of information about their background and family history. Counselling may also be requested by any person who is considering entering into an agreement with the agency for the sharing of protected information under regulation 11. It will help ensure that they are fully

aware of the implications of entering into an agreement and the information that may be shared by virtue of that agreement. This regulation will be welcomed by those seeking information and those who are approached by an adoption agency to give their views as to the disclosure of information about themselves.

Regulation 20 – Registrar General to disclose information etc

This regulation enables the adoption agency to obtain certain information from the Registrar General which will assist it in processing an application for the disclosure of information. This could be information from the Adoption Contact Register which might assist the agency in tracing an individual to seek their views. This information could also help inform the agency's exercise of discretion as to the disclosure of information about a person where that person's views could not be traced and their views sought.

Regulation 21 – Offence

This regulation makes it an offence for an adoption agency to disclose identifying information in contravention of section 57 of the 2002 Act. It is intended to ensure that sensitive information about a person's adoption is properly safeguarded by adoption agencies and only disclosed in accordance with sections 56-64 of the 2002 Act and these regulations. It is an important measure to give service users the assurance that confidential information about them will be properly safeguarded.

Regulation 22 – Fees to be charged by adoption agencies

This regulation provides an adoption agency with the discretion to charge a fee to any person, other than an adopted person, to cover any reasonable costs incurred in processing an application for the disclosure of information. It recognises that adoption agencies have a new duty to seek the views of any person identified by the disclosure of information. Agencies will incur costs in complying with this new duty. Where the applicant is not an adopted person, the agency will be able to recover these costs through the fees it charges. As is explained later in this RIA, the impact of this new burden will not be immediate.

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, birth relatives and others that are seeking information from the adoption agency to that which currently exists. These regulations will:

- Help ensure consistency by providing adoption agencies with a clear and systematic process for managing applications for the disclosure of information.

- Ensure that adoption agencies consider certain issues, such as the adopted person's welfare, before making a determination as to whether to disclose identifying information.
- Provide adoption agencies with the discretion in certain circumstances to override a person's views as to the disclosure of information.
- Balance this discretion by providing a right to request an independent review of the agency's determination.

Costs

There is no impact on businesses. The regulations will impact solely on 150 local authority adoption agencies in England and some of the 31 voluntary adoption agencies that currently make arrangements for adoption. The potential costs of the Regulations are outlined broadly below.

Option 1

None.

Option 2

This would entail minimum change to the current, outdated framework provided by the Adoption Agencies Regulations 1983. Therefore, few new costs would be involved but it would not deliver the framework or the safeguards the Government has committed itself to.

Option 3

Compliance costs for business, charities and voluntary organisations

These regulations impose new burdens on adoption agencies in respect of any adoption where the adoption order is made on or after the date on which the regulations come into force – 30th December 2005. The main cost implication for agencies as a result of these regulations will arise from the new duty to seek the views of any person identified by the disclosure of information. Adoption agencies are required to “take all reasonable steps” to obtain those views. This may require the adoption agency to engage in research work, to use the information it already holds, and possibly gather more information (i.e. purchase certificates from the RG) to enable it to trace a person. An adoption agency could make an arrangement with a registered adoption support agency to undertake this work on its behalf. The adoption support agency will be able to charge the adoption agency a fee for providing this service. The regulations also provide that an adoption agency may charge a fee to the applicant to cover any reasonable costs incurred in processing an application for the disclosure of information, unless the applicant is an adopted person in which case services must be provided free of charge (section 64(5) of the 2002 Act). We believe any increase in costs to agencies is negated by the benefits that these proposals will have. They should also be

considered in the context of increased Government funding for local authority adoption services (explained in more detail below).

This new burden to seek a person's views will undoubtedly increase the workload for adoption agencies but this will be gradual over the next two decades. The vast majority of adopted people will not seek identifying information from the adoption agency under these regulations until they reach age 18. Research indicates that many adopted people do not seek information about their birth family until they reach their late twenties or early thirties. The current average age of an adopted child is 4½ years. These regulations will come into force on 30th December 2005 and will only apply to adoptions made on or after that date. Therefore, there is not likely to be a significant increase in applications by adopted people until at least 2019. Although birth relatives may apply for information about an adopted child under these regulations, the circumstances would have to be exceptional for the adoption agency to process the application. Most applications from birth relatives will arise after the adopted person has reached age 18.

Again, a significant rise in applications is not anticipated until at least 2019.

Costs to Government

There will be no cost to central Government. The regulations will result in some additional costs to local authority adoption agencies because of the new burden to seek the views of any person who may be identified by the disclosure of information. These regulations place the responsibility for processing applications for the disclosure of information on the agency that places the child for adoption or the agency which holds the child's adoption case record. This will generally be a local authority adoption agency. For voluntary adoption agencies the potential work levels are likely to be less than for local authorities as few voluntary adoption agencies now place children for adoption, concentrating instead on recruiting, preparing and approving potential adopters.

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.

SMALL FIRMS' IMPACT TEST

There is no impact on small businesses. 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.

The Government has considered the impact of these regulations on small voluntary adoption agencies. Very few voluntary adoption agencies now place children for adoption and will not, therefore, be responsible for keeping maintaining the child's adoption case record. The scope for applications for the disclosure of information is therefore very limited. Where a voluntary adoption agency is the appropriate adoption agency (as defined by section 65(1) of the 2002 Act) it will be able to recover any costs that it incurs via the fee provision at regulation 22.

COMPETITION ASSESSMENT

The Government has considered the market for voluntary adoption agencies and found that there are 31 not-for-profit voluntary adoption agencies in England. In addition, 150 local authorities with social services responsibilities have a duty to provide local adoption services. Under these regulations, applications for the disclosure of information must be processed by the appropriate adoption agency as defined by section 65(1) of the 2002 Act. This will be the agency which placed the child for adoption or, if different, the agency which holds the child's adoption case record. Therefore, competition is not affected.

ENFORCEMENT AND SANCTIONS

Local authorities, voluntary adoption 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.

The regulations include an offence provision to safeguard against the inappropriate disclosure of information. Where a voluntary adoption agency breached the offence provision, regulation 21 provides that the agency will be liable on summary conviction to a fine not exceeding level 5 on the standard scale. Proceedings will be brought by the registration authority (the Commission for Social Care Inspection). 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 these 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, as stated earlier, the impact of the new burdens in the regulations will be gradual over the next two decades. A significant rise in applications for the disclosure of information is not expected until 2019 at the earliest. Adoption agencies will therefore have time to prepare for their new duties. It is also difficult to predict how many applications might be received by agencies. The only figures currently available in relation to applications for information are those recorded by the Registrar General. These show that in 2000 the Registrar General received around 3,800 applications from adopted people wishing to access their original birth record. Demand for this service actually fell by 27% between 1996 and 2000.

The likely impact of the regulations should also be considered alongside the more open climate in which adoption takes place today. Unlike adoptions which took place 30 or 40 years ago, most children adopted today are older. Many will have memories of their birth family and some will continue to have contact with their birth parents after the adoption order has been made. It is standard practice for adoption agencies to prepare "life story" books for the child containing photographs, letters and other mementoes of the birth family. This is passed to the adopters to share with the child at an appropriate time in his or her life. Therefore, adopted people are less likely to require the services of the adoption agency if they wish to seek information about their birth family when they reach age 18.

There has been ongoing informal consultation with stakeholders which has resulted in further changes to the regulations. For example, regulation 11 (agreements for the disclosure of protected information) has been extended so that any significant person in the adopted child's life could be party to such an agreement for the sharing of information. Initially, the regulations only provided for an agreement to be made between the adoption agency, the adoptive parents and the birth parents. This change provides adoption agencies with greater scope to make agreements and to be released from the duty of having to seek the views of any person who may be identified by the disclosure of information.

SUMMARY AND RECOMMENDATION

Our recommended approach is Option 3, to bring forward the regulations as drafted. This option delivers Government's key objectives in the Adoption White Paper and commitments made by Ministers during the passage of the legislation. It takes careful account of the views submitted by adoption stakeholders.

Option 3 provides a balanced and consistent framework for the disclosure of information about a person's adoption. Most adoptions today involve very vulnerable and, in some cases, damaged children. This framework for access to information recognises the wishes and interests of all those involved but places the adopted person's welfare at the forefront of decision making. It provides adoption agencies with a clear and systematic process for dealing with applications for the disclosure of information. It will provide consistency in the way that sensitive identifying information is disclosed to adopted people, birth relatives and others who may apply to the agency.

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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