

**EXPLANATORY MEMORANDUM TO THE
INDEPENDENT REVIEW OF DETERMINATIONS (ADOPTION)
REGULATIONS 2005**

2005 No. 3332

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 Independent Review of Determinations (Adoption) Regulations 2005 come into force on 30 December 2005 when the Adoption and Children Act 2002 (c.38) (“the 2002 Act”) is fully implemented.
 - 2.2. The Regulations make provision for the review by an independent review panel of a qualifying determination. There are two basic types of qualifying determinations. The first is a determination made by an adoption agency under the Adoption Agencies Regulations 2005¹ that it considers that a prospective adopter is not suitable to adopt a child and that it does not propose to approve him as suitable to do so. This is referred to in the Regulations as a ‘suitability determination’. The second type of determination is referred to in regulation 15(1) of the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005² and is a determination made by an adoption agency in connection with an application for the disclosure of protected information under section 61 of the 2002 Act.
 - 2.3. The function of the independent review panel is to consider a case *de novo* and to make a fresh recommendation to the adoption agency. That adoption agency must then take that recommendation into account when making its final decision.
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 intercountry adoption. This statutory instrument is one of a series of statutory instruments that have been laid to implement the provisions of the 2002 Act. The legislative and policy background for the core provisions of the 2002 Act is set out in the overarching

¹ SI 2005/389

² SI 2005/888

explanatory memorandum on the implementation of the 2002 Act that was laid before Parliament on 2 March 2005. A copy of this memorandum is attached at **Annex A**.

- 4.2. The Independent Review of Determinations (Adoption) Regulations 2005 are made under sections 9 and 12 of the 2002 Act.

5. Extent

- 5.1. This instrument applies to England only.

6. European Convention on Human Rights

- 6.1. No statement is required.

7. Policy background

- 7.1. The 2002 Act reforms adoption law, implements the proposals in the White Paper *Adoption: a new approach* that require primary legislation, and underpins the Government's programme to improve the performance of the adoption service and promote greater use of adoption.
- 7.2. The Independent Review Mechanism was welcomed by Parliament during the passage of the Adoption and Children Bill and by many respondents to the consultation document *Adopter Preparation and Assessment and the Operation of Adoption Panels: A Fundamental Review*. The Independent Review of Determinations (Adoption) Regulations 2004 ("the 2004 Regulations") provided for the review of suitability determinations. The remit of the Independent Review Mechanism has been extended to cover qualifying determinations in respect of applications for the disclosure of protected information under section 61 of the 2002 Act. It is intended that the review panel will consider whether an adoption agency has exercised its discretion appropriately in deciding whether to proceed with an application for the disclosure of protected information or whether to disclose or withhold such information.

Qualifying Determinations (Suitability)

- 7.3. The IRM is a review process which prospective adopters can use when they have been given "a qualifying suitability determination" by their agency with which they are not content, and when they do not wish to make representations to the agency. The review process is conducted by a review panel independent of adoption agencies.
- 7.4. A qualifying suitability determination is a determination by an adoption agency under regulation 27(4) of the Adoption Agencies Regulations 2005 that it does not propose to approve a prospective

adopter as suitable to adopt a child. A qualifying suitability determination may be given in respect of an application from prospective adopters to be approved as suitable to adopt a child from the United Kingdom or from outside the British Islands after either a brief or full prospective adopter's report has been prepared and considered by the adoption panel and agency or where the agency decides to terminate their approval of the prospective adopters as suitable to adopt a child following a review under regulation 29 of the Adoption Agencies Regulations 2005.

Qualifying Determinations (Disclosure)

- 7.5. Regulation 15(1) of the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations prescribes a qualifying determination in respect of an application for the disclosure of protected information under section 61 of the 2002 Act. A qualifying determination will be where the agency determines:
- (a) not to proceed with an application from any person for the disclosure of information under section 61 of the 2002 Act;
 - (b) to disclose protected information to the applicant contrary to the view expressed by the person(s) the information is about;
 - (c) not to disclose protected information to the applicant where the person the information is about has expressed the view that it should be disclosed.
- 7.6 An adoption agency has a general discretion not to proceed with an application for the disclosure of information about a person's adoption where it considers it would not be appropriate to do so. It may determine not to proceed where, for example, it considered the application to be vexatious or where it had grounds to consider that proceeding with the application would be contrary to an adopted person's welfare. Where the agency determines not to process an application – for whatever reason – the applicant may request an independent review of that determination.
- 7.7 The adoption agency also has the discretion to disclose (or withhold) protected information if it considers it appropriate to do so. Where an adoption agency has received an application for the disclosure of protected information it has a duty under section 61(3) of the 2002 Act to take all reasonable steps to seek the views of any person the information is about as to the disclosure of that information. The agency must also consider the welfare of the adopted person and all the other circumstances of the case in deciding whether to disclose the information. Having followed this process, the adoption agency may disclose the information to the applicant if it considers it safe and appropriate to do so.

- 7.8 The right to request an independent review of the qualifying determination will not apply in respect of applications for the disclosure of protected information about a child under section 62 of the 2002 Act. This is because the adoption agency's discretion to disclose information about a child is limited. The child's welfare must be the agency's paramount consideration. Therefore, the prospects of obtaining information against the wishes of the adoptive parents (or the child) are remote.

Process

- 7.9. The applicant has 40 working days from the date the qualifying determination was sent in which to apply to the IRM. Applications must be in writing and include the grounds upon which it is made. The applicant may give the review panel further written details of his grounds for review up to two weeks before the review meeting and may expand on his grounds at the review meeting.
- 7.10 The adoption agency cannot make its decision to implement its original determination until:
- (a) the independent review panel has made its recommendation; or
 - (b) the time limit of 40 working days has elapsed and the agency has received no notification that the relevant person has applied for a review of the qualifying determination.
- 7.11. The constitution and membership of a review panel to consider suitability determinations is similar to that of an adoption panel (which adoption agencies are required to establish under the Adoption Agencies Regulations 2005). However the constitution of the review panel established to review a disclosure determination will be smaller with a membership of three including two qualified social workers. The social workers must have at least three years post-qualifying experience in child care social work, including direct experience in adoption work. The Regulations set out the persons who may not be appointed as a member of the review panel. Each review panel may seek legal advice or advice from a medical practitioner as it considers appropriate in each case.
- 7.12. The review panel may request additional information from the applicant and from the adoption agency and may obtain its own legal and medical advice. The applicant and the adoption agency will be invited to attend the review panel. They will be able to ask the review panel questions and to respond to any questions the review panel may have.
- 7.13. In considering its recommendation, the review panel must consider and take into account all of the information passed to it by the adoption agency and the information obtained during the review panel meeting.

The review panel will make a written recommendation (as appropriate):

- as to the prospective adopter's suitability to adopt a child;
- whether the adoption agency should
 - proceed with the application
 - disclose or not to disclose the information,

and send their recommendation and reasons to the applicant and the adoption agency. The adoption agency must take that recommendation into account when making their decision.

7.14 There is no cost to the applicant applying to the IRM but the cost of a review will be recovered from the adoption agency. The recovery cost of a review to consider a suitability determination is £2,227 (2005/06). The recovery cost is not subject to VAT and is reviewed annually. It is anticipated that the cost of a review to consider a disclosure determination will be lower than £2,227.

8. Consultation

- 8.1. The establishment of an independent review mechanism originated from the Prime Minister's Review of Adoption carried out in early 2000. The Government subsequently published its White Paper *Adoption – a new approach*, in response to the recommendations set out in the Review's Report. The Performance and Innovation Unit, which was responsible for undertaking the review, consulted key stakeholders and those affected by adoption about a range of issues governing the review of adoption services.
- 8.2. The provisions in the 2002 Act, which gives the Secretary of State the power to establish the IRM and appoint a body to operate it, and which govern the scope of its functions, were subject to the full scrutiny of Parliament as the Bill made its passage through both Houses.
- 8.3. In addition to this, the Department of Health¹ published details of its proposals in relation to the establishment and operation of the IRM in its consultation document *Adopter Preparation and Assessment and the Operation of Adoption Panels: A Fundamental Review*². The accompanying consultation questionnaire raised a series of questions on the IRM, responses to which were taken fully into account in developing the 2004 Regulations which these Regulations replace subject to transitional provisions.

¹ Following the creation within government of a Minister for Children, Young People and Families in June 2003, responsibility for adoption issues passed from the Department of Health to the Department for Education and Skills

² Published October 2002

- 8.4. Qualifying suitability determinations include brief prospective adopter's reports (regulation 25(7) of the Adoption Agencies Regulations 2005) and withdrawal of approval of a prospective adopter's suitability to adopt (regulation 29 of the Adoption Agencies Regulations 2005) following public consultation¹ and workshops in 2003 and 2004.
- 8.5. The remit of the Independent Review Mechanism to cover qualifying determinations in respect of applications for the disclosure of protected information under section 61 of the 2002 Act was included in the Disclosure of Adoption Information (Post Commencement Adoptions) Regulations 2005 (regulation 15) which were issued for public consultation in 2004. The extension was welcomed.

9. Impact

- 9.1. A Regulatory Impact Assessment (RIA) was prepared when the Independent Review of Determinations (Adoption) Regulations 2004 were first made under the Adoption Act 1976 (attached at **Annex B**). It has been agreed with the DfES RIA Unit that a new RIA need not be prepared as the disclosure determinations have no immediate impact or burden for adoption agencies.

10. Contact

- 10.1. Ruth Wilson or Paul Jeff at the Department for Education and Skills, telephone: 0207 273 5827/5364 or email: ruth.wilson@dfes.gsi.gov.uk or Paul.Jeff@dfes.gsi.gov.uk can answer any queries regarding the instrument.

¹ *Draft Adoption Regulations and Guidance for Consultation – Arranging Adoptions; Assessing Prospective Adopters*

**EXPLANATORY MEMORANDUM ON 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

¹ 2002 c.38.

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

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 Act 1989¹ 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 2000²);
- 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);³
- 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

¹ 1989 c.41.

² 2000 c.14.

³ 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.

adoption, which is to be complemented by secondary legislation.

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 1976¹ 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 2003² and Adoption (Bringing Children into the United Kingdom) Regulations 2003³ 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 2003⁴ 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 2004⁵ 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.

¹ 1976 c.36.

² SI 2003/118.

³ SI 2003/1173.

⁴ SI 2003/1348.

⁵ SI 2004/190 as corrected, and as amended by SI 2004/1081 and 2004/1868.

13. The annex summarises the position regarding implementation of 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

26. Helen Steele, Head of Adoption, 4th Floor, Caxton House, Tothill Street, London, SW1H 9NA.

Annex: Implementation of amendments to the Children Act 1989 that are not adoption or special guardianship related

The Government has already implemented the following key provisions of the Adoption and Children Act 2002:

- On Royal Assent (7 November 2002): provision in respect of local authorities' power to provide accommodation for children in need under section 17 of the Children Act 1989.
- 1 December 2003: parental responsibility for unmarried fathers who jointly register the birth of their child with the mother.
- 1 April 2004: advocacy services for children and young people. Amendment and widening of the application of, the procedure for making representations under that Act and to impose a duty on local authorities to make arrangements for the provision of advocacy services to children or young people making or intending to make representations.
- 27 September 2004: Independent Reviewing Officers, responsible for chairing statutory reviews of all looked after children.
- 31 January 2005: Amendment to the definition of 'harm' in the 1989 Act to make clear that harm includes any impairment of the child's health or development as a result of witnessing the ill treatment of another person.

The remaining provisions will be implemented as follows:

- 30 December 2005: Amendment enabling the acquisition of parental responsibility by a step-parent either by agreement of both parents or a court order.
- 30 December 2005: Amendment enabling local authority foster carers to seek leave of the court to apply for an order under section 8 of the 1989 Act (including a residence order) if the child has been living with them for one year, rather than the current three years.
- 30 December 2005: Amendment enabling courts to make residence orders that have effect until the child reaches the age of 18.
- DfES have consulted on the draft Regulations required to implement the provisions in respect of inquiries by local authorities into representations. Ministers are considering the timetable for implementation in the light of the responses to that consultation.

FULL REGULATORY IMPACT ASSESSMENT

Title of the Regulatory Proposal

Regulations governing the introduction of the Independent Review Mechanism

This Regulatory Impact Assessment has been amended in paragraphs 4, 5 and 8 to make reference to the Intercountry Adoption (Hague Convention) Regulations 2003 (SI 2003/118) which had not been quoted in the original RIA due to an oversight. The purpose of quoting the above Regulations is to confirm the Government's policy that the Independent Review Mechanism is to be available to all prospective adopters assessed by an adoption agency in England (irrespective of which country they wish to adopt from) who receive a qualifying determination. At the time the original RIA was signed the recovery cost of a review by the IRM was not known. The recovery cost has now been set and paragraph 26 Option 3 has been amended to include the cost.

Purpose and Intended Effect

Issue

1. Following the Prime Minister's review of adoption, Ministers made a commitment in the Adoption White Paper *Adoption – a new approach*¹, to set up an independent review mechanism (IRM) for prospective adopters whose adoption agency was minded not to approve them as suitable to become adoptive parents.
2. The Adoption and Children Act 2002 (the 2002 Act) created the legal power to establish the IRM. The Independent Review of Determinations (Adoption) Regulations 2004 (2004 Regulations) as amended set out the legislative framework for operation of the IRM in England. The provisions are being brought into force in advance of the main body of the 2002 Act in line with the commitments made when the Adoption and Children Bill had its Second Reading in the House of Commons. Early implementation of the IRM provisions was intended to help raise prospective adopters' confidence in the adoption process. A commencement order (the Adoption and Children Act 2002 (Commencement No.4) Order 2003 (SI 2003/3079(C.117)) provides for the provisions of the 2002 Act which are relevant to the IRM to come into force on 1 April 2004. The relevant provision is paragraph 5 of Schedule 4 to the 2002 Act that inserts a new Section 9A into the Adoption Act 1976. The provisions will impact on all local authorities

¹ Published by The Stationery Office Limited December 2000

and the 31 voluntary adoption agencies who are registered to provide adoption services.

Objective

The current position

3. At present there is a great deal of variance in local assessment practice in terms of how adopters are treated, assessed and prepared. Public perception is that the current process can appear over-complicated, unclear and not truly independent.
4. The Adoption Agencies Regulations 1983¹ (the 1983 Regulations) and the Intercountry Adoption (Hague Convention) Regulations 2003² (the 2003 Regulations) make a clear distinction between the function of an adoption panel and the agency's responsibility for decisions. Both sets of Regulations provide that no member of the adoption panel may take part in any decisions on behalf of the agency relating to matters which have been considered by that panel under regulation 10 of the 1983 Regulations or under regulation 9 of the 2003 Regulations.
5. Regulation 11A of the 1983 Regulations and regulation 10 of the 2003 Regulations provide that where an adoption agency considers that the prospective adopter is not suitable to be an adoptive parent, the agency must notify the prospective adopter in writing of its determination. The prospective adopter then has 28 days within which to submit representations to the adoption agency. If no representations are received within this time the agency may proceed to make a decision and notify the prospective adopter in writing of its decision and reasons. If representations are received, the agency may refer the case to the adoption panel (or another panel where the agency has more than one panel or has arrangements with another adoption agency³) for further consideration. The adoption panel can then make a further recommendation taking into account the additional information provided. The adoption agency must then make a final decision taking account of the fresh recommendation of the adoption panel.

¹ Amended by the Adoption Agency and Children (Arrangements for Placement and Reviews) (Miscellaneous Amendments) Regulations 1997 SI 1997/649

² Prospective adopters wishing to adopt under the Hague Convention are assessed under these Regulations. The Hague Convention is the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. A list of countries that have ratified or acceded to the Hague Convention is available from <http://www.hcch.net/e/status/adoshite.html>. The list also identifies those countries to which the UK has raised objections to their accession to the Hague Convention. The UK ratified the Convention on 1 June 2003.

³ Adoption agencies are under no obligation to enter into reciprocal arrangements with other adoption agencies. However, where they have done so, an adoption agency may be able to use these arrangements to refer such cases to a different panel which may reassure a prospective adopter that the case will be genuinely reconsidered.

6. Current assessment practice ensures that the majority of applicants who are likely to prove unsuitable are “counselled out” during the assessment process. The numbers of cases that result in an appeal are believed to be very small. Although we have no data on the actual number of cases, recent research undertaken by the British Association for Adoption and Fostering (BAAF) indicated that approximately 6 per cent of cases are rejected by agencies at panel stage.
7. The Government does not collate information on the number of adopters approved each year. However, it does collate data on the number of children adopted each year by approved prospective adopters. In 2002-03 3,500 children were adopted, this represented a 29 per cent increase on the number of adoptions in 1999-2000. The Government has set a target to increase the number of adoptions by at least 40 per cent, and if possible 50 per cent by 2005-06 based on the base figure of 2,700 adoptions in 1999/2000. This would take the number of adoptions to over 4,000. We have assumed that the rate of 6 per cent of cases rejected at panel stage will remain roughly constant. Working on this basis, we estimate that the IRM could receive approximately 250 applications from prospective adopters whose agency is minded to turn down their application.

The new provisions

8. The IRM will give prospective adopters, who have been notified by their adoption agency that it is minded not to approve them as suitable to be adoptive parents (a qualifying determination), a choice of either making representations to the adoption agency or to request the IRM to review their case and make a fresh recommendation to the adoption agency. Prospective adopters will be able to apply to the IRM where the most recent consideration by an adoption panel of their suitability to be adoptive parents is under regulation 10(1)(b) of the 1983 Regulations and takes place on or after 30 April 2004, or is under regulation 9(1) of the 2003 Regulations and takes place on or after 20 August 2004.
9. The IRM will be seen to be open and transparent giving prospective adopters confidence that their case will be reviewed by a truly independent panel which has no association with the adoption agency.
10. An independent body appointed by the appropriate Minister will convene a review panel to re-examine the evidence and make a fresh recommendation to the agency. The adoption agency must consider both the new recommendation and the recommendation of the original agency panel before making its final decision.
11. While in practice most prospective adopters are likely to prefer an independent review panel to take a fresh look at their case, some prospective adopters may wish to have the matter referred back to the

original agency panel, for example if there is a factual error in the documentation.

12. The ultimate responsibility for deciding whether a prospective adopter is suitable to be an adoptive parent will continue to rest with the adoption agency. This is because the agency is responsible for the provision of the full range of adoption services and, where the agency is a local authority, is responsible for placing children with prospective adopters who are approved as suitable to adopt. It would therefore be inappropriate to remove the final decision from the adoption agency about the suitability of prospective adopters to be adoptive parents.

Risk Assessment

13. Both the Prime Minister's Review of Adoption and the subsequent White Paper underlined the value of adoption for children who might otherwise be looked after, and concluded that the current practice and legislation needed to be improved upon. Stretching new targets and standards have been set for adoption services. The 2002 Act completely modernises existing adoption legislation and will provide a framework for better adoption services. The PM's Review also highlighted a perception that the adoption process currently lacks transparency and fairness. The IRM is one of the key measures being introduced through the new legislation that will help tackle this perceived problem.
14. The 2004 Regulations deliver the Government's commitment to establish an independent review mechanism for prospective adopters. Without these Regulations it would not be possible to meet this commitment.
15. Some people may choose not to apply to adopt because of what they perceive as unfairness and a lack of transparency in the existing system. It is likely that inconsistent practice leads to some prospective adopters not being approved to adopt on the basis of factors which would not have been considered in their assessment had their application to adopt been considered by a different agency. In cases where these risks are realised, children waiting for adoption are potentially being denied a safe and loving adoptive home and suitable applicants to adopt are turned away. The new IRM introduces greater transparency in the adoption assessment process, and will help to raise adopters' confidence in the adoption service.

Options

Option One: Retain the present system and not enact new provisions

16. This is effectively not an option. The 2002 Act has already been approved by Parliament and received Royal Assent and it now has to be brought into force, with the necessary Regulations, if Parliament's will is to be delivered.

Option Two: Issue guidance to require agencies to review qualifying

determinations of neighbouring agencies

17. This would be unsatisfactory because statutory guidance¹ applies only to local authorities in the course of their social services functions and not to Voluntary Adoption Agencies (VAAs). VAAs should nevertheless consider statutory guidance as good practice. Both local authorities and VAAs assess prospective adopters, and as such it would be inappropriate and ineffective to introduce a review process that does not bite on all adoption agencies involved in adopter recruitment and assessment.
18. Furthermore, when Ministers were first asked to consider the options open to them to establish an independent review mechanism for prospective adopters, this option was put forward. The results of the consultation on the PM's Review of Adoption (Performance and Innovation Unit's Report) indicated that there is considerable concern over how 'independent' such a mechanism would be regarded by those using it.

Option Three: Enact the IRM provisions

19. This will deliver Ministerial commitments to Parliament and ensure that concerns about the fairness and transparency of the adoption process, identified by the Prime Minister's Review, and highlighted in the Report's recommendations, are addressed.
20. It is only possible to meet this ministerial commitment through the introductions of Regulations that apply to both local authority and VAAs who undertake the assessment and approval of prospective adopters.

Benefits

Option One: Retain the present system

21. There are no perceived benefits.

Option Two: Guidance on review by neighbouring authority

22. The benefits are very limited. The option would only apply to local authorities given that Section 7 guidance does not apply to VAAs. This

¹ Guidance issued under Section 7 of the Local Authorities Social Services Act 1970

option would however negate the need for these Regulations to be made.

Option Three: Enacting the new provisions to establish the IRM

23. This is the only option that will deliver Ministers' commitments to introduce an independent review mechanism for prospective adopters. The Regulations together with the relevant provisions inserted in the Adoption Act 1976 by the 2002 Act provide for the establishment of the IRM, constitution of the review panels, appointment of members and its operational requirements.

Quantifying and valuing the benefits

24. It is not possible to quantify the benefits of the proposed change in monetary terms. The benefits are primarily to do with meeting the expectations of prospective adopters that they will receive a fair and transparent service from their adoption agency through the establishment of the IRM.

Compliance costs for business, charities and voluntary organisations

25. There is no impact on businesses. The proposals would impact solely on local authorities and the 31 registered VAAs in England that currently assess prospective adopters.

- Option 1 – none, but this option has been dismissed.
- Option 2 – as this would entail minimal change to the current system few new costs would be involved. The main source of expenditure would arise if new guidance was issued and adoption agencies needed to familiarise staff with it and ensure on an ongoing basis that it was being applied. However, this option has effectively been removed, as it does not meet the objectives and does not apply to VAAs.
- Option 3 – there may be a minimal additional cost to agencies as a result of these regulations. The set up and annual running costs of the IRM¹, will be met centrally by the Department for Education and Skills. However, should a prospective adopter request the IRM to review his adoption agency's determination, the adoption agency will be required to pay a standard unit cost to meet the cost of the review. This standard unit recovery cost for 2004-05 is £2,227. However, this should be set against the cost agencies currently incur² as a result of having to consider further representations made by applicants under the existing regulations, as set out in paragraphs 3-6 of this document. Adoption agencies do not collect data on these costs. Consequently we are unable to accurately identify

¹ Operated under contract by an organisation appointed by the Secretary of State for Education and Skills

² Costs include adoption agency staff time, accommodation for the adoption panel meeting, overheads and the payment of expenses to adoption panel members.

savings or additional costs. We do however believe that it is likely that adoption agencies' costs will be lower than the unit cost of a referral to the IRM. However the time saved by the adoption agency in not having to set up and operate an adoption panel specifically to consider the prospective adopter's representations will allow the adoption panel to consider the suitability of other prospective adopters to adopt a child.

Impact on small businesses

26. There is no impact on small businesses. However, there may be a minimal impact on VAAs as set out above, as they will be required to pay the unit cost associated with any reviews referred to the IRM by applicants assessed by that VAA. This will be negligible given the extremely small number of reviews that the IRM is likely to undertake. Based on current trends, we believe that the IRM could expect to consider in the region of 250 applications per year, with referrals being made to it from a potential of 181 different adoption agencies, only 31 of which are VAAs.

Results of consultations

27. The establishment of an independent review mechanism originated from the Prime Minister's Review of Adoption carried out in early 2000. The Government subsequently published its *White Paper Adoption – a new approach*, in response to the recommendations set out in the Review's Report. The Performance and Innovation Unit, which was responsible for undertaking the review, consulted key stakeholders and those affected by adoption about a range of issues governing the review of adoption services.
28. The provisions in the 2002 Act, which gives the Secretary of State the power to establish the IRM and appoint a body to operate it, and which govern the scope of its functions, were subject to the full scrutiny of Parliament as the Bill made its passage through both Houses.
29. In addition to this, the Department of Health¹ published details of its proposals in relation to the establishment and operation of the IRM in its consultation document *Adopter Preparation and Assessment and the Operation of Adoption Panels: A Fundamental Review*². The accompanying consultation questionnaire raised a series of questions on the IRM, responses to which were taken fully into account in developing these regulations.

Competition Assessment

30. No impact on competition was identified and as such, it was not

¹ Following the creation within government of a Minister for Children, Young People and Families in June 2003, responsibility for adoption issues passed from the Department of Health to the Department for Education and Skills

² Published October 2002

necessary to carry out a detailed assessment.

Enforcement, sanctions, monitoring and review

31. The Department for Education and Skills will monitor the effectiveness of the Regulations through management of the IRM contract. We will meet regularly with the contractor to monitor quality assurance of all aspects of the contractor's work programme. The contractor will provide the Department for Education and Skills with timely and ongoing evaluation feedback including the provision of information on customer satisfaction.

Summary and recommendations

32. The Government has indicated its intention to bring forward regulations to implement the Adoption and Children Act 2002, of which the 2004 Regulations form a part of the early implementation work programme. Our recommended approach is Option 3.
33. We consider that the 2004 Regulations as drafted and subsequently amended will meet the objectives. Option 3 gives the only viable means of meeting the Government's commitments as set out in the Adoption White Paper and subsequent legislation to provide an independent, fair and transparent method of review for prospective adopters whose agency is minded not to approve them as suitable to be adoptive parents.
34. Existing practice means that the 2004 regulations as amended will not involve additional work for adoption agencies; they will help ensure a high quality service is available across England. Where additional net costs are incurred they should be relatively low and justifiable when compared to the benefits they will produce. We expect the IRM to identify areas where improvement is required by adoption agencies and this information will help the Government to produce guidance, provide training or if necessary amend legislation.
35. During discussion around the 2002 Act's passage through Parliament, the adoption sector widely welcomed this programme of reform. The 2002 Act was developed in a consultative way and key adoption stakeholders, including VAAs and representatives of local government, gave evidence to the Select Committee that greatly influenced the shape of the legislation.

Declaration

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

Signed by the responsible Minister _____

Date _____

Contact Point

Department for Education and Skills
Adoption Team
104 Wellington House
133-155 Waterloo Road
London SE1 8UG