

## **REGULATORY APPRAISAL**

### **SOCIAL CARE, WALES**

#### **THE ADOPTION INFORMATION AND INTERMEDIARY SERVICES (PRE-COMMENCEMENT ADOPTIONS) (WALES) REGULATIONS 2005**

##### **Background**

1. These Regulations are to be made under the Adoption and Children Act 2002, which replaces the Adoption Act 1976 and modernises the legal framework for domestic and inter-country adoption. The Adoption and Children Act 2002 legally underpins a number of the new policies for adoption set out in the White Paper '*Adoption: a new approach*', published in December 2000, which stemmed from the Review of Adoption commissioned by the Prime Minister in 2000. The Adoption Review concluded by the Performance and Innovation Unit recommended a number of measures, including new adoption legislation to modernise the adoption system.
2. As there may be an initial surge of new applications when the Act is implemented, it is intended to give priority to adoptions made before 12 November 1975, although where spare capacity is available requests concerning adoptions made after 13 November 1975 may be processed. There is provision in the Regulations for cases of urgent need to take precedence over all other requests, for example, where child health issues are concerned.

##### **Purpose and intended effect of the measure**

3. The Adoption and Children Act 2002 enables the appropriate Minister (in Wales, the National Assembly) to make Regulations controlling the disclosure of information in relation to a person's adoption.
4. The Adoption Information and Intermediary Services (Pre-Commencement Adoptions) (Wales) Regulations 2005 set out the legislative framework for the purposes of assisting persons adopted before 30 December 2005 to obtain information about their adoption and to facilitate contact between those persons and their relatives through an intermediary service. The relevant provision of the 2002 Act is section 98(1). The provisions will impact on all registered adoption support agencies as well as local authority and voluntary adoption agencies.
5. Some unregulated intermediary services exist in some parts of the country. However, the level of provision is inconsistent and there are no regulated standards or safeguards.

6. At present there is variance in local practice in terms of how adopted persons and their birth relatives are given access to adoption information and how they are advised concerning contact with each other.
7. The existing legislative framework (the Adoption Act 1976 and the Adoption Agencies Regulations 1983) provides adoption agencies with a wide discretion in respect of the information they keep and how it is disclosed. Such a wide discretion has led to inconsistent practise across adoption agencies.
8. In some cases, adoption agencies have disclosed identifying information without having first consulted the person who would be identified. The current system does not serve the interests of adopted people or their birth relatives well. This may not only be distressing to those concerned but could even place individuals at risk of harm.
8. These Regulations apply to all adoptions that took place before the Adoption and Children Act 2002 comes into force on 30 December 2005. These Regulations provide for a scheme whereby existing adoption agencies and new organisations (registered Adoption Support Agencies (ASAs)) will be able to operate a regulated intermediary service to provide for contact between adopted adults and their birth relatives.
9. Section 98 of the Act provides a new statutory right for birth relatives to request an ASA to trace an adopted adult and establish if contact would be welcome. Similarly an adopted adult could request the same service where he wished to trace a birth relative.
10. Where a registered ASA has agreed to process an application, it will seek to establish the current identity of the subject of the application, trace that person and seek their informed consent to identifying information being passed to the applicant. In order to achieve those aims, the Regulations provide for the disclosure of information between registered ASAs, adoption agencies, the Registrar General and the courts.
11. Demand for regulated intermediary services could be high. There have been approximately 875,000 adoptions in England and Wales since 1926. Many birth relatives see Section 98 as a final chance to establish contact with a child that was relinquished for adoption many years ago.
12. The Regulations place duties and functions on registered Adoption Support Agencies, adoption agencies and the Registrar General. The Regulations set out the circumstances in which those bodies are able (or required) to disclose information to each other. The sharing of information between those bodies is intended to assist an ASA in its task of tracing the subject of an application and seeking their informed consent to the disclosure of identifying information to the applicant.
13. An ASA must be registered with the registration authority under the Care Standards Act 2000 to provide such services. Safeguards will be put in place to prevent the inappropriate disclosure of identifying information. A registered ASA will be prohibited from disclosing any identifying information about a person without having first obtained their informed consent. Disclosure in contravention of the scheme will be a criminal offence.

## **Risk Assessment**

14. Some unregulated intermediary services exist in some parts of the country. However the level of provision is inconsistent and there are no regulated standards or safeguards. Therefore, not implementing these Regulations would mean:

- a key part of the 2002 Act would not be implemented; and
- intermediary services would continue to operate outside a regulatory framework and as a result significant variations of service provision would continue to be the norm.

15. Demand for intermediary services is expected to be significant. Not providing this service would continue to mean a high level of unmet need from those who were separated from birth relatives many years ago.

## **Options**

### Option 1 - Do nothing

16. This is not a valid option, as the Adoption Act 1976 and the Adoption Agencies Regulations 1983 do not make adequate provision in respect of access to information.

### Option 2 - Implement simpler reduced set of Regulations

17. A simpler, skeletal 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.

18. Careful consideration has been given to how to balance the obligations set out in regulations with guidance. This set of Regulations for adoption information and intermediary services relating exclusively to pre-commencement adoptions consists of a set of coherent Regulations. Removing parts of these would open gaps in the regulatory framework and undermine the safeguards that have been put in place.

### Option 3 - Make the Legislation

19. This will ensure that a balanced framework for providing access to sensitive information is put in place.

20. These Regulations provide for a workable scheme to ensure that the new statutory rights to request access to information about adopted adults or their adult relatives can be accommodated in practice. It would not be possible to operate such a scheme without such Regulations.

## **Business sectors affected**

21. The Regulations will affect 22 local authorities and 2 Voluntary Adoption

Agencies (VAAs) in Wales. They will also affect unregulated businesses currently providing such services.

## **Benefits**

22. These Regulations are the most effective way of delivering the findings of the White Paper and the new provisions in the 2002 Act. In relation to pre-commencement adoptions, this option is the only effective way of setting out a scheme providing regulated intermediary services for birth relatives and adopted adults.
23. The Regulations also meet the fundamental principles set out in the Act. Some particular benefits arising from the new Regulations are listed below.

### *New duties and their benefits*

24. *Regulation 3: Agencies that may provide intermediary services.* This provides that under these Regulations intermediary services may only be provided by registered adoption support agencies or adoption agencies
25. *Regulation 4: meaning of "intermediary service" and "intermediary agency".* This defines the services that may be provided under these Regulations, limited to information in respect of adopted persons who have attained the age of 18 and were adopted before the commencement date of 30 December 2005.
26. *Regulation 4(3):* This paragraph excepts from these Regulations those cases where the appropriate adoption agency is only providing information about someone's adoption.
27. *Regulation 5(2): priority for adoptions before 12 November 1975.* In view of the anticipated initially high demand for regulated intermediary services from those who have been waiting to exercise their new rights, this Regulation requires requests in respect of older adopted persons (over 30 years of age) to be given priority. Paragraph (3) provides that applicants and those about whom information is sought must be aged 18 or over.
28. *Regulation 6(1): no obligation to proceed if not appropriate.* This Regulation helps intermediary agencies to avoid wasting precious time and resources inappropriately on futile cases. Paragraph (2) lays out the concerns the agency must consider when deciding whether or not to proceed.
29. *Regulation 6(4):* This paragraph requires agencies to cease processing any application immediately they discover that the subject is under the age of 18.
30. *Regulation 7(1) and (2): consent of subject to disclosure etc.* Of fundamental importance to the spirit of these Regulations, these paragraphs effectively prohibit the release of information in the absence of the subject's informed consent.

31. *Regulation 7(3): subject incapable of giving informed consent.* This gives the agency discretion to release information it considers appropriate having taken into account the considerations listed in Regulation 6(2) in cases where the subject is dead or otherwise unable to give informed consent.
32. *Regulation 7(4): identifying information.* This effectively defines "identifying information" for the purposes of Regulations 7, 9 and 12 as information which, whether taken on its own or together with other information possessed, enables the subject to be identified or traced.
33. *Regulation 8: veto by an adopted person.* This can save a lot of time and trouble in cases where adopted persons can exercise a right to let it be known and have it permanently recorded that they do not wish to be contacted by intermediary agencies in connection with applications for information under these Regulations.
34. *Regulation 8(1)(b)(ii) qualified veto.* This sub-paragraph provides a sophisticated extension of the veto idea - it allows an adopted person to record a partial veto stating that he/she only wishes to be contacted under circumstances or by persons he/she specifies.
35. *Regulation 9: provision of background information where consent refused.* This is important insofar as it prevents the refusal of consent by the subject of an application becoming an absolute bar to release of any information. It allows the intermediary agency to disclose to the applicant any *non-identifying* information it considers appropriate.
36. *Regulation 10: counselling.* This Regulation makes the intermediary agency responsible for making applicants and subjects aware of the availability and possible costs of counselling services, and to offer to secure such services on request.
37. *Regulation 10(6): provision of support and assistance.* Wherever the subject of an application decides not to avail themselves of available counselling services presumably on cost grounds, this Regulation ensures that the agency remains responsible for providing support and assistance to the subject in deciding whether to consent to disclosure.
38. *Regulation 11: procedure on receipt of application.* The steps an intermediary agency must take on receipt of an application for information under these Regulations are detailed. These steps and those detailed in the succeeding Regulations 12 and 13 will be clarified by process flow charts and task lists in supporting guidance.
39. *Regulation 12: contacting the appropriate adoption agency.* More procedural details.
40. *Regulation 13: obtaining information from the Registrar General.* More procedural details.
41. *Regulation 14: Registrar General to comply with request.* This Regulation imposes duties upon the Registrar General to identify either the appropriate adoption agency or the court that made the adoption order in relation to an application for information under these Regulations, section 65(5) of the Act requires the Assembly to seek the approval of the

Registrar General.

42. *Regulation 15: court to comply with request.* In the event that the Registrar General cannot identify the appropriate adoption agency, this regulation requires the court to provide the required information, or if it cannot do so to give written details of searches made and reference to another court if it believes it may hold the information required.
43. *Regulation 16: authorised disclosures.* This is necessary to allow information to be disclosed between officials for various official purposes in connection with these Regulations, under strict conditions of confidentiality.
44. *Regulation 17: offence.* This Regulation makes a breach of confidence in contravention of Regulation 7 a criminal offence, punishable by a fine not exceeding level 5 on the standard scale (currently £5,000).
45. *Regulation 18: fees.* This Regulation enables the intermediary agency to charge the applicant any fee it determines is reasonable, also the subject in respect of counselling services provided. Insofar as Regulation 18(3) provides for a fee of £10 to be paid to the Registrar General by agencies obtaining information under regulation 13, section 65(4) of the Act requires the Assembly to seek the approval of the Chancellor of the Exchequer. Regulation 18(4) also provides for an adoption agency to levy fees in respect of providing information under Regulation 12. Regulation 18(5) prescribes a fee of £20 to be levied by courts providing information under Regulation 15.

#### Quantifying and valuing the benefits

50. The benefits of the proposed changes will not manifest themselves in monetary terms. The value will be seen in providing an improved, more consistent service to adopted people and birth relatives wishing to access information about an adoption.
51. These Regulations will provide for new statutory rights to request access to information by:
  - enabling intermediary agencies to obtain information from an adoption agency or the Registrar General on behalf of the person who is seeking to make contact with their relative; and
  - placing a duty on adoption agencies and the Registrar General to provide information to registered intermediary agencies which may be used to trace people and facilitate contact, provided a person who would be identified has given his consent.

#### **Costs**

52. There is no impact on businesses. The proposals in relation to pre-commencement adoptions would impact principally on registered Adoption Support Agencies with a significantly lesser resource implication for local authorities and voluntary adoption agencies. Both the Registrar General and the family courts involved in making adoptions will also be involved to a limited extent in new work under these Regulations.

53. The main cost implications for providing this new service will be for registered Adoption Support Agencies (ASAs) acting as intermediary agencies in respect of applications to access information and facilitate contact. There will also be resource implications for adoption agencies in assessing and providing information to ASAs to assist them in processing an application - however many already provide much of this information to adopted persons and these Regulations may result in lessening the burden on local authorities. Although intermediary services are already provided by a number of voluntary sector bodies it is very difficult to predict the level of demand that these regulations may generate.
54. There have been around 875,000 adoptions in England and Wales since 1926. When the numbers of birth parents and other relatives are considered, there are likely to be over 2 million people who might have an interest in applying or being the subject of an application under Section 98.
55. We anticipate that there is likely to be an initial surge from those who are waiting for Section 98 to be implemented, and we expect that this will then subside. Some stakeholders have suggested that the initial surge could amount to around 20 – 30,000 applications across England and Wales. This is why it is intended that the scheme will be phased in through two stages to help registered ASAs, adoption agencies, the Registrar General and the courts manage the demand from applicants for this new service. The first stage would apply to all adoptions made between 1926 and 12 November 1975, and the second stage would apply to all adoptions made between 13 November 1975 and the full commencement of the 2002 Act on 30 December 2005.
56. The draft Regulations provide registered Adoption Support Agencies with the power to charge a fee to cover any reasonable costs incurred in processing an application. A fee may be charged to any person seeking an intermediary service from a registered ASA, including an adopted person. Therefore, where an ASA incurs costs in obtaining information from an adoption agency, the Registrar General or the courts it will be able to recover these costs from the applicant. The ASA will also be able to charge a fee in respect of other services – for example providing counselling or securing the provision of counselling where a person wishes to receive it. Therefore, the costs incurred by these new duties will be recoverable.
57. Registered Adoption Support Agencies will shoulder most of the duties set out in these Regulations. Though a local authority adoption agency, the Registrar General, or the court may be required to assist an ASA by disclosing information to it, there will be no cost implications as they may each charge the ASA a fee to cover their costs.
58. Additional funding to take forward the implementation of the Adoption and Children Act 2002 is included in the additional resources provided to local authorities as 'Children First Grant' and in the revenue settlement. The budget for 2004-05 was £30.756m. The 'Children First Grant' budget for 2005-06 is £28.079m and is located in the Health and Social Services

MEG. This, together with the £13.557m transferred from the 'Children First Grant' into the local government revenue settlement in 2005-06, provides a total funding for 2005-06 of £41.636m.

59. Ultimately, the Regulations give the intermediary agencies the power to recover all their costs in processing applications for information and contact by charging reasonable fees to the applicants. The fees currently charged by agencies providing these services vary greatly and a number charge a minimal fee. It is not expected that fees will be prohibitive and agencies currently providing this service will continue to do so.
60. There are no financial implications for the National Health Service or other statutory bodies.

### **Small Firms' Impact Test**

61. There is no impact on small business. The Regulations will be cost neutral, as a registered Adoption Support Agency will charge service users a fee for the provision of a regulated intermediary service. Fees will apply to a birth relative or an adopted adult.

### **Competition Assessment**

62. Intermediary services are currently unregulated. As explained earlier, it is difficult to predict the likely demand for services or the numbers of current unregulated providers of intermediary services that will wish to register to operate. If, as expected, there is an increase in demand for these services, additional providers may enter the market. Competition is unlikely to be adversely affected.

### **Enforcement and Sanctions**

63. Local authorities, VAAs and registered Adoption Support Agencies will be required to comply with these Regulations. Those bodies that intend to provide intermediary services will be required to register as an Adoption Support Agency with the National Assembly.
64. The Regulations include offence provisions to safeguard against the inappropriate disclosure of protected information about a person's adoption. Where a VAA or a registered ASA breached the offence provision, the Regulations provide that the registration authority may instigate proceedings. If guilty of an offence, a registered adoption society or Adoption Support Agency will be liable to a fine not exceeding £5,000 (level 5 on the standard scale).
65. 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 contravention of the Regulations, the offence may be dealt with under the default power provided for the National Assembly for Wales in 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 2002 Act.



66. Local authorities, VAAs and registered ASAs will be required to comply with these Regulations. The Care Standards Act 2000 established the National Care Standards Commission (NCSC) and the Welsh Assembly as the registration authorities. The Assembly, through the Care Standards Inspectorate for Wales is responsible for the inspection and registration of VAAs, and the inspection of local authority adoption services in Wales.
67. In addition, the Adoption and Children Act 2002 provides powers for Ministers to intervene in certain circumstances: the appropriate Minister may make an order containing directions to ensure that the local authority complies with the duty within the period specified in the order. Ministers will receive information about the failure of local authorities through a variety of sources, including the Care Standards Inspectorate Wales (CSIW) and the Social Services Inspectorate Wales (SSIW).
68. These Regulations are to be made several months in advance of coming into force. This should provide ample time for adoption agencies to prepare for the new requirements, and so reduce the risk of the agencies being in breach of new requirements.

## **Consultation**

### With Stakeholders

69. The Welsh Assembly Government has consulted with other key government interests, including the Department for Education and Skills in its development of the Regulations. A package of Regulations was also issued for full public consultation for three months between 1 May 2004 and 31 July 2004. (A list of consultees is attached at Annex 1.) It comprised of three related sets of Regulations and guidance. These were::
- The Draft Access to Information (Pre-Commencement Adoptions) (Wales) Regulations;
  - The Draft Access to Information (Post-Commencement Adoptions) (Wales) Regulations; and
70. The Draft Adopted Children and Adoption Contact Registers Regulations (joint England and Wales, made 24 March, come in to force 30 December 2005).
71. As part of the consultation, two events were held in South and North Wales on 17 May 2004 and 20 May 2004, respectively, at which 78 people attended from Local Authorities, Health Services and the Voluntary Sector.
72. Altogether 16 written responses were received. A summary of consultation responses is attached at Annex 2. Overall, the majority of respondents felt the level of detail provided by the Regulations and guidance was about right.
73. Following analysis of responses received, the draft Regulations were substantially revised

- Substantial additional Regulations in respect of intermediary services
- Title changed
- Provision added giving priority for adoptions before 1976
- Provision added enabling veto by an adopted person
- Provision added enabling provision of background information where consent refused etc.
- Regulations concerning Registrar General expanded and moved from Part 4 to Part 3
- Provision added requiring Court to comply with request.

#### With Subject Committee

74. These Regulations were notified to the Health and Social Services Committee via the list of forthcoming legislation on 14 January 2004 (HSS(2)-01-04 (p.4a), item no. HSS 07 (04)) and ever since, but were not identified for detailed scrutiny.

#### **Summary and Recommendation**

75. These Regulations will provide a fair and consistent statutory framework for the disclosure of information about adoption which recognises the wishes of interests of all involved, placing the adopted person's welfare at the forefront of decision making. The Regulations provide for the first time a properly regulated intermediary service for adopted adults and their birth relatives.

76. Most of the new burdens and costs in the Regulations will fall to registered Adoption Support Agencies who will operate regulated intermediary services in this country for the first time. Registered ASAs will be able to recover their costs by charging fees to service users, including adopted adults. Local authorities and voluntary adoption agencies may choose to operate an intermediary service for former clients but there is no obligation on them to do so. Many will refer clients to an ASA for this service.

## **Annex 1**

### **Consultation Document sent to:**

22 Local Authorities  
22 Local Health Boards  
NHS Trusts  
Childrens Commissioner  
Chief Officer of Voluntary Adoption Agencies, Wales  
British Association for Adoption and Fostering  
After Adoption  
St. David's Society  
Voices from Care  
CAFCASS  
Welsh Local Government Association  
ADSS  
Designated Doctors and Nurses for child protection

### **Respondents in Writing:**

#### **a) Individual**

|                 |                             |
|-----------------|-----------------------------|
| Anonymous       |                             |
| Monica Bradley  | Post-Adoption Counsellor    |
| Joan Price      | St David's Children Society |
| Marja Kempenaar | After Adoption              |
| Roslyn Rees     | Newport City Council        |

#### **b) Official**

Anglesey LHB  
National Public Health Service for Wales  
Flintshire CC  
Momoouthshire CC  
Neath Port Talbot CBC  
Caerphilly CBC  
Torfaen CBC  
Newport City Council  
Voices From Care  
CAFCASS Cymru  
Barnardo's Cymru

## Annex 2

### Summary of Consultation Responses

1. Draft Regulation 5 prohibits a registered ASA from disclosing any identifying information about the subject of an application without having first obtained his/her informed consent. Consultees were asked that if it were not possible to obtain consent because the subject had died or could not be traced, how would these Regulations be construed. The majority of respondents felt this requirement was too restrictive.
2. Asked what their view might be on what may be disclosed by a registered ASA in these circumstances the response was, as much information as possible but the overriding rule should be a consensual model and should ultimately be based upon the response of the contacted person. It was felt that adopted adults were often interested in information such as whether there were siblings, medical information, type of employment, cause and circumstances of death. The fact of death should be shared as a right to know. The refusal of information to adopted adults in such circumstances would be ill advised. Adopted adults have the same rights to such information as birth relatives. The Regulations now state that "if the subject has died or the intermediary agency determines that he or she is incapable of giving informed consent, the intermediary agency may disclose such identifying information about the subject as it considers appropriate".
3. Draft Regulation 14 provides registered ASA's with the discretion to charge a fee to any person in connection with the provision of counselling services. Respondents were asked who should bear the cost where counselling is provided to the subject of an application, and to give their reasoning behind their answer. It was thought illogical to charge the subject; as the process would be initiated by the applicant this person should bear the costs. Applicants should be given clear information about fees from the outset and they should be affordable. Any fees charged by the Registrar General, courts and local authorities should be fixed fees across the country.
4. The 2002 Act recognises that not everybody involved in an adoption wishes to be traced or reunited with a birth relative. Some people will have no wish even to be approached by an Adoption Support Agency. Therefore, section 80 of the Act extends the Adoption Contact Register so that a person can formally register their wish for no contact with a specified person. This is expressed in draft Regulation 8 as registering a veto by an adopted person.
5. Where the subject of an application for information is an adopted person who has registered a veto, respondents were asked what the ASA should do. Four respondents felt that all further work should stop on the application, whilst six felt that informing the applicant would impose a total ban that would prevent the possibility of change, understanding and possible reflection. One suggestion was a low-key letter to the subject,

noting their previous decision but asking if they still wanted this to show on the register.

6. It was thought that if the adopted person has taken the step of informing the Contact Register of their wish not to be contacted/traced – this should be respected, there should be a fundamental right to privacy and a need for the adopted person to be in control. They themselves need to determine when the time is right and if at all.
7. Where the veto has been registered by the adoptive parents, it was felt that circumstances needed to be carefully explored with them. Would there be sufficient and ethical reasons for withholding this enquiry from the adopted adult? Does he/she have mental health difficulties or terminal illness? Is the adopted person aware of his status? There is a need to feel confident that an adoptive parent cannot block important information that may help birth families/adopted adults trace each other.
8. It was noted that there was no question regarding the procedure to follow when a birth parent/relative had recorded a wish for no contact. It was felt an explanatory leaflet might be drafted with specific circumstances when the 'wish for no contact' notification might be waived.
9. To help registered ASA's, adoption agencies and the Registrar General to manage the new demand for services under section 98 of the 2002 Act, it is proposed to implement the scheme in two phases. The first phase would apply to all adoptions made prior to 12 November 1975, and the second phase to all adoptions made between 13 November 1975 and full commencement of the 2002 Act.
10. When asked when the second phase should be introduced, the majority of respondents stated that the second phase introduction should be dependent on the demand for services.
11. At present, practice amongst health professionals in respect of health records of adopted children varies from doing nothing apart from changing the child's name, to sealing the record completely and either not forwarding it to the new area or denying access to it. It was suggested that health records of an adopted person should not be destroyed and should be subject to the same Regulations as adoption agencies i.e. kept for 75 years. Consideration should be given to having a universal policy on a child's health records.
12. It was suggested guidance set for the Independent Review of Determinations Regulations will be helpful in outlining expectations in respect of access to information. More clarity was sought about the retention of Section 56 information in pre-commencement cases, and about the level of decision making conferred on Adoption Support Agencies.
13. Additional coverage was sought regarding the overlap of services available to adopted adults from VAA's & ASA's, where the service from the former was free of charge, but from the latter would have a cost attached.
14. Distinction was requested between "counselling" and "support and advice".

More detail was needed about tracing, and who is acceptable to make contact? What methods should be used or avoided? Also the need for quality control.

## **Response**

15. The Assembly noted the responses to the consultations described above, and in re-drafting the Regulations officials have worked with the Permanence and Adoption Task and Finish Group to address these issues. The Task and Finish Group was set up by the Welsh Assembly in 2003 in order to guide the work of the Assembly in implementing this legislation. It is made up of recognised experts in the field of fostering and adoption taken from both the public and voluntary sectors in Wales.