

**Adoption and Children Act 2002 Draft regulations and guidance**

**BAAF Nuffield Project on Implementation of Adoption and Children Act 2002**

**Access to information (pre-commencement and post-commencement adoptions) and Registrar General's functions**

**Joint Consultation Response from**

**After Adoption**

**BAAF (British Association for Adoption & Fostering)**

**Children's Legal Centre**

**Consortium of Voluntary Adoption Agencies (CVAA)**

**Coram Family**

**Essex County Council**

**NAGALRO**

**NCH**

**Post Adoption Centre**

**The Who Cares? Trust**

**NB This response contains our general comments and needs to be read in conjunction with the attached response on the response form published with the consultation paper.**

For further information please contact

Deborah Cullen

Secretary to the Legal Group

BAAF

Skyline House

200 Union Street

London SE1 0LX

020 7593 2039

email [Deborah.cullen@baaf.org.uk](mailto:Deborah.cullen@baaf.org.uk)

## **Background to the Response**

With the assistance of the Nuffield Foundation, BAAF has been responsible for facilitating a series of meetings which have enabled a wide variety of agencies and organisations to come together and consider the consultation documents. We are pleased that representatives of both the Department for Education and Skills and the Department of Constitutional Affairs have also attended these meetings, and we have welcomed the dialogue that this has made possible. As a result, the contents of this response should not contain any surprises.

### **1. Issues of principle**

#### **(a) Equal treatment for adopted people and birth relatives**

There is considerable concern that the new regime may unduly restrict the information that agencies may share with adopted people. This difficulty arises chiefly from the fact that the legislation endeavours, as the Government has put it, to strike a balance between the rights of adopted people and others affected by the adoption. The procedure to be followed for “post commencement” cases where individuals seek access to “protected information” is essentially the same, *whether the person seeking the information is the adopted adult or a birth relative*.

**Section 57 of the Adoption and Children Act** provides that protected information may only be disclosed “in pursuance of this group of sections” (i.e. sections 57 – 65). Protected information is defined as section 56 information (i.e. the adoption case record set up under Part 3 of the Adoption Agencies Regulations, plus, according to Draft Regulation 3, other material added to the file following the adoption) which is, or includes, identifying information about an adopted person or any other person.

Since, however, the right of an adopted adult to access his or her original birth certificate is maintained, then **any** information given about, at least, the birth mother, will necessarily be about an identified, or identifiable, person. Similar difficulties arise in respect of Regulations governing pre-commencement adoptions even though the statutory provision is not so detailed.

#### **(b) Information to be shared with adopters**

A further difficulty arises in that **section 54 of the Act** provides for Regulations to prescribe the information to be given to prospective adopters. This was welcomed when the Government included this amendment in the Bill. It is clear however from the first package of consultation, as well as from the current one, that it was the Government’s intention, or hope, that information given to the prospective adopters would be non identifying. Not only will this not be the reality in a number of cases, but responses to the

consultation on the first package made it clear that it was inappropriate not to disclose the identity of the birth family to the prospective adopters. Failure to do so could result in the making of an inappropriate placement.

(c) Limitations of disclosure agreements

(i) Post adoption

Although it may be hoped that these will be possible, it is clear that in a number of cases no agreement will be forthcoming. If it is made impossible to give information about the birth parent/family to an adopted person without first seeking that individual's consent, not only will the service provided to an adopted person deteriorate, but distress may also be caused to the person whose consent is sought. The very approach to the parent seeking this agreement may, if the adopted person is only seeking information, not contact, raise hopes, only to dash them, or unnecessary apprehension. In practice, those assisting an adopted person would encourage them to obtain and digest information **before** considering whether or not they wish to make an approach to the birth relative.

(ii) Making placements

Good practice and case law make it clear that agencies placing a child for adoption need to share with the prospective adopters all the relevant information about the child. Without this adopters cannot make an informed decision to agree to the placement, and, once the child is placed, they will be hampered in caring for the child. This information will necessarily include some information about the child's parents and family history.

As pointed out above it is unrealistic and inappropriate for this information to be shared without identifying the birth family, yet on the face of the Act, this appears to fall within the definition of "protected information" and cannot usually be shared without the agreement of the person to whom it relates, unless it is covered by regulations made under section 57(6) of the Act. Section 61 of the Act does permit the agency to disclose information against the wish of the person concerned "if it considers it appropriate to do so".

A parent who is opposed to the agency's plan for adoption may well object to such a decision, and would – it seems - have a right to apply to the independent review panel under regulation 14 of the "Post Commencement" regulations and section 12 of the Act.

Although it may be the intention that sections 61 and 62 should only apply to applications for information where the adoption has already taken place, it is not clear that they are in fact restricted to such circumstances.

We have grave concerns about the possible effect of these provisions. If information cannot be shared with the adopters, or included in a life story book or later life letter, without the agreement of any individual

identified, the consequences are very serious. Either children will be placed without adequate information – with potentially disastrous consequences – or placements will be delayed while negotiations take place with the birth family members or others, or an application is made to the IRM. **It is vital that this is addressed before these provisions are brought into force.**

One possible solution would be to give those who objected to the sharing of information the right to have included in the information passed on their own account of the matters in dispute. Ultimately, however, the agency must be put in a position where it can pass on information necessary for the well being of the child, even in the face of objections. It must be borne in mind that, while most parents will, if the agency explains the reasons, be able to understand the importance for their child of having full background information, some parents will be so angry at the adoption plan, and so determined to do everything possible to prevent the placement, that agreement will not be possible.

(d) Professional expertise and the exercise of discretion

Many agencies in both the statutory and voluntary sectors have been working for many years in this complex field, and much has been learnt both by and from them. It is essential that any guidance issued builds on that experience, and that the regulations enable good practice to continue, while preventing as far as possible any inappropriate disclosures or **unnecessary** secrecy. It needs to be acknowledged, though, that the age profile of many of the most experienced post adoption social workers means that a disproportionate number of them may have retired within a few years of the Act's implementation. It is vital that plans are made for the training of their successors which will take advantage of what can be learnt from those experienced in this work.

## **2 Responses to the Consultation Questions**

Please see the attached response form

### **3. Additional comments on specific points in the draft regulations and guidance**

Post commencement regulations  
Regulation 2

Definition of "birth parent". Unfortunately this is not clear. "Parent" in the Act is restricted to a parent with parental responsibility; is it intended that a father who did not have parental responsibility before the adoption should be included in the definition of "birth parent"?

Regulation 10

It is not logical to restrict the parties to a prescribed agreement to the adopters, the birth parents and the adoption agency. Section 57(5) allows for an agreement for disclosure of protected information relating to **any person**,

so clearly that person must himself or herself be a party to any agreement. It will not always be necessary for the birth parents to be party to an agreement, for example where the former foster carers agree to the sharing of information about themselves.

What is the position where the birth parents do not agree between themselves on the disclosure of information? Can an agreement be made with one birth parent alone? And what of the child? It would be unacceptable for the agency, adopters and birth parents to make an agreement to *disclose information about the child* unless he or she were also a party to the agreement if of sufficient age and understanding.

Regulation 10(2)(b) should include details of any agreement as to the **timing** of any agreed disclosure. A further issue to be addressed is the question of how long the agreement will last. If an agreement is to be relied on perhaps many years later, it is important that the person making it properly understands this. They should of course be given a copy of the agreement, and need also to be given information about what they should do if they wish to modify it at a later date.

#### **4. Role and regulation of adoption support agencies**

We have concerns about the fact that individuals may seek registration as adoption support agencies. It will be essential for the registration authority to obtain confirmation of the individual's continuing suitability and to require that he or she is affiliated to some professional or other umbrella organisation that will assist in appropriate professional development. There are also concerns about agencies that exist only to offer help with tracing, and who will not therefore be required to be registered. Any steps that can lawfully be taken to restrict the activities of these agencies need to be considered, and, if there is no way in which they can be licensed or regulated, they need at least to be given every encouragement to urge their clients to make use of intermediary services offered by an adoption support or adoption agency. The level of fees charged by adoption support agencies could deter people from seeking their help, and those fees will themselves be affected by the costs of registration. It will be in the public interest therefore to keep these as low as possible.

#### **4. Conclusion**

**As will be seen from these comments, we have serious concerns about the proposals. Unless radical changes are made, current good practice in the sharing of information and the help provided for all those seeking information or contact after adoption will be jeopardised. It is also possible that local authorities' ability to place children for adoption will be affected, or that plans will be subject to unacceptable delay. If it is the case (as we think it may be) that amendment is needed to the provisions of the Act itself, this must be pursued as a matter of urgency.**

Deborah Cullen  
BAAF

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