

Draft Electronic Commerce (Adoption and Children Act 2002) Regulations 2005

Consultation Response Form

The closing date for this consultation is: 24
September 2005

Your comments must reach us by that date.

department for

education and skills

creating opportunity, releasing potential, achieving excellence

The information you provide in your response will be subject to the Freedom of Information Act 2000 and Environmental Information Regulations, which allow public access to information held by the Department. This does not necessarily mean that your response can be made available to the public as there are exemptions relating to information provided in confidence and information to which the Data Protection Act 1998 applies. You may request confidentiality by ticking the box provided, but you should note that neither this, nor an automatically-generated e-mail confidentiality statement, will necessarily exclude the public right of access.

Please tick if you want us to keep your response confidential.

Name Deborah Cullen and Denise Barnett
Organisation (if applicable) British Association for Adoption & Fostering
Address: Skyline House
200 Union Street
London SE1 0LX

If your enquiry is related to the policy content of the consultation you can contact Jane Cunliffe on:

Telephone: 020 7273 5246

e-mail: jane.cunliffe@dfes.gsi.gov.uk

If you have a query relating to the consultation process you can contact the Consultation Unit on:

Telephone: 01928 794888

Fax: 01928 794 311

e-mail: consultation.unit@dfes.gsi.gov.uk

Please enter an X in the box below that best describes you as a respondent.

X Adoption agencies

ISP

X Other (please specify)

Please Specify: BAAF is a registered adoption agency, but does not directly place children for adoption. It provides a service to other agencies through its child profiling newspaper '*Be My Parent*'. It is planning to provide a similar service via the internet.

BAAF is the leading UK-wide membership organisation for those involved in adoption, fostering and childcare, it is a key source of information and advice for professionals, carers and the public.

Note

BAAF does not like the use of the word 'advertising' in relation to featuring children who are in need of adoption and it is only used in this response in relation to the wording of the relevant sections of the Adoption and Children Act 2000.

1 Do you agree with the overall approach outlined in the draft regulations?

X Yes

No

Not Sure

Comments: BAAF recognises the difficulty in drafting the regulations in such a way that the intention of the Adoption and Children Act 2000 is retained, while complying with the EU Directive's expectation of freedom to provide information society services from other Member States. The regulations and explanatory notes need to be clear enough to stand alone without recourse to the text of the EU Directive 2000/31/EC. BAAF members have had difficulty in making sense of the Proposed statutory instrument, the Directive's wording and EU jargon. It would be helpful to explain the interpretation of 'derogation' for the proposed regulations.

Regulation 4 appears to clarify the application to UK establishments.

Regulation 5 appears to allow a UK adoption agency to use an ISP from another EU Member State to provide adoption website design, maintenance and ISP services. The redress for any contravention of the agency's instructions or misuse of the supplied data by that incoming ISP would appear difficult to achieve through application of these regulations, unless the threshold for 'grave and serious risk to child welfare' was set at a low level. Then urgent action initiated by the responsible UK authority might be possible. It is not clear whether such a low level would be acceptable as 'stated reasons' by the European Commission. [It would be helpful to state in (8c) that the "Commission' was the European Commission as two of the UK responsible authorities are Commissions (v &vi)].

BAAF's concern is the welfare of the children who might be featured, especially the protection of their dignity, and whether delays in the process of achieving a 'notice and take down' would take weeks or months rather than hours or at worst a few days.

Regulation 5 appears to be aimed at an incoming ISP acting for an individual or agency in another Member State. Derogation would be possible on a case by case basis. Transnational activities can take a long time, particularly where there may be major differences in adoption law in relation to restrictions on arranging adoption and on advertising adoptions, as well as the need to translate requests into another community language. BAAF is also concerned that some of the states who have recently joined the EU or are candidates for membership have been used by internet spammers and virus distributors.

BAAF supports the use of out of court settlements where possible as these are likely to be faster than prosecutions under sections 92/3 and 123/4 of the Adoption Act as proposed within the 4.4 of the DfES notes.

2 Do you agree with our assessment that the regulations maintain the policy intentions of the Adoption and Children Act 2002?

Yes

No

X Not Sure

Comments: Regulations 5 and 6 in respect of incoming providers are not clear and the explanatory notes at the end of the draft regulation do not adequately clarify the intention of the derogate which, in order to follow the meaning of the Adoption and Children Act 2002 would be for the sections 92/93 and 123/124 to be applied to ISPs.

The DfES notes do help but require careful reading to absorb the intent.

BAAF would value the opportunity to comment on any prior assessment of the responsible UK authorities on the core factors they will consider when deliberating on whether an online adoption service or adoption advertising service is contrary to public policy, or would constitute a serious or grave risk of prejudice.

BAAF also notes under Article 16, para 1e) of the Directive that member states and the European Commission shall encourage "the drawing up of codes of conduct regarding the protection of minors and human dignity".

3 Do you agree that the defences allowed in regulations 10 and 11 should be included?

Yes

No

X Not Sure

Comments: The defences replicate those within the EC Directive 2000/31/EC (Articles 12-14) and should cover ISPs that act as a conduit or provide a hosting-only service.

The regulations do not cover ISPs that provide a website design and maintenance service on behalf of adoption agencies, other than by implication that under Article 14 of the EC Directive they do not have knowledge of illegal activity.

BAAF's survey of child profiling websites in the UK, undertaken in July/August 2004, found it can be difficult to disentangle the use of real children's data supplied for featuring children in need of adoption from fictitious examples used to recruit potential adopters. The reuse of this information by the ISP in more than one website and the length of time it was in use were of concern. It is not clear whether such an ISP could use the defence of hosting.

The FF4C survey also identified that a significant proportion of child profiling website users, interested in adoption, view the websites from their workplace. Businesses that provide internet access to their staff may keep copies of all electronic communications and cache websites for internal monitoring purposes (for example those in the financial sector) and therefore longer than the simple transmission as part of a network. This appears to limit their defence of acting as a 'mere conduit'.

In the FF4C survey, seeking views about profiling children needing adoption via the internet, one of the main concerns for both social workers and potential new families was the risk of copying to misuse of children's images/ photographs by paedophiles, including by those with access during storage or transmission. There were concerns that ISP staff could have unsupervised access through their work.

4 Do you have any information that would assist in estimating accurately the benefits and compliance costs for businesses which would potentially be affected by the derogation?

Comments: BAAF does not have any information about the cost to ISPs of derogation. However it is in an excellent position to work with the DfEs in preparing information for its members, including adoption agencies who contract with ISPs to design, maintain or host child-profiling and other adoption related websites.

Other Comments:

The draft statutory instrument for brevity does not reproduce the paragraphs within the Directive to which it refers. It would be helpful to provide an accompanying guide (for example as was done with the Charity's Act) to provide a resource for adoption agencies and others that provided this information. This should include article 2 (h) of the electronic commerce directive, Article 2(a) and the sections mentioned in the Explanatory Note attached to the regulations. Reproducing the relevant sections in full from the Adoption and Children's Act 2000 would also assist ISPs.

Article 5 of the EU Directive 2000/31/EC sets out the general information to be provided to recipients of the internet service. BAAF notes that the ISP should provide set information including the relevant supervisory authority. BAAF would suggest that adoption agencies are also advised that it would be good practice to provide a link to the responsible authorities on their adoption-related websites, together with a hyperlink to any agreed notification process. This would help members of the public understand the implications of sections 92/3 and 123/4 and how to report incoming websites that do not follow these standards and which may put children at risk. It may be appropriate for BAAF to assist by providing agreed web-page content for use by adoption agencies. The FF4C survey last winter found some agencies were interested in receiving standard pages, particularly about legislation, to reduce the duplication in effort if each had to write the material de novo.

It is important that guidance on this issue is made available to those in agencies responsible for featuring children via electronic media, and contracting with ISPs to do this. It needs to be recognised that there is a danger that any document whose title contains the words "E-Commerce" or similar will bypass or be overlooked by adoption managers and be routed straight to IT managers. Perhaps guidance could be issue to agencies n publicity for children generally, and the statutory restrictions on advertising which could cross refer to the provisions under these regulations. It would be helpful for guidance to be offered to adoption agencies on matters that they need to consider specifvina in

contracts with ISPs. It is clear that the process for dealing with abuse could be cumbersome and slow, so that it is important for agencies entering into such contracts to be able to terminate the contract quickly if the ISP acts inappropriately.

We understand that some of these provisions will be relevant to parts of the UK apart from England and it would be helpful for any letter or circular accompanying the final version of the regulations and guidance to spell out clearly the relevance of specific parts to the various parts of the UK.

Thank you for taking the time to let us have your views. We do not intend to acknowledge individual responses unless you place an 'X' in the box below.

Please acknowledge this reply X

Here at the Department for Education and Skills we carry out our research on many different topics and consultations. As your views are valuable to us, would it be alright if we were to contact you again from time to time either for research or to send through consultation documents?

X Yes	<input type="checkbox"/>	No
-------	--------------------------	----

Code of Practice on Consultation

All UK national public consultations are required to conform to the following standards:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

Further information on the Code of Practice can be accessed through the Cabinet Office Website: <http://www.cabinetoffice.gov.uk/regulation/consultation-guidance/content/introduction/index.asp>

Thank you for taking time to respond to this consultation.

Completed questionnaires and other responses should be sent to the address shown below by 24 September 2005

Send by post to: Jane Cunliffe, Department for Education and Skills, Area 4F, Caxton House, 6-12 Tothill Street, London, SW1H 9NA

Send by e-mail to: jane.cunliffe@dfes.gsi.gov.uk