

INFORMATION SHARING INDEX – draft regulations

CONSULTATION RESPONSE

Please contact

Deborah Cullen
Secretary to the Legal Group
Saffron House
6-10 Kirby Street
London EC1N 8TS
Tel: 020 7421 2641
Email: deborah.cullen@baaf.org.uk

December 2006



1. **About BAAF**

The British Association for Adoption & Fostering (BAAF) is pleased to respond to this consultation. BAAF is the leading charity and membership organisation in fostering and adoption in the UK. We:

- promote the highest standards of child-centred policies and services
- speak out on behalf of looked-after children
- influence UK-wide policy and legislation
- provide much-needed information and advice
- promote greater public understanding of adoption and fostering
- support our members in their work

BAAF's main activities are the development, promotion and advocacy of best policy and practice; the provision of advice and information to our members and to the general public; training, consultancy and seminars; child placement services including the publication of our flagship monthly newspaper, *Be My Parent*. We also publish a quarterly professional journal, *Adoption and Fostering*, books and guides for professionals, academics, parents and carers and research studies. The main users of our services are our members comprising local authorities across the UK, voluntary adoption agencies, independent fostering agencies and also individual social work, legal and medical professionals and carers.

2. We would like to draw attention to our response in January 2005 to the earlier consultation on 'sensitive services' and recording concern. We remain of the view expressed there that the establishment of the index is unlikely to achieve the benefits claimed for it, but on the contrary could be damaging to the human rights of children and families and to the trust necessary to enable effective support to be made easily available to families by professionals and statutory and voluntary services.
3. We note that draft statutory guidance to accompany the proposed regulations is to be issued for consultation in 2007. It would have been helpful to have had this draft in conjunction with the draft regulations since there is much detail left unclear in the current consultation paper.
4. We attach to this response the questionnaire form published with the consultation paper but there are issues of concern that are not addressed in the questions.
5. **Scope and Definitions – reg 2**
We note that the definition of 'sensitive services' is 'as agreed by the Government'. However, given the nature of the index, the enormous numbers of people who will be able to access it, and the intention to include information on it without explicit consent of the subject, we consider that other services too should fall within the definition of 'sensitive services'. While it may be helpful and appropriate for – say – a young person's GP to be aware that, for

example, the Youth Offending Team or the police have been in touch with the young person, we do not consider that the disclosure of such information should be automatic. The definition of 'specialist or targeted service' is also extremely wide. On the face of it, it extends to – for example – holiday sports provision, music lessons and any health services beyond those provided by the Primary care trust and Community health trust.

6. **Information to be contained – reg 4**

We note that it is proposed that the Index should contain information relating only to children (and relevant over 18 year olds) who are *ordinarily resident* in England. This seems to create potential additional difficulties. Case law has shown that establishing a person's (and particularly a child's) 'ordinary residence' is by no means simple. Quite apart from the fact that some children may reside with one parent for part of the time in another part of the UK, and the remainder of the time with the other parent in England, there will be a high proportion of especially vulnerable children who may not be considered 'ordinarily resident' in England, although they are physically present here perhaps for some time. These would potentially include asylum seeking children, illegal immigrants, some privately fostered children, children born in prison to mothers awaiting deportation, and children abducted here from abroad by one of their parents. There might well have been arguments as to whether Victoria Climbié (in whose name it appears these proposals are put forward) was not ordinarily resident here.

It is by no means clear from the draft regulations or from the consultation paper what in practice is the proposed relationship between the local authority responsibility for collecting or holding the information relating to children ordinarily resident in its area and the Secretary of State's responsibility for a national database. Draft regulations 6, 8 and 9 relate to access to the Index, ensuring its accuracy, and a complaints procedure, but they do not make clear who will actually be responsible for maintaining the database. The implication of somewhat oblique references in the consultation paper and the partial Regulatory Impact Assessment is that this will be a body to which the Secretary of State will contract the operational duty. Given that, even where it is clearly established that a child is ordinarily resident in the area of one local authority, he or she may well be receiving services from, or in contact with, service providers and agencies in a different local authority area, as much clarity as possible is required.

7. It appears from regulation 5 that in some cases, those who provide the information will place it directly onto the index, and in other cases this will be done indirectly. The wording of this regulation is particularly complex. Reg 5(4) refers to the information being disclosed to the Secretary of State 'at such times as he may specify'. What is envisaged here? In relation to voluntary and other organisations and individuals who are permitted but not required to disclose information to the index, regulation 5(3) appears to **require** them to pass on updating information. While it is right that they should have a duty to correct outdated information previously supplied by them, they should be enabled to do this by simply removing it or requesting its removal, if they take

the view that they do not consider it appropriate on this occasion to add new information.

8. Access to the index

We are concerned at the enormous number of people who will have access to the index under regulation 6. Without sight of the draft guidance it is difficult to comment in detail, but, for example, it is essential to know what criteria are expected to be applied by a chief officer of police in authorising himself (apparently) or another employee to have access. We note also that **any** officer of the British Transport Police Authority (exercising functions in England) may have access without any process for authorisation at all. How much discretion will the guidance encourage local authorities to exercise in restricting the number of people with access, and what criteria will they be expected to follow? There is potentially a huge administrative burden placed on local authorities in making arrangements under this regulation, undertaking CRB checks (which could overwhelm the operation of the CRB), providing training and devising systems for determining whether some individuals should have only partial access to the index under regulation 6(7). The consultation paper suggests that this will require a case by case assessment which will be potentially hugely time consuming. In this context (restricted access) we would mention also our concerns (outlined in more detail at paragraph 15 below) about looked after children, and children placed for adoption or adopted, and the confidentiality of the material on the database.

In more general terms, the large number of people with access to the index creates in our view unacceptable breaches of privacy for individuals. The index will show in relation to each child the names of those with parental responsibility; this would include the name of an ex-spouse where the parent with care – and possibly the child – did not wish this information known. It should not be forgotten that many professionals using the index will themselves be parents too, and some of their professional colleagues may, even perfectly legitimately, obtain access to information about their children which they would not wish to have shared. Would a GP necessarily wish his or her partners in his practice to know that his son was known to the local police or social services? We consider it unrealistic to assume that the monitoring regime proposed in the draft Regulatory Impact Assessment will be sufficient safeguard against undesirable or undesired access. A school administrator may, for example, be entitled to access records relating to all children in the school, including the children of the head teacher, and it would be hard to establish – if such were the case – that he or she had been trawling for such information for improper motives.

9. Retention of Information (reg 7)

- a. We would point out that where people are aged 18 or over no one has parental responsibility for them, so it is not clear whose consent would be sought to retention on the index beyond the age of 18 if the young person is incapable of giving informed consent.
- b. We note from the consultation paper that it is intended that the power to archive material before a child's 18th birthday will be used to safeguard the confidentiality of adopted children, but further consideration about

the way this is to be done will be needed. There are still more complex issues too in relation to children placed for adoption but not yet adopted, where parental responsibility is shared by the prospective adopters, the adoption agency and the birth parents.

10. Accuracy of the index

We appreciate the need for the information to be accurate and kept up to date, but we believe that the size of the task of trying to ensure this has been seriously underestimated. From the draft RIA we see that it is the hope that much information will be automatically processed and uploaded to the index. This means that any quality control would have to be imposed afterwards. Since the responsibility is placed on the local authority for trying to ensure the accuracy of the index as regards the children in their area, they will presumably have to employ large numbers of people to follow up any inconsistencies. While in some cases it may be possible to resolve these by a simple telephone call to the person supplying the information, in many cases more detailed enquiries will be needed. **It must be questioned how good a use it is of resources for staff to be employed attempting to verify incomplete or doubtful information possibly in connection with a child and family who are not remotely at risk or deprived of universal services.** As things stand at present, local authorities have insufficient staff to provide needed support to children in need and their families and this task will place further burdens on them.

11. Overriding of common law principle of confidentiality.

We are unhappy with the blanket provision exempting disclosure to the Index under regulation 5(2) from the common law duty of confidentiality. We believe that it will continue to be good practice for voluntary organisations and individuals who are not compelled to refer information to the index to continue to observe the normal rules of confidentiality, and only to make referrals with the express consent of the children and families concerned.

12. Information to be included in the index (schedule 1)

- a. Paragraph 6 is extremely broad. We note the exception to the definition of a person 'who has care of' a child, but apart from those exceptions the details of a person who has care of the child *at any time* are to be entered. This would appear to include a friend with whom a child spends a weekend, or other situations of short stays which would fall outside the definition of private fostering.
- b. Presumably guidance will make it clear that children cared for by a relative who is not a local authority foster parent, and who would by definition not be a private foster parent, are to be included a 'having the care of' the child. Would this apply also to people with whom a 16 or 17 year old was staying, since such a child would also fall outside the definition of a privately fostered child, unless disabled.
- c. Where a child is in a young offenders' institution how much detail of 'the education being received' will be required? (para 7(2))
- d. As we have mentioned, if the providers of specialist or targeted services are really required to provide information about any child who

is receiving any such service, the index will be overwhelmed to no good purpose.

13. Those required to disclose information (schedule 2)

Further clarification is needed here. Will all these bodies listed be required to disclose such information as they have 'available' relating to any child? To take one example, the police may have information about a child for a range of reasons – as a criminal suspect, as a victim of crime or an accident, as a witness, in connection with child protection or as a member of a household where domestic violence has occurred. Will they be required to share information in all these circumstances?

14. **Schedule 3** Is the reference to section 12(1) in paragraph 38 meant to refer to section 12(8)?

15. Special considerations for adopted children, those placed for adoption and other looked after children

For adopted children, the consultation paper suggests that the archiving of material will be used to provide a wall between the adopted child's new identity and his or her former identity. As we have pointed out in correspondence with the Department, this is by no means a perfect solution. On the one hand, since children placed for adoption do not acquire a new identity until the adoption order is made, the confidentiality of their adoptive placement and the identity of their prospective adopters may be compromised. On the other hand, if a complete separation is made at the time of the adoption the supposed benefits for information sharing may be denied since new practitioners coming into contact with the child would not be aware of the other professionals involved under the child's previous identity.

For looked after children, there may also be security and confidentiality issues in some cases, where local authorities, if there is a care order, have the power not to disclose the child's whereabouts or the identity of his or her carer to birth parents. Since the child's parents retain parental responsibility, there we would seek clarification of the safeguards proposed to prevent inadvertent disclosure to parents or other family members of information that they should not be given. It is by no means clear how the administrator of the database will be able to be aware of such risks, or indeed, have the authority to deny parents access to the information held about their own children on the Index.