

Draft regulations and guidance on arranging adoptions and assessing prospective adopters

JOINT RESPONSE SUBMITTED BY BAAF ON BEHALF OF:

**BAAF (British Association for Adoption and Fostering)
Children's Legal Centre
Family Rights Group
The Grandparents Association
National Children's Bureau**

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. In addition to those organisations which have formally asked to be associated with this joint response, a number of others represented at the meetings have indicated that they share many of the views expressed, differing only on a few specific issues.

1. Overall view of the guidance (Q23)

- 1.1 We recognise the fact that this is a draft document and look forward to significant changes.
As far as the structure of the Guidance is concerned, it would be more helpful for the guidance to the regulations to focus on certain points
- Where clarification is thought necessary
 - Where explanation would be helpful (e.g. rather than refer to the definition of specified offence (Guidance 4.15) it would be more useful actually to provide a list of relevant offences
 - Where cross referencing would be helpful (e.g. as in part 5.21 where the guidance draws attention to Part 8 of the regulations)
 - Where attention is drawn to more detailed practice guidance – or possibly other resources – available either as an appendix or elsewhere.
- 1.2 There is certainly a place for more detailed good practice guidance on a number of issues, such as the guidance on assessment of adopters in Annex A. In some parts of the current draft the Guidance moves towards this good practice guidance (e.g. on counselling the child, parts 3.13 – 3.25) where in other places the guidance does little other than recite or paraphrase the regulation (e.g. paragraph 6.17)
- 1.3 It is also important that the guidance helps practitioners to understand the links between the requirements of these regulations and other regulations or

guidance by which they are bound –e.g. regulations and minimum standards for inspection purposes, the National Adoption Standards, relevant Children Act regulations (particularly the Arrangements for Placement regulations and the Review regulations), court rules (not only adoption rules but also those governing care proceedings) and protocols. The context of compliance with the ECHR and the Human Rights Act also needs to be underlined.

- 1.4 There is a danger that practitioners will feel overwhelmed by the volume of regulations and guidance. To reduce this risk it is essential to focus on the essential clarification and cross-referencing (as suggested in 1.1 above) with manuals of good practice guidance – and, of course, access to training – being available in support. In terms of layout, the most helpful approach would probably be to reproduce the relevant regulation in a box on the page of guidance which discusses this, thus avoiding the need to paraphrase the regulation itself. This would also have the advantage of reducing the text considerably. Consideration should be given to ways of making the guidance available electronically, for example on a CD-Rom.
- 1.5 The guidance should be issued under section 7 Local Authority Social Services Act 1970, including the guidance on assessment of adopters. There is a danger that it will be disregarded if it is not.

2. Omissions

- 2.1 In light of our plea for a more streamlined version of the guidance it may seem perverse to draw attention to areas where more guidance is needed! Nevertheless, there are areas where additional help is needed (although in some instances this may not need to be in the body of the guidance) and others where important points (which can be briefly made) are apparently overlooked.

- 2.2 Planning for adoption while care proceedings are in train

There is virtually no reference in the guidance to the particular issues that arise when adoption is being considered for a child who is the subject of care proceedings. There is mention of contingency planning (page 27) and of the importance of discussions with local courts in this context, but nothing that helps to clarify the respective roles of all concerned – agency, panel, court, child, guardian, legal advisers, and independent reviewing officers. This is a complex and often controversial area. Already under the current law it generates uncertainty and disagreements. The issues are likely to be highlighted when under the new system a higher proportion of cases involve care proceedings and placement order applications running in tandem. Local authorities are often under time pressures to be in a position to file their care plans in accordance with the court timetable, but they are also required to ensure that parents have a proper opportunity to participate in the decision making process – all this possibly at a time when the parents do not even accept that the threshold conditions under s 31 are satisfied. The most helpful way forward would probably be for joint guidance to be issued by the DfES, the President of the Family Division and/or the new Family Justice Council

when this is established. This should also clarify that reports to court should be available to the panel. We note that draft guidance on care planning has now been included in the consultation package on special guardianship. Any guidance on this issue that may be contained in different volumes of the final version of the guidance will need to be cross-referenced, and, of course, internally consistent.

2.3 Disclosure of Confidential Information

The guidance makes some attempt to address areas of difficulty here (e.g. para 2.46, 3.65 – 3.70) but it is not sufficient to leave it to each individual agency, or Primary Care Trust's legal and medical advisers to assist in working out their agency's own procedures.

Examples abound of conflicting, confusing or even misleading advice, and a lead from central Government, with input from the relevant professional bodies, is urgently needed. The draft guidance itself is questionable (para 3.61) in implying that the consent of a parent to disclosure of the child's health information will be needed "while they retain parental responsibility" even, apparently if the L.A. itself has p.r. under a care order.

2.4 Birth parents and other birth family members

There are a number of points in both the regulations and the guidance where the rights and needs of birth parents, and other relatives, are insufficiently acknowledged. (It is perhaps significant that none of the consultation questions in the Feedback Form are directly concerned with birth family members). Specific points that need to be addressed are:

- Local authorities ensuring that there is ready access to pre-birth counselling for parents considering adoption. (guidance)
- Reconsideration of use of the term "counselling" in the context of the work that is done with parents (and, indeed, with others). What is needed, to different degrees in different circumstances, is both information and advice about the implications of the various options, social casework, and also therapeutic counselling.
- More guidance about the role of the dedicated independent support worker for parents once adoption is identified as the plan. (paragraph 3.28 to be expanded) Guidance could also highlight the value of providing support to birth parents through contact with other birth parents with similar experiences.
- Ensuring that parents have an opportunity to express their views directly (in writing if necessary) to the panel and/or that they have an opportunity to comment on information given about themselves by the agency in the report to panel. (Birth parents have told us that, even where the social worker has intended that this opportunity will be given, lack of time and pressure of work have meant that in practice this has not been done. This is not a task that should be regarded as merely optional.)
- With appropriate support, a contribution by parents to the matching considerations and the drawing up of the placement plan (it is hard to see how the panel can fulfil its duty under s. 1 (4) (f) of the Act if the views of the parents and relatives with regard to the proposed placement and

contact are not ascertained as far as possible.) Schedule 5, it is true, includes the wishes and feelings of parents in information to be given to prospective adopters, but the implication of this is that it is the general view ascertained at the time adoption was being considered rather than views specifically about the proposed placement. The parents will, after all, still have parental responsibility, and their views cannot be ignored.

- A role for parents in the reviews under regulation 31. Again, since they have parental responsibility, it is not sufficient merely to hope that the agency will see fit to include them under “any other person the agency considers relevant” under regulation 31 (b) (c). The guidance suggests that these views could be sought “where the agency considers it appropriate to the particular case”; this should be rephrased to indicate that their views should be sought *unless* in this particular case it is inappropriate (e.g. if the parent has expressed a wish for no further involvement). Anything less would risk a breach of the parents’ rights under Article 8 of the ECHR. (In this regard it is worth pointing out that paragraphs 3.32 and 3.33 of the guidance are relevant here. The parents’ change of view may well come about gradually after a decision has been reached about adoption. If they are treated with consideration while placement plans are made and reviews undertaken, and are given information about the adopters, and wherever possible a chance to meet them, their former opposition to the plan may be reduced. Those who feel they have been ignored and deprived of information about their child are more likely to feel – justifiably – resentful and angry.)
- Advocacy
In order for the parents to be able to participate properly in the evaluation and information gathering process, they need to have access to independent advocacy from the earliest possible stage. This should be highlighted in the guidance.

2.5 Reports to the Panel

2.5.1 **Child’s view**

The guidance repeatedly emphasises the importance of ascertaining the feelings of the child and communicating these to the panel. We welcome the recommendation in the guidance for the panel to record its reasons if its recommendation is contrary to the child’s expressed views. Nevertheless, in submitting to the panel information on the child’s expressed wishes and feelings, it is important that the agency make it clear how and by whom these views were ascertained. The panel needs to be able to satisfy itself that this work has been undertaken with appropriate care and expertise, and the results (which may well be equivocal) properly recorded.

2.5.2 **Parents views** – see the remarks above on parental participation generally

2.5.3 **Views of wider family and other relevant people**

In order for the agency and panel to comply with the requirements of section 1 (4) (f) it will be necessary for them to ascertain the views of the relatives and all those whose relationship with the child the agency considers relevant. This means that where no such views with regard to the plans for the child, including contact, are included in the report to the panel, the agency should explain why. It will not be helpful to the child if a recommendation has to be

deferred because information that should be included has not been supplied. In some cases it will be appropriate for relatives to be given the opportunity to make their views known to the panel in a direct way, in writing or otherwise. (It might be helpful for the panel's recommendation to be recorded in such a way as to show how it has addressed each head of the checklist in section 1 (4) (f).)

Regulation 16 (1) (g) requires the report to panel to include the views of the person with whom the child is living. It is likely also to be relevant to ascertain and report on the views of the person with whom the child was formerly living (this could be included in the guidance).

2.5.4 Contact

The explicit references to consideration of contact are welcome. One aspect to be explored is the willingness of prospective adopters and birth parents to meet each other (and the support needed for all parties to make this meeting helpful). Birth parents whom we have consulted have said that they would welcome such a meeting provided adequate support is given. Such a meeting is of course likely to take place at a crucial and extremely sensitive time for the parents when they are beginning the painful process of adjusting to a new role. However it can in itself help them to begin to make this adjustment.

3 Placement of infants under 6 weeks old

3.1 We have grave concerns about these (admittedly probably rare) cases. In cases where there is no parental consent, we cannot envisage that a child would be placed for adoption, although it will be in some cases be appropriate to use concurrent planning schemes. It could be helpful, and in the interests of children, for consideration to be given to extension of concurrent planning schemes to provide foster/adoptive placements for very young infants where parents appear to be seeking adoption. While it is likely to be damaging to the infant's development to have to undergo an additional move (from a short term foster placement to adoptive home) it may apply inappropriate pressure on parents if a baby is placed *for adoption* within a few weeks of the birth.

3.2 The Act does of course permit agencies to place infants for adoption under the age of six weeks without consent to placement under section 19. Any consent given by the mother within six weeks of the birth is "ineffective" (section 51 (3)). If it is ineffective, there can be no point in obtaining her consent in writing (regulation 18 (6)). Such a document would be valueless, but it runs the risk of confusing the mother into believing that she has made a decision from which she cannot withdraw. ***"Informal consent" is a dangerous and misleading concept.***

3.3 We would propose a different approach. In those cases where a mother has been able to receive counselling during pregnancy and appears even after the birth to be firm in her desire to have the baby adopted, the following steps would take place

- (a) The child would need to be accommodated (under section 20 or section 59 of the Children Act). In the absence of a care order, the agreement of a person with parental responsibility would be required under the Arrangement for Placement of Children (General) Regulations 1991 to the placement plan. The

placement agreement would indicate – among other things – that the plan was for adoption. The parent should indicate agreement to this plan, rather than “informal consent to placement”.

- (b) A report would – in the usual way – be prepared for panel under regulation 16. This would include of course a statement of the wishes and feelings of the parent(s). They would have an opportunity to see the report and to object to any inaccuracies, as well as making their own submissions if they wished.
- (c) Probably at the same time a report under section 27 would be prepared (although there are possibly timescale problems here). Among other things the counselling to be provided under regulation 27 (2) (b) to prospective adopters would need to underline the fact that the parents retained the right to change the plan; the prospective adopters are the people who need to give informed consent to the risk they are undertaking.

3.4 In making these comments we are drawing on a wide range of views, including those of mothers who consented to adoption in the past. The point to make forcibly is that for a mother signing a consent, the distinction between a formal consent witnessed by a CAFCASS officer, and a so-called informal written consent witnessed only by the social worker is unlikely to be clear. The bar on giving formal consent to adoption or placement within six weeks after birth is included in the statute for good reason: to protect mothers at a time of vulnerability. It undermines this principle to provide for the giving of informal consent.

3.5 Fathers are strictly speaking in a different position. The Act does not make their consent within six weeks of birth ineffective. Nevertheless, in those few cases of this kind where the father has parental responsibility we consider it will be good practice to allow the father this time to consider before being asked for formal consent.

3.6 There are particular difficulties that may arise if a placement of an infant under 6 weeks has been made, but when the CAFCASS officer attempts to contact the mother 6 weeks after the birth to obtain her consent she either cannot be found or, while not requesting the return of the child, avoids signing the formal consent. It would appear that prospective adopters may be legally permitted to issue an adoption application ten weeks after placement, but guidance is needed, among other things, on the position of the agency in such an eventuality.

3.7 Because of the particular issues involved it may be more helpful to provide for the infant placements in a separate regulation, or separate part of the regulations.

4 Timescales

4.1 Target or benchmark timescales can if used appropriately be a valuable tool. In the context of adoption they need to be applied sparingly and sensitively. Although delay will often be harmful to a child, it must be borne in mind that thorough and painstaking work early on may avoid pitfalls – and often further work and delays – later. The decision to place a child for adoption is such a serious one that there can be no short cuts. As is acknowledged within the draft guidance, tasks such as counselling and preparation of adopters need to proceed at

the pace that is right for the individual. If too much store is set by meeting target timescales pressure may be imposed inappropriately to rush a task that should not be rushed. This applies also where mistakes have been made or insufficient work done in the past. A panel may feel reluctant to refer the case back to the agency for further work, conscious of the delay this will cause to the child, but to fail to do so risks compounding the problems and ultimately does a disservice to children and families. The target time scale of two months from the review proposing an adoption plan to the report to panel is a tight one to meet at the best of times. Whether it is achievable will depend to a large extent on how thorough the work has been with the child and family up to that point. Where aspects of the child's assessment have not been properly completed, for example, it will be necessary for any gaps to be filled before the case can be taken to panel.

- 4.2 There is, nevertheless, *provided they do not dominate practice*, a place for having some benchmark timescales, with a requirement for the agency to monitor and record the time taken, and reasons for delays. It must be clearly understood that these may well be *good* reasons.

5 Preparation and Assessment of Prospective Adopters

- 5.1 In addition to the responses on the response form we would make some further points.

5.2 “Counselling out” – referral to panel.

While there is agreement that it is of no benefit to anyone, as well as being a waste of resources, to continue with an assessment when it appears to the agency that there is no likelihood of approval, there does need to be a means by which the applicant(s) can have their case referred to panel, with the possibility then for an application to the IRM. This may mean that the regulations should specifically allow for a partial report to go to panel. Panel's recommendation would be either to continue assessment or that the applicant(s) should not be approved.

- 5.3 **Assessment.** Schedule 4, part 1 should include a heading on “personal and family history”.

- 5.4 Further debate will obviously follow on the approach to assessment. We question whether the use of the assessment framework is the most appropriate method.

5.5 References and checks.

- i) Further guidance is needed on the minimum enquiries to be made when applicants have lived overseas, for example to the relevant embassies and/or child protection agencies.
- ii) It would be helpful if the response by a local authority to an enquiry were in a standard form and included an indication of whether a similar enquiry had previously been made by another adoption or fostering agency.

6 Reviews

6.1 Timing

The third review after placement is to take place no later than six months after the second review – i.e. normally 10 months after placement. Experience has shown that it is often in about the sixth or seventh month after placement that problems

emerge. There is an argument therefore for bringing forward the timing of the third review.

6.2 Independent Reviewing Officers

These draft regulations make no mention of the role of an independent reviewing officer, as introduced in section 118 of the Act for all looked after children. Presumably this omission will be rectified. It is vitally important that the reviews of children when the agency is authorised to place for adoption are subject to proper independent scrutiny. We would envisage that if necessary a referral to CAFCASS could be made with a view to an application on behalf of the child to revoke a placement order.

6.3 Additional guidance on the conduct of reviews would be helpful, particularly in respect of children placed for adoption. While they are, of course, looked after children, the prospective adopters will have parental responsibility and their position must be acknowledged and respected. It is important that independent reviewing officers receive training specifically on the issues relevant to these reviews. The guidance – if not the regulations – should draw attention to the need to consider when would be the appropriate time to issue the application for adoption, and make arrangements for the agency to provide support to the adopters in doing this.

7 Parental responsibility

There is a need for further guidance here. The draft does little more than paraphrase the regulations. It would be helpful to provide some case illustrations and examples of the aspects of exercise of parental responsibility that will have to be considered – choice of school, consent to medical treatment, and the controversial area of religious ceremonies.

8 Placement orders

8.1 Additional guidance will be needed on applications for placement orders. While these do not themselves fall within these regulations, local authorities will need to be clear about their responsibilities, and about questions of timing. There are references in Annex D and, for example 6.27 – 6.28, but they give rise to further questions.

8.2 Paragraphs 3.54 and 3.55 suggest that it may be possible and appropriate to apply for a placement order if there are concerns about the views of a father without parental responsibility, or a mother seeks to impose a condition limiting the agency's ability to seek the father's views. No mention is made of the need to satisfy the threshold condition under section 31 of the Children Act, and this may be problematic in such cases.

8.3 Once a decision has been reached under regulation 18 that a child should be placed for adoption, the local authority will have a duty to apply for a placement order if there is no consent under section 19 of the Act. The guidance on regulation 18 gives no suggestions as to how long it may be appropriate to allow for exploration of whether section 19 consent is forthcoming. While in some

cases it will be abundantly clear that a placement order is needed, in others it will be uncertain. It must be right to give any parent who may be willing to consent the opportunity to do so, as provided for in regulation 18 (4), but the parent may need time to consider – and may wish to give consent to placement with identified prospective adopters (for example where the child is living with foster carers who wish to adopt) and this would require the consideration and decision under Part 5 of the regulations to have taken place.

9 Miscellaneous comments and queries

9.1 “In principle” recommendations

The guidance in paragraph 2.27 touches on a very difficult area. With regard to recommendations about a child (under both regulations 17 and 28) it is clearly right that the panel cannot make conditional or “in principle” recommendations. Clearly it either has the information it needs, or it has not. If it has not, it cannot make a recommendation. It may nevertheless be helpful for it to give some initial advice about concurrent or contingency planning – although care will be needed to ensure that birth parents are not confused by such a referral. In the case of assessment and approval or review of prospective adopters, however, such a referral is more problematic. Agencies and adopters need clarity about the circumstances in which a decision not to continue with assessment amounts to a decision not to approve, giving rise to the rights provided for applicants under regulations 23 (6) and (7) and 25. Paragraph A.59 of Annex A points out that a prospective adopter whose case has not been referred to panel will have no access to the IRM. The question arises whether those applicants who do not agree with the agency’s decision not to proceed should have access to more than the agency’s own complaints procedure. See also our comments at paragraph 5.2 above. Prioritisation of certain applicants, as recommended in paragraph A.20, is also a difficult area.

9.2 CRB checks

There are issues about the CRB’s restrictions on sharing “soft” information with a person who is checked, and also about sharing information in inter-agency placements. Regulation 22 requires the agency to notify the applicant if ruled out by regulation 21 (2), but the guidance (A.33) suggests that applicants may be ruled out at this stage for a conviction outside the list of “specified offences”.

9.3 It is not clear whether it is intended that there should continue to be flexibility about which agency’s panel considers a match in inter-agency cases; Regulation 28 (4) conflicts with the guidance in paragraph 5.23.

9.4 Medical advisers for voluntary adoption agencies

Paragraph 2.45 recommends that the agency make arrangements for appointment of its medical adviser with a local Primary Care Trust’s designated doctor for looked after children. It would be helpful if PCTs were expected to collaborate with voluntary agencies as well as local authorities over this.

9.5 Case records and use of Integrated Children’s System

There is potential for confusion here, with a combination of paper and electronic records. The last sentence of paragraph 3.8 of the guidance is unclear.

9.6 Agency adviser to panel

It would be helpful to expand the guidance on this role. It is necessary to monitor not only the panel's performance, but also the quality of the material provided by the agency to the panel. Should the same person be responsible for both aspects?

9.7 Schedule 1 Part 1. The information about the child should include any court orders, not only whether there is a care order.

9.8 Placement breakdowns

Where a placement ends, whether at the request of the prospective adopters, or because of an agency decision, there will of course be a need for intensive support for both the child and the adopters. It might be appropriate to include in the review regulations a requirement to hold a review within a specified time after a placement has ended under section 35. There is a further issue over the timing of reviews since such a child appears to fall within neither regulation 31 (1) nor 31 (2). There should also be a requirement to notify birth parents that the placement has ended. (Their right to apply for revocation of a placement order is dependent on this, and they do still have parental responsibility.) Guidance should emphasise the importance of holding disruption meetings, independently chaired, when a placement has broken down.

9.9 The term "counselling" does not adequately describe the tasks that need to be undertaken at various stages of the adoption process. As well as the conveying of information, and explaining the implications of possible options, there is a need for what can best be described as "social case work" with, particularly, the child, but also with the adults involved.

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On behalf of BAAF's Nuffield project

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