

EXPLANATORY MEMORANDUM TO
THE ADOPTIONS WITH A FOREIGN ELEMENT REGULATIONS 2005

2005 No.392

1. This explanatory memorandum has been prepared by the Department for Education and Skills and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

- 2.1 The Adoptions with a Foreign Element Regulations 2005 (the AFE Regulations) set out safeguards and procedures for intercountry adoption. The AFE Regulations replace the current regulations, which are to be repealed when the Adoption and Children Act 2002 (the 2002 Act) is fully implemented.

- 2.2 The AFE Regulations need to be read with the Adoption Agencies Regulations 2005. The Adoption Agencies Regulations make provision relating to the exercise by adoption agencies of their functions in relation to adoption. In particular, the Adoption Agencies Regulations set out the procedure to be followed in respect of the assessment of prospective adopters including obtaining information and various reports.

3. **Matters of special interest to the Select Committee the Merits of Instruments and the Joint Committee on Statutory Instruments**

- 3.1 The AFE Regulations are made under powers conferred by sections 83(4)-(6), 84(3) and (6), 140(7)-(8), 142(4)-(5) of the 2002 Act¹ and sections 1(1) and (3)-(5) of the Adoption (Intercountry Aspects) Act 1999 (the 1999 Act). This is the first time that the powers in sections 83 and 84 have been used.

- 3.2 The repeal of the regulations, transitional and consequential provisions will be addressed by another statutory instrument dealing with these issues arising from the implementation of the 2002 Act. It is intended that a further statutory instrument will provide for the criteria for overseas adoptions to be prescribed under section 87 of the 2002 Act and a procedure for the adoption of children not in local authority care in England and Wales by persons resident abroad under the Convention.

¹ These sections were brought into force by the Adoption and Children Act 2002 (Commencement No.7) Order 2004 on 7 December 2004 for the purposes of making regulations (SI 2004/3203).

4. Legislative Background

- 4.1 The 2002 Act modernises entirely the existing legal framework for domestic and intercountry adoption. This statutory instrument is one of a series of statutory instruments to be laid to implement the core provisions of the 2002 Act. The legislative and policy background for the core provisions of the 2002 Act are set out in the overarching explanatory memorandum on the implementation of the 2002 Act that was laid before Parliament on 2 March 2005. A copy of this memorandum is attached.
- 4.2 The 2002 Act replaces the 1976 Act and also incorporates most of the provisions of the 1999 Act. Intercountry adoption in England and Wales is currently regulated by two separate sets of regulations (the 2003 regulations):
- The Intercountry Adoption (Hague Convention) Regulations 2003² made under the 1999 Act which, together with the corresponding legislation in Scotland and Northern Ireland, enabled the UK to ratify the Convention on 1 June 2003; and
 - The Adoption (Bringing Children into the United Kingdom) Regulations 2003³ made under the transitional provisions in the 2002 Act which amended the 1976 Act, which apply to adoptions from non-Hague Convention countries or Convention contracting States that have acceded to the Convention but the UK has raised an objection.
- 4.3 The 2003 regulations will be repealed when the 2002 Act is fully implemented and replaced by the AFE Regulations. The AFE Regulations provide for adoptions under the Convention and non-Convention adoptions and apply to bringing children into the UK and to removing children from the UK for the purposes of adoption. The AFE Regulations apply to these different cases as follows:
- Part 2, Chapter 1 sets out the requirements and conditions that must be met by prospective adopters and the functions conferred on local authorities where a child is brought into the UK in circumstances where section 83 of the 2002 Act applies;
 - Part 2, Chapter 2 applies where a person or couple wishes to remove a child for the purposes of adoption under the law of a country or territory outside the British Islands under section 85 of the 2002 Act, other than under the Convention;
 - Part 3, Chapter 1 applies where a person or couple habitually resident in the British Islands wish to adopt a child who is habitually resident in a Convention country outside the British Islands;

² SI 2003/118.

³ SI 2003/1173.

- Part 3, Chapter 2 applies where a person or couple habitually resident in a Convention country outside the British Islands wish to adopt a child who is habitually resident in the British Islands; and
- Part 3, Chapter 3 deals with miscellaneous provisions, modifications and offences relating to certain provisions in Part 3, Chapter 1.

5. Extent

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 Not applicable.

7. Policy background

7.1 International law is clear that children are entitled to grow up as part of a loving family which can meet their needs during childhood and beyond. For some children (both abroad and in the UK) intercountry adoption may be their only opportunity to belong to a permanent family. The needs of these children may be met through intercountry adoption where suitable domestic care cannot be found for them in their country of origin. Interests contrary to the child's welfare and fundamental rights, as set out in international law, should not influence intercountry adoption. There can be no right to adopt a child.

7.2 The AFE Regulations underpin a number of policy objectives. These are to:

- establish safeguards to ensure intercountry adoption takes place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;
- ensure prospective intercountry adopters have been assessed and approved in accordance with the appropriate procedures; and
- enable the UK to continue to meet its duties under international law.

7.3 The AFE Regulations were issued for public consultation for over three months. A two-day workshop and a number of single day focus groups to look in depth at key issues with representative groups and adoption agencies also formed part of the consultation process. The consultation helped the Department to identify problems and develop improvements to the Regulations and accompanying guidance. Most respondents to the written consultation (62%) agreed that the AFE Regulations effectively replace the current regulations on intercountry adoption within the new context of the 2002 Act. Only 16% of respondents disagreed, and 22% had no view. The key issue identified in the consultation were the need to secure the well being of children brought into the UK for adoption and the AFE Regulations have been developed to strengthen this provision.

7.4 The Department for Education and Skills has also consulted with the National Assembly for Wales, the Department for Constitutional Affairs and the Home Office in its development of the Regulations.

8. Impact

8.1 A Regulatory Impact Assessment (RIA) is attached to this memorandum. The RIA also explains the impact on the public sector.

9. Contact

9.1 Tim Gardner at the Department for Education and Skills Tel: 020 7273 1129 or e-mail: tim.gardner@dfes.gov.uk can answer any queries regarding the instrument.

EXPLANATORY MEMORANDUM ON THE IMPLEMENTATION OF THE ADOPTION AND CHILDREN ACT 2002

1. This explanatory memorandum has been prepared by the Department for Education and Skills and is submitted voluntarily.

Description

2. This is an overarching explanatory memorandum which explains the context of the Adoption and Children Act 2002⁴ (“the 2002 Act”), and relates to a series of Statutory Instruments, as set out in paragraphs 14 and 15, which are intended to be made and laid during 2005 to implement the 2002 Act.

Matters of special interest to the Joint Committee on Statutory Instruments

3. Three of these Statutory Instruments will be subject to the affirmative resolution procedure. These are The Restriction on the Preparation of Adoption Reports Regulations 2005, The Suitability of Adopters Regulations 2005 and an Order to be made under section 142 of the 2002 Act to amend the statutory adoption pay provisions as a consequence of unmarried couples being able to apply to adopt jointly.

Legislative background

4. Following a review of adoption law carried out by the Department of Health between 1991 and 1993, a draft Adoption Bill was published in 1996. The Bill was generally well received, but was never introduced into Parliament. In February 2000, the Prime Minister announced that he would lead a thorough review of adoption policy. He commissioned the Performance and Innovation Unit (PIU) to carry out a review of adoption and make recommendations to the Government for future action. The PIU review reported in July 2000 and made a number of recommendations to Government, including several related to changes in adoption legislation.
5. In December 2000, the Department of Health published a White Paper *Adoption: a new approach*, which took on board many of the PIU recommendations. The Government made a commitment to legislate in 2001 to ‘overhaul and modernise the legal framework for adoption.’⁵

⁴ 2002 c.38.

⁵ *Adoption: a new approach*, White Paper, December 2000, p.25.

6. The Adoption and Children Bill was subsequently introduced in 2001, and received Royal Assent in November 2002. The 2002 Act:

- aligns adoption law with the relevant provisions of the Children Act 1989⁶ to ensure that the child's welfare is the paramount consideration in all decisions relating to adoption;
- places a duty on local authorities to maintain an adoption service, including arrangements for the provision of adoption support services;
- provides a new right to an assessment of needs for adoption support services for adoptive families and others;
- sets out a new regulatory structure for adoption support agencies (requiring them to be registered under the Care Standards Act 2000⁷);
- enables the appropriate Minister to establish an independent review mechanism in relation to qualifying determinations made by an adoption agency;
- makes provision for the process of adoption including new measures for placement for adoption with consent and placement orders;
- provides for adoption orders to be made in favour of single people, married couples and, for the first time, unmarried couples (amended by the Civil Partnership Act);⁸
- provides for a new framework designed to ensure a more consistent approach by adoption agencies in respect of access to information held about adoptions which take place after the 2002 Act comes into force;
- provides for a new regulatory framework within which intermediary agencies (registered adoption support agencies or adoption agencies) will be able to assist adopted adults to obtain information about their adoption and facilitate contact between them and their adult birth relatives, where the person was adopted before the 2002 Act came into force;
- provides additional restrictions on bringing a child into the UK in connection with adoption;
- provides for restrictions on arranging adoptions and advertising children for adoption other than through adoption agencies;
- makes provision enabling the Secretary of State to establish a statutory Adoption and Children Act Register to suggest matches between children waiting to be adopted and approve prospective adopters; and
- amends the Children Act 1989 to introduce a new special guardianship order, intended to provide permanence for children for whom adoption is not appropriate.

7. The 2002 Act provides the framework for the new approach to adoption, which is to be complemented by secondary legislation.

⁶ 1989 c.41.

⁷ 2000 c.14.

⁸ The definition of couple in section 144(4) of the 2002 Act has been amended by the Civil Partnership Act 2004 (2004 c.33) to include a civil partnership.

Early implementation

8. In accordance with commitments made by Ministers during the passage of the 2002 Act through Parliament, the 2002 Act included provisions to amend the existing Adoption Act 1976⁹ to enable important elements of the new adoption framework to be implemented in advance of the full implementation of the 2002 Act (see Schedule 4 of the 2002 Act).
9. In June 2003 the Intercountry Adoption (Hague Convention) Regulations 2003¹⁰ and Adoption (Bringing Children into the United Kingdom) Regulations 2003¹¹ came into force. These Regulations put in place the necessary provisions to give effect to the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption concluded at the Hague on the 29 May 1993 (“the Hague Convention”) and provide an increased level of protection to children coming into the UK from other countries.
10. The first phase of the adoption support services framework was implemented on 30 October 2003 when the Adoption Support Services (Local Authorities) (England) Regulations 2003¹² came into force. These Regulations give adoptive families an entitlement to receive an assessment of their adoption support needs and give birth relatives an entitlement to receive an assessment in relation to support for contact arrangements. They also require local authorities to make arrangements for the provision of a range of adoption support services, including financial support, and to appoint an adoption support services adviser to act as a first port of call for enquiries and signpost families to services.
11. The independent review mechanism in respect of qualifying determinations made by adoption agencies, where they consider that a prospective adopter is not suitable to be an adoptive parent and does not propose to approve him as suitable to be an adoptive parent was introduced in April 2004 when the Independent Review of Determinations (Adoption) Regulations 2004¹³ came into force.
12. As the early implementation relates to the current Adoption Act 1976 scheme for adoption, similar provision in secondary legislation needs to be made in the context of the 2002 Act scheme for adoption in respect of those elements of the Act which have been implemented early.
13. The annex summarises the position regarding implementation of amendments to the Children Act 1989 made by the 2002 Act which relate to areas other than adoption and special guardianship.

⁹ 1976 c.36.

¹⁰ SI 2003/118.

¹¹ SI 2003/1173.

¹² SI 2003/1348.

¹³ SI 2004/190 as corrected, and as amended by SI 2004/1081 and 2004/1868.

Implementation

14. The statutory instruments necessary to implement the 2002 Act are to be made in two main stages. The first series of statutory instruments will be as follows, and each will be accompanied by an individual explanatory memorandum setting out the detail of the SI, and a regulatory impact assessment:
- **The Adoption Agencies Regulations 2005** will provide for the duties agencies will have in relation to arranging adoptions under the 2002 Act, including agency arrangements for adoption work, considering whether a child should be placed for adoption, approval of prospective adopters and whether a particular child should be placed with prospective adopters.
 - **The Adoptions with a Foreign Element Regulations 2005** will provide additional requirements for, and set out additional procedures in relation to, the adoption of children from abroad by British residents and the adoption of children in England and Wales by persons resident abroad. This includes adoptions falling within the scope of the Hague Convention and non-Convention adoptions.
 - **The Suitability of Adopters Regulations 2005 (affirmative)** will prescribe the matters which must be taken into account by an adoption agency in preparing reports on and determining the suitability of a person wishing to adopt a child.
 - **The Restriction on the Preparation of Adoption Reports Regulations 2005 (affirmative)** will specify who may prepare reports in specified circumstances in connection with adoption.
 - **The Adoption Support Services Regulations 2005** will build on the framework established through the 2003 Regulations, widening the pool of people entitled to an assessment of their need for adoption support services and extending the list of adoption support services that local authorities are required to maintain to explicitly include services to assist with disruption. The 2005 Regulations also further refine the process for assessment of need and for the planning and review of service provision as well as further clarifying the role of the adoption support services adviser.
 - **The Adoption Support Agencies Regulations 2005** together with accompanying national minimum standards issued under section 23 of the Care Standards Act 2000 will govern the management and general operation of adoption support agencies, including making provision for their registration.
 - **The Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005** will apply to adoptions made after the 2002 Act came into force and will provide adoption agencies with a framework within which they are required to consider certain issues, such as the adopted person's welfare, before making a determination as to whether to disclose sensitive identifying information which would identify persons affected by an adoption.

- **The Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005** will enable registered adoption support agencies and adoption agencies to operate a regulated intermediary service so that adults adopted before the 2002 Act comes into force can obtain information about their adoption and contact between adopted adults and their adult birth relatives can be facilitated where appropriate.
- **The Adopted Children and Adoption Contact Registers Regulations 2005** will prescribe the form of entry in the Adopted Children Register, requirements etc. in relation to registrable foreign adoptions, information for the purposes of the Adoption Contact Register and for obtaining information from the registers and information about adopted persons and their relatives for the purposes of the Adoption Contact Register.
- **The Special Guardianship Regulations 2005** will prescribe the list of special guardianship support services which local authorities are required to maintain, the process for assessing special guardianship support needs, and requirements in respect of the planning, delivery and review of special guardianship support services. The Regulations will also prescribe the matters that local authorities are required to include in the report that the court must receive before it can make a special guardianship order.

15.

The second series of statutory instruments will be as follows:

- **The Independent Review of Determinations (Adoption) Regulations 2005** will provide for the continued operation of an independent review mechanism in respect of qualifying determinations made by adoption agencies under the new scheme for adoption.
- **Adoption Agencies (Prescribed Fees) (England) Regulations 2005** will provide that fees may be charged by adoption agencies for their services in certain circumstances, for example, fees local authorities may charge for the preparation and assessment of prospective adopters who wish to adopt a child who is not resident in this country.
- Regulations made under section 108 of the 2002 Act regarding corresponding provisions in the Channel Islands and the Isle of Man. This will allow us to make the new adoption system work with the adoption system in the Channel Islands and the Isle of Man, for example in terms of mutual recognition of orders.
- Regulations made under section 87 of the 2002 Act prescribing the requirements that ought to be met by an adoption for it to be an “overseas adoption”. An overseas adoption is an adoption of a description specified in an order (to be made under section 87), being a description of an adoption effected under the law of any country or territory outside the British Islands. The status of children adopted under an overseas adoption is recognised by virtue of section 66 of the 2002 Act.
- **Non-Agency Adoptions Regulations 2005** will prescribe the local authority responsible for assessing the suitability of prospective adopters and providing a report to the court where the child is already living with the applicants and they give notice of their intention to apply for an adoption order, such as foster carers or relatives of the child and require the local authority to carry out CRB checks in respect of the applicants.

- Regulations making provision for any necessary consequential and transitional provisions.
- Regulations under section 2(2) of the European Communities Act 1972 to ensure the 2002 Act is consistent with Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services.
- An order (affirmative) made under section 142 of the 2002 Act will amend the statutory adoption pay provisions as a consequence of unmarried couples being able to apply to adopt jointly.

16. The intention is that all of the SIs set out in paragraphs 14 and 15 above will come into force on 30 December 2005.

17. As noted above, the White Paper recommended the establishment of a statutory adoption register – the Adoption and Children Act Register – for which provision was made in the 2002 Act. This provision is not being implemented at present. Ministers have decided to continue with a non-statutory register for the next three years. This will give a stronger evidence base on which to assess the effectiveness of a non-statutory register and the desirability of moving to a statutory register.

Extent

18. Regulations will apply either in England only or in England and Wales. Each individual explanatory memorandum will set out the application of each statutory instrument.

Policy background

19. The total number of adoption orders made in England has declined from 5,657 in the year ending 31 December 2001, to 4,479 in 2003. At the same time, the number of adoptions in respect of looked after children in England has increased from 3,400 in the year ending 31 March 2002, to 3,700 in 2004. The number of applications to adopt a child from overseas processed by the DfES has remained relatively steady at around 300 each year (330 in year ending 31 December 2004).

20. The PIU review of adoption in 2000 and the White Paper *Adoption: a new approach* identified some key problems which meant the needs of looked after children were not consistently being met, including:

- wide variation by councils in the use and practice of adoption;
- to the detriment of children, the adoption process was widely seen as prone to delay, with clear concerns over the consistency, quality and clarity of the process;
- a lack of consistency in the law;
- the review mechanism for those applying to adopt was seen as unfair and not impartial;
- little support was available for adopters; and
- delays in the court processes over adoption.

21. Implementation of the 2002 Act will fulfil the Government's intention to reform adoption law and implement the proposals in the 2000 White Paper which require legislation. The overriding aim of improving the adoption service and promoting greater use of adoption will be furthered by the implementation of the SIs.

Public Consultation

22. There has been extensive public consultation upon the adoption procedures set out in the regulations. The explanatory memorandum to accompany each statutory instrument will give further details of the public consultations.
23. Five consultation packages on draft regulations and draft guidance to be made under the 2002 Act were published in 2003 and 2004. A further consultation document will be issued in early 2005 to cover the key draft SIs in the second series set out in paragraph 15 above which introduce the final changes. The numbers of respondents for each package are listed below. The overall number of written responses was 422.
- Arranging Adoptions and Assessing Prospective Adopters – (115 responses)
 - Adoption Reports and Adoptions with a Foreign Element – (50 responses)
 - Access to Information (including the Registrar General's functions) – (124 responses)
 - Adoption Support and Adoption Support Agencies (75 responses)
 - Care Planning and Special Guardianship (58 responses)
24. The responses to these documents together with the information gathered at 14 regional consultation events and 15 focus groups and numerous other meetings held earlier in the year have informed the development of the Regulations and implementation arrangements. The explanatory memorandum in relation to the individual SIs will provide more detail.

Impact

25. Each Statutory Instrument will have a regulatory impact assessment attached.

Contact

26. Helen Steele, Head of Adoption, 4th Floor, Caxton House, Tothill Street, London, SW1H 9NA.

Annex: Implementation of amendments to the Children Act 1989 that are not adoption or special guardianship related

The Government has already implemented the following key provisions of the Adoption and Children Act 2002:

- On Royal Assent (7 November 2002): provision in respect of local authorities' power to provide accommodation for children in need under section 17 of the Children Act 1989.
- 1 December 2003: parental responsibility for unmarried fathers who jointly register the birth of their child with the mother.
- 1 April 2004: advocacy services for children and young people. Amendment and widening of the application of, the procedure for making representations under that Act and to impose a duty on local authorities to make arrangements for the provision of advocacy services to children or young people making or intending to make representations.
- 27 September 2004: Independent Reviewing Officers, responsible for chairing statutory reviews of all looked after children.
- 31 January 2005: Amendment to the definition of 'harm' in the 1989 Act to make clear that harm includes any impairment of the child's health or development as a result of witnessing the ill treatment of another person.

The remaining provisions will be implemented as follows:

- 30 December 2005: Amendment enabling the acquisition of parental responsibility by a step-parent either by agreement of both parents or a court order.
- 30 December 2005: Amendment enabling local authority foster carers to seek leave of the court to apply for an order under section 8 of the 1989 Act (including a residence order) if the child has been living with them for one year, rather than the current three years.
- 30 December 2005: Amendment enabling courts to make residence orders that have effect until the child reaches the age of 18.
- DfES have consulted on the draft Regulations required to implement the provisions in respect of inquiries by local authorities into representations. Ministers are considering the timetable for implementation in the light of the responses to that consultation.

FULL REGULATORY IMPACT ASSESSMENT (RIA) FOR THE ADOPTIONS WITH A FOREIGN ELEMENT REGULATIONS 2005

TITLE OF PROPOSAL

The Adoptions with a Foreign Element Regulations 2005

PURPOSE AND INTENDED EFFECT OF MEASURE

Objective

The Government intends to overhaul the current legal framework for domestic and intercountry adoption by bringing the Adoption and Children Act 2002 (the 2002 Act) fully into force on 30 November 2005. When the 2002 Act is implemented, the current restrictions on intercountry adoption will be repealed, and will need to be replaced in full to allow existing safeguards and procedures to continue. The new arrangements for intercountry adoption will need to take account of the new legal framework provided by the 2002 Act, and will impact on local authorities and the six Voluntary Adoption Agencies (VAAs) that are currently registered with the Commission for Social Care Inspection (CSCI) to work on intercountry adoption.

The objective of the Adoptions with a Foreign Element Regulations (the (2005) Regulations) is to:

- provide statutory safeguards and procedures to protect the interests of all children involved in intercountry adoption; and,
- enable the UK to continue to meet its duties under international law.

The 2005 Regulations are intended to replace the current requirements for intercountry adoption and take account of the new legal framework provided by the 2002 Act and feedback received during the public consultation.

Background

Children are entitled to grow up as part of a loving family which can meet their needs during childhood and beyond. Although there are children in the UK who are looking for adoptive parents, there are also children in other countries for whom intercountry adoption may be their only opportunity to belong to a permanent family. Intercountry adoption is a service for meeting the needs of those children where suitable care cannot be found for them in their own country, and must not be influenced by interests contrary to the child's welfare and fundamental rights. There can be no right to adopt a child.

International Law

The United Kingdom is party to a number of international agreements, declarations, resolutions and Conventions including:

- the United Nations Declaration on Social Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placements and Adoption nationally and internationally, adopted by General Assembly Resolution 41/85 of 3 December 1983;

- the United Nations Convention on the Rights of the Child 1989;
- the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 (the Hague Convention);
- the European Parliament's Resolution on improving the law and co-operation between the Member States on the adoption of minors of 12 December 1996; and,
- Recommendation 1443(2000) *International adoption: respecting children's rights* adopted by the Parliamentary Assembly of the Council of Europe on 26 January 2000.

These set out the following principles for intercountry adoption, amongst others:

- children who cannot live with their birth parents should be given the opportunity to live as part of a permanent family in their country of birth, maintaining links to their ethnic origin, cultural background, religion and language and, if possible, their wider family;
- intercountry adoption may be considered as an alternative means of providing a permanent family for a child who cannot be cared for in a suitable manner in his or her own country. Intercountry adoption should never be considered as the first or only option for a child;
- intercountry adoption should only take place where it is in the best interests of the child, and with respect for his or her fundamental rights; and,
- safeguards and standards equivalent to those which apply in domestic adoption should be applied in intercountry adoption to protect the welfare of the child. Profit should not be made from the process.

Domestic Legislation

From 1 June 2003, intercountry adoption in England and Wales has been regulated by two separate sets of regulations (the 2003 regulations):

- The Intercountry Adoption (Hague Convention) Regulations 2003¹⁴, together with the corresponding legislation in Scotland and Northern Ireland, enabled the UK to ratify the Hague Convention on 1 June 2003. The Hague Convention aims to safeguard the best interests of the child, and establish a system of co-operation between contracting States to prevent the abduction of, sale of, or traffic in, children. The Regulations were made under the Adoption (Intercountry Aspects) Act 1999 (the 1999 Act); and,
- The Adoption (Bringing Children into the United Kingdom) Regulations 2003¹⁵ regulate adoptions from countries that have not yet ratified or acceded to the Hague Convention and contracting States that have acceded to the Hague Convention but the UK has raised an objection. The Regulations were made under section 56A of the Adoption Act 1976 (the 1976 Act) as amended by the 2002 Act.

The 2003 regulations require anyone habitually resident in England or Wales wishing

¹⁴ SI 2003/118.

¹⁵ SI 2003/1173.

to adopt a child living in another country to:

- be assessed and approved as suitable to adopt by a local authority or VAA registered to work on intercountry adoption, regardless of the nature of their relationship to the child or the country they wish to adopt from; and
- except where a Convention adoption or overseas adoption has been obtained, notify their local authority of their intention to adopt or not to give the child a home within 14 days of returning to the UK.

Before any child living in the UK can be adopted by a person living outside the British Islands, the High Court must make an order for the transfer of parental responsibility for the child to the prospective adopters.

The 2002 Act

The 2002 Act replaces the 1976 Act and reforms the existing legal framework for domestic and intercountry adoption in England and Wales. The 2002 Act incorporates most of the provisions of the 1999 Act, which provides a statutory basis for the regulation of intercountry adoption, enabled the UK to ratify the Hague Convention and introduces sanctions against those who bring children into the UK without following the proper procedures.

Risk assessment

When the 2002 Act is implemented, the current restrictions on intercountry adoption will be repealed, and will need to be replaced in full to allow existing safeguards and procedures to continue. Recent focus on intercountry adoption has underlined the importance of appropriate assessment and approval processes to protect the welfare of children. The assessment of the suitability of prospective adopters includes police checks, medical reports and an assessment of their home. While an appropriate assessment cannot guarantee a child's safety, it makes it much less likely that a child will be adopted by unsuitable people. Without the checks being carried out a child is at risk of being put in a damaging situation and at risk of abuse.

In 2001-02 there were a total of 6,200 adoptions registered in the UK. In comparison, the number of children adopted from another country is relatively low. The Government does not collect statistics on the number of intercountry adoptions. However, the Department for Education and Skills holds information on the number of intercountry adoption applications received per year. Although not all applications will result in the adoption of a child, and some may result in the adoption of more than one child, it is likely that around 300 children are brought into the UK because of intercountry adoption per calendar year.

The numbers of applications received per year are represented in the table below:

Calendar Year	1999	2000	2001	2002	2003	2004
Number of Applications	94	351	326	285	302	329

Some 64 countries have now ratified or acceded to the Hague Convention and six other countries have signed it. By continuing to enforce the Hague Convention, the UK enables UK residents wishing to adopt from another country the opportunity to

use procedures that protect them and the children involved. Without continuing to enforce the Hague Convention, many of the countries with the best adoption systems will be closed to prospective intercountry adopters in the UK.

OPTIONS

Option 1

Do nothing and rely on current arrangements. The Adoption Act 1976 is an outdated piece of legislation. The Adoption and Children Act 2002 has already been passed, and now needs to be implemented through regulations if Parliament's intentions are to be delivered.

Option 2

Bring forward regulations for England and Wales under the new legal framework of the 2002 Act to replace the arrangements currently in place, and incorporate the feedback received from the public consultation.

Option 3

Legislate to significantly extend the arrangements currently in place by making the assessment of prospective intercountry adopters much more stringent, and to require adopters to meet substantial additional requirements.

COSTS AND BENEFITS

Business sectors affected

Local authorities and the six not-for-profit VAAs currently registered with the CSCI to work on intercountry adoption.

Benefits

Option 1

No perceived benefits. This option would not deliver the intentions of Parliament and would not therefore meet the objective.

Option 2

This option would allow the UK to meet its duties under international law without placing significant additional burdens on prospective intercountry adopters, local authorities or VAAs that are registered to work on intercountry adoption. This option is the most effective way of meeting the objective and ensuring that children adopted from abroad are protected.

Option 3

This option would allow the UK to meet its international law obligations and introduce further checks and safeguards that would place significant additional burdens on prospective intercountry adopters, local authorities and VAAs registered to work on intercountry adoption.

Quantifying and valuing the benefits

The benefits of preventing children from being adopted from another country by individuals who have not been through the proper assessment and approval procedures, and preventing children from being abducted and bought and sold in other countries, will largely not manifest themselves in monetary terms. The value will be seen in improving the safety and welfare of children who are adopted from another country, and in reducing the pressure on child protection teams in local authorities that might otherwise have to take action. It is not possible to quantify the expected reduction in the workload of child protection teams.

Costs

There is no impact on business. The 2005 Regulations would impact solely on local authorities and the six not-for-profit VAAs currently registered with the CSCI to work on intercountry adoption work. The present position whereby local authorities and VAAs may (and do) charge prospective intercountry adopters for reasonable fees will remain unchanged. We understand that at present the average fees charged are in the region of £4,000 per assessment.

Option 1

None.

Option 2

None. This option would allow the existing arrangements to continue together with some new or amended requirements to take account of feedback from the implementation of the 2003 regulations and/or the new legal framework provided by the 2002 Act. This includes:

- a new condition that the prospective adopter must meet with the adoption agency to discuss the report on the child sent by the relevant foreign authority in the child's country of origin. This is currently the practice of many adoption agencies and is a requirement of the 2003 regulations for all applications under the Hague Convention. The extension of this requirement to non-Hague Convention applications is unlikely to result in an increase of more than one meeting per adoption agency per year;
- where a prospective adopter has not applied for an adoption order within two years of giving notice of their intention to adopt the child, a new requirement for the local authority to undertake a review. This applies only where the child has been brought into the UK without a recognised adoption¹⁶. Typically, less than half of the applications received by the DfES per year are to adopt from countries where adoptions are not recognised in the UK. It is therefore anticipated that the number of prospective adopters in this situation will be very low;
- where a child has been brought into the UK without a recognised adoption, a new requirement for the local authority to visit the child and the prospective adopter to provide advice and information. Local authorities currently have a duty to visit children in these circumstances under section 33 of the 1976 Act, although this will

¹⁶ Convention adoptions and overseas adoptions are recognised in the UK as having the same effect as an adoption order made in the UK courts.

be repealed when the 2002 Act is implemented in full; and,

- the requirements that must be met before an order under section 84 of the 2002 Act¹⁷ (giving parental responsibility prior to adoption abroad) can be made by the High Court. A recent Court of Appeal judgment¹⁸ highlighted the need for a transparent procedure for local authorities to follow when placing children living in the UK for adoption with a prospective adopter living outside the UK. The requirements prescribed in the 2005 Regulations include that the relevant parts of the Adoption Agencies Regulations 2005 have been followed and that the prospective adopter has been assessed and approved by the relevant foreign authority.

Option 3

VAAAs currently assess peoples' suitability to be intercountry adopters, provide information on intercountry adoption, and help individuals to check their eligibility to adopt from particular countries. They do not have to accept any extra requests for assessment and approval unless they wish to do so. More stringent assessments of prospective intercountry adopters would result in an increase in the work required by local authorities and VAAAs. If significant additional requirements were to be placed on prospective intercountry adopters, this would also result in an increased burden on local authorities and VAAAs. Local authorities and VAAAs may have difficulty in identifying the necessary extra capacity to deal with these additional obligations. This option is therefore unsuitable.

Costs to government

Option 2 may impose some additional costs on local authorities in visiting children after prospective intercountry adopters give notice of their intention to adopt. However, the 2005 Regulations effectively replicate the duties currently placed on local authorities by the 1976 Act. The new duty to carry out a review after two years if an application has not been made to adopt the child is unlikely to be required in more than a handful of cases, so these costs will be negligible.

SMALL FIRMS' IMPACT TEST

There is no impact on small businesses. Due to the vulnerability of those affected by adoption, and that international law seeks to protect the rights of children, and reduce the incidence of child trafficking, the primary legislation prevents any organisation making arrangements for adoption from making a profit. To be approved as a VAA, the organisation must be a not-for-profit incorporated body.

However, we have considered the impact on smaller VAAAs, and anticipate that there will not be any impact beyond that seen as the result of the changes brought into force from 1 June 2003.

COMPETITION ASSESSMENT

We have considered the market for VAAAs, and found that there are six VAAAs in

¹⁷ Section 84 provides that the High Court may make an order for the transfer of parental responsibility for a child to prospective adopters who are not domiciled or habitually resident in England or Wales but who intend to adopt the child outside the British Islands.

¹⁸ Re B (children) (Adoption: Removal from Jurisdiction) [2004] EWCA Civ 515

England and Wales who are registered with the CSCI to make arrangements for intercountry adoption independently at present, in addition to the 172 local authorities with social services responsibilities. As costs associated with the 2005 Regulations are low, and VAAs may (and do) charge prospective adopters reasonable expenses for providing an intercountry adoption service, competition is unlikely to be affected.

ENFORCEMENT AND SANCTIONS

Prospective intercountry adopters will be required to comply with the 2005 Regulations. The maximum penalty for non-compliance is 12 months imprisonment and/or an unlimited fine upon conviction. Suspected offences will be investigated by the Police and prosecuted by the Crown Prosecution Service. Due to the very small numbers of cases involved this will have a minimal impact in terms of costs.

The Department for Education and Skills and the National Assembly for Wales will monitor the number of Convention adoptions, overseas adoptions and external adoptions, and the numbers of prosecutions. Local authorities and VAAs registered to work on intercountry adoption will be inspected by the CSCI.

CONSULTATION

The draft Regulations, accompanying guidance and a partial Regulatory Impact Assessment were issued for a full public consultation on 31 January 2004. The consultation period lasted for three months, in accordance with the Cabinet Office code of practice, and finished on 30 April 2004. The Department for Education and Skills also ran a two day consultation event on the draft Regulations which was mainly targeted at local authorities. There were 50 written responses to the consultation from local authorities, representative groups, VAAs, adoptive parents, social workers and others. Approximately 50% of responses received were from local authorities.

The majority of those who responded to the written consultation considered that the current regulations on intercountry adoption have been implemented successfully. Most respondents (62%) agreed that the draft Regulations effectively replicate the current regulations on intercountry adoption within the new context of the 2002 Act. Only 16% of respondents disagreed, and 22% had no view. Nearly 80% of respondents considered that the level of detail provided by the draft Regulations is about right. Only 3% of respondents believed that the Regulations are too detailed.

Most respondents (94%) considered that the requirement for the local authority to visit where a child has been brought into the UK without a recognised adoption were about right or too few. Feedback received at consultation meetings was that these visits should be more frequent in the first month and mirror the requirement for domestic adoptive placements. We have reflected these comments in the draft Regulations.

The majority of those who responded to the written consultation considered that the assessment of the impact, benefits and costs of the draft Regulations was about right.

The Department for Education and Skills, and the National Assembly for Wales, have also consulted with other key Government interests including the Department for Constitutional Affairs, the Home Office, UK Visas, CAFCASS and the Ministry of Defence during the development of the 2005 Regulations.

SUMMARY AND RECOMMENDATION

We recommend Option 2. The Government has indicated its intention to bring the 2002 Act fully into force. To do this, and continue to meet the UK's obligations under international law, the 2005 Regulations replace the current intercountry adoption arrangements, but take account of the change to the legal context. This will not impose significant extra obligations on local authorities or VAAs.

MINISTERIAL DECLARATION

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Lord Filkin

24th February 2005

..... Date.....

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