

REGULATORY APPRAISAL

SOCIAL CARE, WALES

CHILDREN AND YOUNG PERSONS, WALES

THE INDEPENDENT REVIEW OF DETERMINATIONS (ADOPTION) (WALES) REGULATIONS 2006

Background

1. The Adoption and Children Act 2002 led to the overhaul of adoption legislation in England and Wales. The Act created the legal power to establish an independent review of determinations (IRD). These powers are devolved to the National Assembly for Wales in respect of the establishment and operation of the IRD in Wales. The provisions impact on all local authorities and voluntary adoption agencies that are registered to provide adoption services.
2. The Independent Review of Determinations (Adoption) (Wales) Regulations 2005 set out the legislative framework for operation of the IRD in Wales. Those Regulations deal with the review of qualifying determinations concerning the suitability of prospective adopters. Prospective adopters who have been notified by their adoption agency that it is minded not to approve them as suitable to be adoptive parents can apply for a review through the 2005 IRD Regulations. They may either make representations to the adoption agency or request the IRD panel to review their case and make a fresh recommendation to the adoption agency. The 2005 Regulations also provide for those approved prospective adopters who have not had children placed with them, but who have been informed that their approval is to be revoked, to ask for an independent review of that determination.

Purpose and intended effect of the measure

3. These Regulations replace the Independent Review of Determinations (Adoption) (Wales) Regulations 2005, which established an independent review mechanism (IRM) to review qualifying determinations made by adoption agencies:
 - not to approve prospective adopters as suitable to become adoptive parents, or
 - to revoke approval to those prospective adopters who are no longer considered suitable as adoptive parents and who have not had adoptive children placed with them.
4. These Regulations extend the qualifying determinations to cover disclosure of information decisions as follows:
 - not proceeding with an application for disclosure of protected information;
 - disclosing information about a person when that person has withheld consent; and
 - not disclosing information about a person where that person has given consent to the disclosure of information.
5. The provision for an independent review mechanism under the Adoption and Children Act 2002 is being implemented in two phases. The first phase was the introduction of The Independent Review of Determinations (Adoption) (Wales) Regulations 2005, which were implemented on 30 December 2005 and only

covered those determinations concerning the suitability of prospective adopters. These proposed Regulations cover the second phase of the independent review mechanism and extend the qualifying determinations to include disclosure of information.

6. Where an adoption agency is minded not to approve applicants as suitable to become adoptive parents, the prospective adoptive parents may apply for a review of that determination either by the adoption agency making the determination (by virtue of the Adoption Agencies (Wales) Regulations 2005) or by the independent review panel.
7. The independent review panel cannot overturn a determination of an adoption agency. It can review the information presented to the adoption agency and request further information. It can then make a recommendation to the adoption agency about the adoption agency's decision. The adoption agency must take into account the review panel's recommendation when making its final decision.

Risk Assessment

8. The Adoption and Children Act 2002 sections 56 to 65 include provisions to ensure that those individuals who were affected by adoption, e.g. adopted persons, birth family and siblings, could apply for information about the specific adoption that affected them. The resulting Regulations differentiate between adoptions made prior to commencement of the Act and those made after commencement, i.e. 30 December 2005. It is the post commencement adoptions that are affected by disclosure determinations and, therefore, IRD.
9. The Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005 provides for adoption agencies to keep information about each adoption and to provide services for persons seeking information about an adoption. The adoption agencies will need to consider applications for disclosure of information about an adoption on a case by case basis and using their discretion and having obtained in-house legal advice where necessary.
10. However, an adoption agency may respond to a disclosure application by:
 - not proceeding with an application for disclosure of protected information (protected information is defined in section 57(3) of the Adoption and Children Act 2002);
 - disclosing information about a person when that person has withheld consent; or
 - not disclosing information about a person where that person has given consent to the disclosure of information.
11. These decisions are very sensitive bearing in mind the requirements of the Data Protection Act 1998. There may also be circumstances when passing on information could put an individual at risk.
12. Following disclosure determinations by an adoption agency an applicant, or any other individual affected by any proposed disclosure (or non-disclosure), may wish to seek a review either by the adoption agency's own review mechanism or through IRD.

13. These new Regulations provide the mechanism by which IRD can consider disclosure determinations. If the regulations are not made and disclosure determinations were not subject to IRD, objections may be raised because of:
- a) a lack of openness in agency procedures as was intended under the Adoption and Children Act 2002; and
 - b) a lack of parity with England where such procedures have been introduced.

Options

Option 1: Do Nothing

14. This is not an option because the Adoption and Children Act 2002 has already been approved by Parliament, received Royal Assent and been brought into force. The stated intention of the UK Government, and the Welsh Assembly Government, was to ensure that agency determinations around both adopter approvals and access to information would be subject to a review mechanism. England has already introduced Regulations to cover both types of determination and Wales needs to make similar provision if the original policy intent is to be met.

Option 2: Make the Legislation

15. These Regulations will ensure that a proper process will be in place to deal, in a fair and transparent manner, with applications from individuals seeking review of disclosure determinations.

Benefits

16. These Regulations set out the legislative framework for operation of the IRD in Wales. The benefits are primarily to do with meeting the expectations of the applicants seeking a review of a qualifying determination that they will receive a fair and transparent service from their adoption agency through the establishment of the IRD.

Costs

17. The proposals would impact solely on local authorities and registered Voluntary Adoption Agencies (VAAs) that currently provide intermediary services. Regulation 15 allows that the 'panel may make an order for the payment by the adoption agency by which the qualifying determination reviewed was made of such costs as the panel considers reasonable.' Consequently, the Assembly is able to reclaim any costs arising from administering the panel.
18. However, there is no proposal at present to seek cost recovery. Under existing arrangements the costs of any review are intended to be met from the Child Protection and Placements Team Budget. For 2006-2007 provision has been made for costs of £10,000 and this will be monitored in light of how many reviews are carried out in future years. To date there have been no applications for review and no costs have been incurred.
19. Should Ministers decide at some stage in the future to seek recovery of costs, there may be a minimal additional cost to agencies as a result of these Regulations. Should a prospective adopter request the Independent Review of Determinations panel to review his adoption agency's determination, and the

adoption agency is required to meet the cost of the review, the cost to the agency is estimated to be in the region of £1,500. Given that we have so far received no applications for a review, we expect the number of applications to be very low and the actual financial impact on any single local authority or voluntary adoption agency is unlikely to be more than £2,000 - 3,000 per annum and the vast majority will have no costs to bear.

20. Any costs should also be set against the costs agencies currently incur as a result of having to consider further representations made by applicants. These costs include adoption agency staff time, accommodation for the adoption panel meeting, overheads and the payment of expenses to adoption panel members. Adoption agencies do not collect data on these costs. Consequently we are unable to accurately identify savings or additional costs. However, it is likely that adoption agencies' costs will be similar to the unit cost of a referral to the IRD. Additionally, time will be saved by the adoption agency in not having to set up and operate an adoption panel specifically to consider the applicants representations.
21. The financial impact on local authorities and voluntary adoption agencies is therefore minimal.
22. There are no financial implications for the NHS or other bodies.

Impact on small businesses

23. There is no impact on small businesses. However, there may be a minimal impact on VAAs as set out above, because they will be required to pay the unit cost associated with any reviews referred to the IRD by applicants assessed by that VAA. This will be negligible given the extremely small number of reviews that the IRD is likely to undertake. Based on current trends, we believe that the IRD could expect to consider no more than 10 applications in total per year throughout Wales, with referrals being made to it from a potential of 22 local authority agencies and 3 VAAs.

Consultation

With Stakeholders

24. Formal consultation on these Regulations was carried out between 19 June 2006 and 12 September 2006. All key stakeholders were invited to comment on the draft Regulations, those consulted were: local authorities; voluntary adoption agencies; adoptive parents; adopted people; and the Children and Family Court Advisory and Support Service.
25. Seven responses were received to the written consultation and several representatives of the key stakeholder groups named above attended a consultation event held in mid Wales. The consultation event indicated broad agreements across the sectors and this was reflected in the few written responses. All who took part welcomed the consultation. However, there were some concerns over the time scales set down in the Regulations and the make up of the appeal panels. These concerns were addressed at the stakeholder event and the Regulations were amended to reflect the wishes of the majority of consultees. A

summary of the consultation responses is attached at Annex 1 to the Regulatory Appraisal.

With Subject Committee

26. These Regulations were notified to the Health & Social Services Committee, via the list of forthcoming legislation, on 14 January 2004, (HSS(2)-01-04, item no: HSS 14 (04)) and have remained on the list ever since. The Regulations were not identified for detailed scrutiny.

Monitoring and Review

27. The Welsh Assembly Government will monitor the numbers of cases reviewed annually, the proportion of decisions reversed and the efficiency and effectiveness of the procedures. The Regulations are specific as to the time allowed for each step in the process, and also the constitution of a proper panel in terms of numbers and qualifications of the membership.

Summary

28. The Regulations as drafted will meet the objectives and give the only viable means of providing an independent, fair and transparent method of review for applicants seeking a review of a qualifying determination. Existing practice means that the Regulations will not involve additional work for adoption agencies; they will help ensure a high quality service is available across Wales. Where additional net costs are incurred they should be relatively low and justifiable when compared to the benefits they will produce.

29. The intention of these Regulations is to extend existing arrangements for reviewing adoption agency determinations on the approval of adopters to cover cases where an adoption agency has been approached by an individual under the Access to Information (Post-Commencement Adoptions) (Wales) Regulations 2005 and the adoption agency is minded not to disclose information to the applicant, that applicant may apply for a review of that determination either by the adoption agency making the determination or by the independent review panel.

ANNEX 1 – SUMMARY OF CONSULTATION RESPONSES

CONSULTATION PROCESS ON DRAFT INDEPENDENT REVIEW OF DETERMINATIONS (WALES) REGULATIONS

In June 2006 the consultation document 'The Draft Independent Review (Wales) Regulations 2006' was launched by the National Assembly for Wales.

The document was widely distributed to interested parties inviting comments on the proposed regulations by the end 12 September 2006. **7** written replies were received with an addendum from one respondent and this was in addition to a consultation event held in Mid Wales where **38** people attended representing Local Authorities, Health Services and the Voluntary Sector.

General Responses

The consultation event indicated broad agreements across the sectors and this was reflected in the few written responses. All who took part welcomed the consultation and the proposals. However there were some concerns over the time scales set down in the regulations and the make up of the appeal panels.

The main findings of the consultation are summarised below and have been noted and the final regulations and guidance for the Independent Review of Determinations will reflect, where appropriate, this.

Concerns were also raised about the time commitment for panels members, particularly the medical advisor and it was felt paying loss of earnings would help.

REGULATION 5

Membership of Panels

Five written responses felt both panels should have five members and were concerned that quorum should not be an even number and therefore suggested a quorum of five. Regulations will be amended to ensure both panels have five members though it is impractical to also have a quorum of five. Consideration will be given to setting a quorum that will not threaten the possibility of panels proceeding to time.

Four respondents suggested that a medical practitioner who sits on an adoption panel should be on the appeal panel with another medical practitioner to act as advisor for appeals where the issues are medical. It was suggested that the medical practitioner be defined in regulations as it is in the Adoption Agency Regulations;

1.'The adoption agency must appoint at least one registered medical practitioner to be the agency's medical adviser.'

2.It must be noted that the regulations already allow for panels to seek further information and this includes medical advice. Where a review involves medical issues it

is intended to include a medical practitioner on the panel with additional medical advice being available to the panel.

Discussion at the event and **one** respondent suggested that disclosure panels membership should be determined by the issues raised by the appeal. Alternative members of panel included local authority Data Protection Officers and Freedom of Information Officers and possibly a representative from Wales Committee of the Equality and Human Rights Commission be present. Each of these suggestions were by only one person.

Additionally it was suggested by **two** respondents that the panel be advised by members from the Legal and Child Protection Teams from the Assembly. This could be dealt with in guidance to panel members.

Queries were raised at the event and by **two** respondents on how the chair is appointed. Regulations provide for the chair to be appointed by the Assembly and to be someone with appropriate skills and experience.

REGULATION 9

Administration of Panels

It was suggested at the consultation event that a transcriber be used to ensure accurate minutes. This has not been supported in any of the written submissions. Panel hearings are not quasi-judicial hearings and the panel is required to record its recommendation and the reasons for it: there is no pressing case for the use of transcription.

REGULATION 10

Fees of Panel Members

Two respondents, both medical practitioners suggested that fees be paid for preparation time, reading notes etc. These to be paid at professional rates especially for the medical practitioner. Regulations currently state that reasonable fees may be paid. This reflects the arrangements for adoption agency panels.

REGULATION 11

Records

Five respondents stated that records should be kept by the Assembly for five to ten years in case the appellant makes further applications through different local authorities or voluntary agencies. This will need to be considered in the context of the Assembly's data retention policies and practices.

REGULATION 13

Appointment of panel and conduct of review

Four respondents expressed particular concern about regulation 13(1)(d) and 13 (3), with requests that the five working days notice be extended to at least ten working days. The will always be to issue information to panels as soon as possible but it is possible that additional information might only be obtained at a late point in the proceedings and we would not want to further delay a panel hearing if we were constrained by tighter time limits.

REGULATION 14

Recommendation of panel

Two written responses queried Regulation 14 (3) the recommendation to be recorded and the document signed off by the chair within five working days. This was also raised at the consultation event. However, judgement may be reserved so this will have to be dealt with in guidance to panel members.

Conclusions

Broadly respondents agreed with the regulations but **one** respondent thought that the regulations and panel were not needed and appeals should be dealt with by the adoption agency's internal mechanism.