**EXPLANATORY MEMORANDUM TO**

**THE ADOPTION AND CHILDREN (MISCELLANEOUS AMENDMENTS) REGULATIONS**

**2005 No. 3482**

**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 and the House of Lords Select Committee on the Merits of Statutory Instruments.

## 2. Description

2.1 The Adoption (Miscellaneous Amendments) Regulations 2005 amend eight sets of other regulations, making some improvements, technical corrections and some consequential amendments for the implementation of the Adoption and Children Act 2002 (the '2002 Act').

## 3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Adoption and Children (Miscellaneous Amendments) Regulations 2005 come into force on 30 December 2005 to ensure that the necessary amendments are made to the adoption regulations are effective when the 2002 Act comes fully into force on that date. The Department regrets the breach of the 21 day rule in respect of these regulations.

3.2 The reason for non-compliance with the 21-day rule is that the policy for the Adoption and Children (Miscellaneous Amendments) Regulations 2005 was only finalised after the Department had considered representations from interested parties that arose prior to and during a six week training programme preparing for implementation of the 2002 Act. The training programme consisted of 75 two-day workshops for adoption agencies which finished at the end of November.

## 4. Legislative Background

4.1 The Adoption and Children (Miscellaneous Amendments) Regulations 2005 are made under the following Acts and their specified provisions:

i. Children Act 1989: sections 26(3B), 26(3C), 59(4) and 59(5);

ii. Education Act 1962: sections 1 and 4(2);

iii. Teaching and Higher Education Act 1998: sections 22 and 42(6);

iv. the Adoption (Intercountry Aspects) Act 1999: section 1;

v. the Adoption and Children Act 2002: sections 3(4)(b), 9(1), 53(1) – 53(3), 54, 56 – 64, 98, 140(1) and 140(7). The legislative and policy background for the core provisions of the Act is set out in the overarching explanatory memorandum on the implementation of the Act that was laid before Parliament on 2 March 2005. A copy of this memorandum is attached at Annex A.

## 5. Extent

5.1 The Adoption and Children (Miscellaneous Amendments) Regulations 2005 extend to England and Wales.

## 6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## 7. Policy background

7.1 As the Adoption and Children (Miscellaneous Amendments) Regulations 2005 amend eight Statutory Instruments the policy reasons for these changes are set out below for each Instrument.

Regulations made under the Children Act 1989

7.2 The Representations Procedure (Children) Regulations 1991 are amended to include adoption support services and special guardianship support services as specified functions for the purposes of the Representations Procedure (Children) Regulations 1991. This will enable representations (including complaints) about these specified functions to be considered through the children's complaint procedures.

Regulations made under the Education Act 1962

7.3 The Education (Mandatory Awards) Regulations 2003 are amended to update a reference to allowances payable in accordance with regulations made under section 57A of the Adoption Act 1976, which is repealed with effect from 30th December 2005.

Regulations made under the Teaching and Higher Education Act 1998

7.4 The Education (Student Support) Regulations 2005 are amended to replace a reference to transitional provisions in the 2002 Act with a reference to the substantive provision, in force on 30th December 2005.

Regulations made under the Adoption and Children Act 2002

7.5 Following the making of regulations under the 2002 Act earlier this year, the Department consulted informally on the drafting of the statutory guidance. As a result of this final piece of consultation and representations that have been received in the course of the training programme run by the Department to prepare adoption agencies for implementation of the 2002 Act, the Department identified and considered a number of improvements and technical corrections to the various regulations.

7.6 The Adoption Agencies Regulations 2005 come into force on 30th December 2005. These Regulations are amended to make a small number of technical corrections and some more substantive amendments. These:

i. reduce the scope of the disqualification of persons who may be appointed as independent chairs of local authority adoption panels. The amendment would limit the restriction of regulation 3(7)(b) to local authority members and to those employed or related to a person employed in the children and family social services of the local authority. Without the amendment, regulation 3(7)(b) is too broad and would disqualify teachers or those working for a local authority even though they have no direct connection with the adoption service of that authority;
ii. provide an exemption under regulation 3A to the requirement for all adoption agencies to establish an adoption panel. This exemption provides for an agency which operates only to facilitate contact between adoption agencies, or between persons and adoption agencies. This will allow, for example, the British Association for Adoption and Fostering to continue their current functions – promoting contact between prospective adopters and adoption agencies and operating the Adoption Register for England and Wales – without having to establish an adoption panel;
iii. clarify transitional regulation 10 to ensure that all previous members of an adoption panel are subject to the tenure restrictions for new adoption panels, according to the number of terms they have served on the old adoption panel;
iv. limit the application of regulation 17(2)(b) to circumstances where the medical adviser advises the agency it is necessary to submit detailed health information about the child to the adoption panel;

v. insert new regulation 20A to provide for cases where a child's parent or guardian resides outside England and Wales and wishes to give their consent to placement of the child for adoption under section 19 of the 2002 Act and, as the case may be, to the making of an adoption order under section 20 fo the 2002 Act;
vi. amend regulation 25 to ensure that reports on prospective adopters are not completed until the agency has completed their police checks and adoption preparation;
vii. limit regulation 25(9)(b) to circumstances where the medical adviser advises the agency it is necessary to submit detailed health information about the prospective adopter to the adoption panel;
viii. amend regulation 26 to ensure that where the agency has submitted a brief prospective adopter's report to the adoption panel, the panel must either request the agency to prepare a full prospective adopter's report or recommend that the prospective adopter is not suitable to adopt;
ix. limit the application of regulation 31(3) to cases where the adoption agency remains of the view that a proposal to place a child with a prospective adopter should proceed; and
x. replace obsolete statutory references in regulation 42 with a reference to section 3 of the Children Act 2004 (inquiries initiated by the Children's Commissioner).

7.7 The Adoptions with a Foreign Element Regulations 2005 come into force on 30th December 2005. These regulations are amended to require adoption agencies to provide the same reports and information to the Department for Education and Skills or the National Assembly for Wales where a person has been approved as a prospective adopter under the regulations, regardless of whether or not the application for approval is made under the Hague Convention on intercountry adoption. The regulations are also amended to correct two drafting errors identified by the Joint Committee on Statutory Instruments.

7.8 A transitional provision is inserted in the Adoption Support Services Regulations 2005 and the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005, which provides for the continued operation of adoption support agencies (ASAs), pending registration under Part 2 of the Care Standards Act 2000. Where a service provider has applied for registration as an ASA before 30 December 2005, it will be treated as being so registered until it is notified that the application has been finally determined.

7.9 The Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005 are amended to amend the list of purposes for which information may be disclosed to substitute a reference to section 3 of the Children Act 2004 (inquiries initiated by the Children's Commissioner) for obsolete statutory references and to add inquiries held by the Public Services Ombudsman for Wales.

## 8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

## 9. Contacts

The contacts at the Department for Education and Skills for amendments to the following Statutory Instruments are:

The Representations Procedure (Children) Regulations 1991 and the Adoptions with a Foreign Element Regulations 2005: Tim Gardner, Tel: 0207 273 1129 or email: tim.gardner@dfes.gsi.gov.uk

The Education (Mandatory Awards) Regulations 2003 and the Education (Student Support) Regulations 2005: Cliff Woods, Tel: 0207 925 5353 or email: cliff.woods@dfes.gsi.gov.uk

The Adoption Support Services Regulations 2005: Claire Allan, Tel 0207 273 5692 or email: claire.allan@dfes.gsi.gov.uk

The Adoption Agencies Regulations 2005, the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005 and the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005: Brendan Clark, Tel: 0207 273 5907 or e-mail: brendan.clark@dfes.gsi.gov.uk

**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 2002[1] ("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.'[2]

[1] 2002 c.38.
[2] *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 1989[3] 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 2000[4]);
- 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);[5]
- 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.

[3] 1989 c.41.
[4] 2000 c.14.
[5] 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.

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

*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 1976[6] 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 2003[7] and Adoption (Bringing Children into the United Kingdom) Regulations 2003[8] 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 2003[9] 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 2004[10] came into force.

[6] 1976 c.36.
[7] SI 2003/118.
[8] SI 2003/1173.
[9] SI 2003/1348.
[10] SI 2004/190 as corrected, and as amended by SI 2004/1081 and 2004/1868.

**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.

*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.