

***Statutory Review of the
Adoption Regulation 2003
Discussion Paper December 2011***

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Introduction

The purpose of regulations is to support the “parent act”, in this case the *Adoption Act 2000*. Regulations (often referred to as subordinate legislation) provide the “nuts and bolts” to ensure the parent act operates effectively and achieves what Parliament intended.

Unlike acts, amendments to regulations are not debated in Parliament. They are drafted and presented directly to the Governor for proclamation. Because they are amended more often and without the level of scrutiny of primary legislation, it is important they are reviewed on a regular basis.

The review requirements of regulations and the process are set out in the *Subordinate Legislation Act 1989* (SL Act)¹. The objectives of the review process include evaluating whether the regulation is supporting the parent act effectively; streamlining the regulation to ensure it is clear; and ensuring that the regulation is not creating unnecessary regulatory burden on those who use and rely on it.

The Adoption Regulation 2003 (the Regulation) is due to be automatically repealed under the SL Act on **1 September 2012**. Therefore, unless the Regulation is reviewed and remade by this date, there will be no regulation in place to support the parent Act from 1 September 2012.

The review of the Regulation is being undertaken in the context of the New South Wales Government’s reform agenda which aims to improve services for children and young people while boosting accountability and transparency and empowering local communities.

Amendments to the Regulation will be evaluated in light of the Government’s overall reform for Community Services. The Government’s policy is to increase permanency options for more children in ‘Out-of-Home Care’ (OOHC) through adoption. Adoption offers a child the greatest level of permanency through a legal change of relationship. Community Services’ commitment to permanency for children, and specifically adoption, is borne out of research, over many years, which has found that children need stability, security and the opportunity to form attachments in order to reach their full potential², and that the emotional security and sense of belonging offered by adoption provides the best environment for this to occur³.

¹ Section 10A(1A)(a), SL Act

² ‘Adoption-are we missing an important opportunity for children permanently removed from their families?’ Barnardos. Monograph 54.

³ John Triseliotis: ‘Long term foster care or adoption? The evidence examined’ in *Child & Family Social Work*; 2002. Vol. 7, No .1, pp. 23-33; Judy Cashmore and Marina Paxman ‘Predicting after-care outcomes: the importance of ‘felt security’, in *Child & Family Social Work* 2006 Vol 11, No. 3, pp 232-241

Community Services is reviewing a range of policies and procedures to support the increase in the number of OOHC adoptions. Work is also underway with the NSW Department of Attorney General and Justice, the Supreme Court of NSW and the Crown Solicitor's Office to streamline processes and to identify strategies to improve the timeliness of securing adoption orders for children in OOHC.

This paper provides an overview of the statutory requirements for that review; summarises the key provisions of the Regulation; and poses some questions for your consideration and comment. These questions are designed as a guide only. Please feel free to address any issues not specifically raised in this paper concerning the Regulation, including providing your views more generally on how the Regulation is currently working.

The Regulation as a whole has not been reviewed since its commencement on 31 January 2003, so this is an important opportunity to consider how the Regulation is operating and how it might be improved.

This Paper includes input from key adoption and other relevant stakeholders. It will be distributed across the sector. Copies are available on the Family and Community Services webpage at www.community.nsw.gov.au The views of all who work with and rely on the Regulation are absolutely critical in assessing how well the Regulation is working and whether amendments need to be made.

Please note that references to "the Court" are references to the Supreme Court of NSW. References to the Director-General are to the Director-General, Department of Family and Community Services.

A copy of the Adoption Regulation 2003 may be accessed at www.legislation.nsw.gov.au Select "Browse" and then under the title "Regulations" select "A" and scroll down to the Adoption Regulation 2003. If you have any difficulties accessing this site or do not have access to the internet, please contact the Community Services Legislative Review Unit on 9716 2321 and the Unit will arrange for a copy to be sent to you.

Statutory Review of Regulations

The *Subordinate Legislation Act 1989* provides for regulations to have a limited life, in most cases 5 years from the date on which they are made.

Prior to a regulation lapsing, the options available to government agencies are to:

- Allow the regulation to lapse; or
- Remake the existing regulation; or
- Remake the existing regulation with amendments.

When a regulation is due for repeal, the responsible agency (in this case Community Services) must review the regulation, its social and economic

impacts, and the need for the regulation. The agency must then make a decision about whether the regulation should be remade. The results of this review are required to be published in a Regulatory Impact Statement (RIS). The RIS and the draft regulation are released together for public comment.

Agencies are able to seek a postponement of the repeal in some circumstances. A postponement was sought for the Adoption Regulation 2003 on two previous occasions, primarily to enable the 2008 amendments relating to access to adoption information for adoptions which are finalised after January 2010 to come on line.

It is anticipated the existing Regulation will be remade with amendments.

Better Regulation Principles

All new and amending regulatory proposals submitted to Cabinet or the Executive Council must demonstrate application of the seven better regulation principles⁴.

- Principle 1:** The need for government action should be established.
- Principle 2:** The objective of government action should be clear.
- Principle 3:** The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options.
- Principle 4:** Government action should be effective and proportional.
- Principle 5:** Consultation with business and the community should inform regulatory development.
- Principle 6:** The simplification, repeal, reform or consolidation of existing regulation should be considered.
- Principle 7:** Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness.¹

These principles will be applied in the preparation of the draft Regulation and the RIS but it may be useful to keep them in mind when you are thinking about the Regulation and possible changes which ensure the

Savings

Most legislation includes what are referred to as “savings and transitional” provisions. These provisions quite literally save things that were done under a

⁴ Further information about the better regulation principles and a copy of the Better Regulation Guide can be accessed from the website of the Better Regulation Office: www.betterregulation.nsw.gov.au.

previous regulation of the same kind. The savings provision in the Regulation is clause 79.

Any act, matter or thing that, immediately before the repeal of the Regulation had effect under the previous regulation continues to have effect under the current Regulation.

Section 30 of the *Interpretation Act 1987* also provides that the repeal of a regulation (which is what will occur in relation to the Adoption Regulation 2003 in September 2012) does not effect the operation of any savings or transitional provision contained in the regulation.

Adoption Regulation 2003

The balance of this paper focuses on the Regulation. A summary of key provisions and a number of questions for your consideration are included and your views on these matters are sought. Please do not feel constrained by focusing solely on the questions included. If there are other amendments or problems you can identify that may assist in improving the Regulation, these are also welcomed.

Please note that a proposed amendment can include amending a particular provision or deleting it entirely if it is no longer necessary or is inconsistent with the Act or current practice.

Regulations can only be made where the parent act allows for them; that is where the parent act (in this case the Adoption Act 2000) contains a regulation making power. A regulation making power may be general or specific. Any proposed amendments which are made to a Regulation must fall within the scope of the regulation making power/s.

Section 208 of the Act contains the general regulation making power and lists a number of matters for which the regulations may make provision. In addition to this, certain sections in the Act also contain regulation making powers. For example, section 47 of the Act enables an adoption plan to be made prior to an application for adoption. Section 47(2) provides that the Regulation may set out the particulars which must be included in the plan. Section 47(2) then provides the power for the Regulation to set out these particulars.

If you require advice about whether a regulation making power exists, please contact Legal Services at LRU@facss.nsw.gov.au.

Timing of Review

As noted above, the Regulation must be remade by 1 September 2012. We seek your views on the issues raised in this paper and on any other matters you think are relevant to the review. Please send your submission to:

- lru@facs.nsw.gov.au; or
- **Posting** it to:
Legislative Review Unit (Attention: Johanne Gow)
Department of Family and Community Services
L3, 2 Cavill Ave
Ashfield NSW 2131 (It would assist us if you could also provide an electronic version of your submission.)

If you have questions about the process please call Johanne Gow on (02) 9716 2321 or email johanne.gow@facs.nsw.gov.au.

The closing date for submissions is 31 January 2012.

Summary of the Adoption Regulation

Part 1 – Preliminary

Part 1 sets out the full name of the Regulation, the date on which it commenced and definitions for the Regulation.

Questions for consideration

- Do any of the definitions in clause 3 of the Regulation require updating or clarification?
- Should the definition of “non-identifying information” be broadened?

Part 2 – Accredited adoption service providers

Part 2 of the Regulation focuses on adoption service providers and the accreditation process. It sets out how to apply for accreditation as an adoption service provider in NSW and the types of adoption services that may be accredited.

It references the accreditation standards (*NSW Adoption Standards*) with which services must comply and the conditions to which an adoption service is subject (including those set out in Schedule 1 of the Regulation - please see discussion below in relation to these conditions).

The Part requires former adoption services to preserve and lodge any adoption records it was required to keep under the legislation with the Director General.

Questions for consideration

- The Regulation makes it an offence if an adoption service, on ceasing to provide adoption services, fails to deliver all records kept by it for the purposes of the Act to the Director General. The penalty is 25 penalty points (equivalent to \$2,750). Is this penalty sufficient?
- Given the penalty, should the clause be more specific about how long the former accredited provider has before it must deliver records?
- Should the Regulation provide greater detail about *how* records should be lodged with the Director General?
- Should there be a definition of "all records"? Which records should it capture?
- Does the legislation need to explicitly state that the records cannot be destroyed and how they should be kept?

Part 3 Selection of prospective adoptive parents

Part 3 sets out how a person may apply to become a prospective adoptive parent, including documentation required and training; the criteria against which applicants are assessed, the assessment process; and sets out certain conditions that can be applied to an approval to become a prospective adoptive parent.

Persons who wish to become prospective adoptive parents must submit an expression of interest (EOI). Under the Regulation, the EOI is current for 12 months. Currently the provision does not make clear that the EOI process need not apply where an adoption by the child's authorised carers in the out-of-home-care program or in the case of intra-family adoptions, as these children have already been placed with the prospective adoptive parents.

Following the receipt of an EOI, the Regulation sets out certain information the Director General (or Principal Officer of an accredited adoption service) must forward to the person who submitted the EOI. The Director General (or Principal Officer) may require the person to undertake education or training to prepare for the adoption process at their own expense. However in the case of out-of-home care adoptions, Community Services covers the costs of the training and in the local adoption program the Agency subsidises the cost.

The Regulation then provides for persons to make an application for assessments as suitable to adopt a child. It sets out the documents to accompany the application including birth and marriage certificates. Where marriage certificates are not in English they must be accompanied by a translation. It also sets out the actions to be taken by the Director-General (or Principal Officer) in assessing the application, deciding whether or not to

approve the application, and notifying the applicants of the decision made.

Decisions by the *relevant decision maker*⁵ to decline an application or to revoke the approval of an application are reviewable decisions. The way in which these decisions may be reviewed is set out in Chapter 10 of the Act.

Section 45(1) (a) of the Act provides that the regulations may provide for guidance on the suitability of applicants and the selection of persons to adopt. In May 2009, clause 12 was amended to set out the specific criteria which a decision maker should consider when assessing an applicant as someone who might be suitable to adopt. Prior to this, the selection criteria had been published in the Government Gazette. Including the criteria in the Regulation, rather than “gazetting” them provides additional transparency and scrutiny. Although any changes are not debated in the Parliament, as they would be were they being made to the Act, amendments are “laid on the table” for 14 days. During this period they are reviewed by the NSW Parliament’s Legislation Review Committee. Under section 9, *Legislation Review Act 1987*, the Committee reports to the Parliament if it has concerns about amendments to a Regulation on grounds, including if amendments “trespass unduly on personal rights and liberties” and are not in the spirit of the parent Act.

These criteria include a person’s health, age and maturity, financial circumstances and their ability to provide a stable and secure home for a child. A person’s criminal history and that of their spouse and other members of their household must also be considered.

Clause 13 sets out the types of decisions a decision-maker is able to make in relation to an application to become a prospective adoptive parent; either to (1) decline to assess an application; (2) to approve an application with or without conditions or (3) decline to approve an application. These decisions are all reviewable decisions under Chapter 10 of the Act.

In making this decision the decision-maker should take into consideration the criteria set out in clause 12. Where the decision maker is the Principal Officer of an adoption service (other than the Department of Family and Community Services) it may apply its own selection criteria rather than the ones set out in clause 12.

The decision maker must advise the applicant in writing of a decision. The advice must be accompanied by reports used by the assessor in coming to that decision (except criminal record checks and confidential referee reports).

An approval remains in effect for a period of four years.

⁵ “Relevant decision maker” is used throughout the Regulation. It is defined in clause 3 of the Regulation, Definitions, as either the Director General or the Principal Officer of an accredited adoption service provider.

If a decision maker approves an application, s/he may do so with certain conditions. Clause 15 of the Regulation sets out examples of these conditions. These include limiting the duration of the approval and limiting the approval to adopt a nominated child or a child from a specified age group or of a specified sex.

A decision maker must advise an applicant of a decision as soon as practicable after the decision is made. When the decision maker advises the applicant of the decision, they must also provide them with information on the applicant's right to request reasons for the decision and to appeal any decision.

A decision maker may revoke an approval at any time. In doing so they need to advise the applicant in writing of the decision, their right to request reasons for the decision and their right to appeal the decision.

Questions for consideration

- Is 12 months a sufficient timeframe for the validity of an EOI?
- Should the Regulation make clear that foster carers seeking to adopt children already placed in their care and interfamily adoptions be exempt from the EOI process?
- In relation to clause 10, are there any other documents necessary? Are all of these documents necessary at this stage of the application process?
- Is there any other information Director General should be required to provide to a person/s submitting an EOI?
- Are the criteria appropriate? Are there any others which could be considered?
- Does the decision making process adequately provide for natural justice for applicants?
- Is 4 years an appropriate period of time for an approval to remain current?

Part 4 Adoption Register

Part 4 of the Regulation requires the Director General to keep an adoption register. The Register lists the details of all prospective adoptive parent applicants, their applications and any approvals.

Clause 20 provides for circumstances where a person's name must be removed from the Register as follows:

- (a) *on the making of an adoption order or interim order in favour of that person, or*
 - (b) *on receipt by the Director-General of a notice in writing from that person requesting the removal of the person's name, or*
 - (c) *if, after reasonable inquiry, the person cannot be found, or*
 - (d) *if, because of a change in the circumstances of the person existing at the time when the relevant decision-maker approved the person as suitable to adopt a child, the person is, in the opinion of the Director-General, no longer suitable to adopt a child, or*
 - (e) *following a decision to decline to assess or approve, or a revocation of approval of, the person as suitable to adopt the child, or*
 - (f) *in such other circumstances as the Director-General considers appropriate.*
- (2) *If a name removed at the request of the person concerned is the name of a person who applied jointly with another person for approval to enter his or her name in the adoption register, the name of that other person is, at the same time, to be removed from the adoption register.*

Inclusion on the Register does not give the prospective adoptive parent any rights or entitlement to the placement of a child for the purposes of adoption.

If a person requests to be removed from the Register and they applied jointly with another person, the name of the person with whom they applied is automatically removed from the register.

Questions for consideration

- Should a person who has applied as a prospective adoptive parent jointly with another be required to reapply if their relationship breaks down but that person still wishes to adopt? Should their original joint application instead be revived and updated as an application by a single person?

Part 5 Placement for adoption

Part 5 sets out the reports required before a child can be placed for adoption. These reports include those which document the child's health and medical history and social development. It also sets out the types of matters that should be considered when placing a child with prospective adoptive parents, for example the wishes of a birth parent in relation to religious upbringing.

In selecting an applicant for an adoption order for a particular child, the Director-General should do so from the Register of approved applicants.

However, a person does not have the right to adopt a particular child by virtue of being on the Register, unless it is the opinion of the decision maker that the person is suitable to adopt a particular child.

If a female approved person is pregnant, a child cannot be placed in her care or that of her husband or de facto partner for the purposes of adoption.

In placing a child, a decision maker is to make all reasonable efforts to do so in accordance with the wishes of the child's parent/s/guardian in relation to religious upbringing and to the cultural heritage, identity or ties of the parent or guardian.

If this is not possible, the decision maker needs to make all efforts, prior to the filing of the application to advise the parent/s/guardian that that is the case.

Part 5 also provides for the confidentiality of adoption information, which is defined as the name and address of the applicant or other identifying information about the parties to a prospective adoption.

Questions for consideration

- Clause 24 of the Regulation provides that a child cannot be placed in the care of a female approved person or her husband or de facto if the female person is pregnant. Is this appropriate? Should it apply to all types of adoption (e.g. overseas, local)?
- Do the provisions of this Part adequately provide for consideration of the intentions of birth parents for their children in the selection of adoptive parents?

Part 6 Adoption plans

Adoption plans are provided for in section 47 of the Act.

Under the Act an adoption plan is mandatory where one parent of the child to be adopted is of Aboriginal or Torres Strait Islander background and the other is non-Aboriginal to address how the child is to develop and/or retain a connection to both cultures (sections 35(5) and 39(4) of the Act).

In all other circumstances plans are optional. Where a plan is developed it must be in writing and include particulars set out in the Regulation. It can be registered with the Court. On the making of an adoption order, a plan becomes in effect part of the Adoption orders.

Part 6 sets out particulars which need to be included in adoption plans. The plan is to include the purpose and frequency of contact, how the child will be supported to develop a positive cultural identity and how the child's cultural heritage is to be fostered; the type/s of information that can be exchanged and the frequency of the exchange; any financial assistance to which the Director-General has agreed; and a statement of the period for which the plan is to have effect. One of the issues raised has been whether specifying a period during which the plan has effect should apply to the whole plan, or be

able to operate in relation to discrete aspects of a plan where appropriate. The rationale for this would be to reduce the likelihood of any ongoing litigation or renegotiation where this is unnecessary.

Questions for consideration

- Should the Regulation allow for aspects of a plan to be ongoing and/or for aspects of a plan to have differential timeframes?

Part 7 Consents to adoptions

Counsellors play an important role in the adoption process.

The primary role of counsellors under the Act is in ensuring that persons consenting to an adoption, including the birth parents and the child, understand the nature of providing consent.

Part 7 of the Regulation provides for a register of counsellors who are able to undertake this work in relation to adoptions in NSW. The Part provides a definition of counsellor for the purposes of section 57 of the Act. It does this by setting out the qualifications counsellors on the register must hold. These include that counsellors have at least two years experience undertaking related counselling in the last five years and that they are an employee of Community Services or an accredited adoption service provider (although the Part also allows provides that they can be a member of a professional association approved by the Director-General, the Director General has not approved any associations).

Persons who have the requisite qualifications and no criminal record are eligible to have their name placed on the Register. As an employee of the Department or an accredited adoption service provider, the counsellor will have already undergone a relevant criminal check. The requirement in clause 32(3) (b) that a person seeking to have their name placed on the register undergo a relevant criminal check would therefore seem unnecessary.

Questions for consideration

- Should the requirement that a person undergo a criminal check prior to being eligible to being placed on the Register be removed, if the check was completed as an employee of or contractor with the Department or an accredited adoption service?

Under section 59 of the Act, before a person consents to an adoption they must be provided with certain mandatory information by either the Director-General, the Principal Officer of an Adoption Service or the applicant (where the child is being adopted by a step-parent or relative). The Part sets out information that is "mandatory written information" for the purposes of section 57(g) of the Act.

The Part also sets out the form in which the consent must be in, including the particulars of the person providing consent and child to be adopted. It also provides details on the requirements for the witnessing of consents.

Part 8 Preliminary hearings

Sometimes in adoption matters there are important issues that need to be addressed with the court before an adoption application is ready to be filed with the Court. For example:

- seeking a consent order in order to confirm that the Director-General is the child's exclusive guardian whilst the child is awaiting adoption
- having the Court confirm that placing an Aboriginal child with non-Aboriginal carers for adoption is an appropriate course of action
- obtaining interim orders, including about contact, where it may be some time before an adoption application can be filed for the child's adoption

The Act therefore allows these issues to be brought to the court at a preliminary hearing prior to any adoption application being filed.

Section 80 of the Act allows the Court to hold preliminary hearings in certain circumstances set out in clause 40 the Regulation. These include in relation to the validity of a consent to the adoption of a child (for example, where the capacity of the birth parent to consent is in question) and contact with the child (by for example the birth parent or members of the birth family and significant others).

Section 80(2) of the Act requires a preliminary hearing where an Aboriginal child is being placed with a prospective adoptive parent who is not Aboriginal and where a Torres Strait Islander child is being placed with a prospective adoptive parent who is not of Torres Strait Islander background.

Section 80(3) of the Act also enables the Court to hold a preliminary hearing on its own motion or on the application of classes of people prescribed in the Regulation. Clause 41 of the Regulation prescribes these as parties to the adoption and people approved by the Court as having a sufficient interest in an adoption.

Part 9 Adoption Orders

Under section 88(1) of the Act, a person whose consent is required for an adoption to proceed (unless the Court has dispensed with the need for their consent) and a person with whom the child resides or who holds Parental Responsibility for the child must be provided with the application for adoption.

Section 88(1) provides that the regulations may prescribe the

particulars of an application for an adoption order. Accordingly, these are set out in clause 42.

Part 10 Records of Adoptions

This part of the Regulation sets out the particulars which must be included in an adoption order. These are more detailed than those required in an application for an adoption order. Their primary purpose is to provide the Registrar of Births, Deaths and Marriages in NSW and where the child was born in another jurisdiction, the Registrar in that jurisdiction with sufficient information to identify the child's original birth certificate and to then create a new amended birth certificate following the child's adoption.

Part 11 Adoption information

This part of the Regulation is lengthy and the most complex. Part 11 supports Chapter 8 of the Act. Chapter 8 sets out the entitlements of adoptees, birth parents, siblings and others to adoption and related information.

In 2008, Parliament passed the *Adoption Amendment Act 2008* which among other things sought to provide greater access to adoption information to those directly affected. The Act preserved the existing entitlements for adoptions which occurred prior to January 2010 (the date when the Act commenced) but enabled significantly greater access to information for adoptions which occurred after this time. In particular it allowed for identifying information about parties to the adoption to be made available to the adoptee, birth parents and siblings prior to the adoptee turning 18 years.

Questions for consideration

- Is there information which should be included and is not?
- Are the provisions of this part of the Regulation clear? If not, please provide details about what aspects are confusing?

Part 12 Miscellaneous

Part 12 sets out other reviewable decisions that have been made under the Regulation. It requires the Director-General (or Principal Officer) to keep a case record of adoptive parents and their adopted child and each person who has requested the Director-General (or Principal Officer) make arrangements for the adoption of a child by them.

Despite section 194 of the Act which protects adoption records made under the Act and Regulation, the above records may be open to inspection by an officer of the Court, the Director-General and the Principal Officer of the adoption service involved in the particular proceedings.

Schedule 1: Conditions of accreditation for adoption service providers

An accredited adoption service (AAS) cannot enter into a direct agreement (nor negotiate to do so) with a foreign country in order to arrange adoptions from that country for people in NSW unless there are existing arrangements between Australia and that country for this to occur.

AAS may only provide services to persons who reside in NSW.

Where an AAS is accredited to provide adoption services from a particular country, the service cannot provide them from another country to a person living in NSW.

Local adoption services cannot share premises with adoptive parent organisation and overseas adoption service providers may not share premises with adoptive parent organisations and/or overseas aid organisations.

The Principal Officer of an AAS must have a university degree and have had 5 years in the last 10 years experience in adoption service provision, family services or OOHC. An acting Principal Officer of an AAS must have a university degree and have 2 out of the last 5 years experience in adoption service provision, family services or OOHC.

AAS must make sure that staff are aware of their approved code of conduct and the Service must comply with undertakings it has given the Director-General.

AAS must give each prospective adoptive parent a copy of the AAS's selection criteria and make its fees public (either on display or in brochures).

AAS must allow the Director-General or the Director-General's delegate access to premises and records. AAS must provide Director-General with a copy of its annual report in relation to adoption services, other adoption related reports, any report it is legally required to provide to other authorities.

AAS must advise Director-General in writing of any conflicts of interest in relation to staff members and take advice of Director-General in response to these matters. The Director-General must approve the appointment of any person acting on behalf of an adoption agency accredited to provide inter-country adoption services, where that person is representing the agency in relation to adoption proceedings in a foreign country.

An AAS must advise the Director-General of a change of address in 14 days (or 28 days for those accredited pre 2009); change in constitution, terms of trusts, selection criteria in 28 days. ASS must notify Director-General as soon as practicable if it cannot comply with conditions of accreditation.

General questions

- Should the Regulation make broader provision for collecting information from birth parents prior to the adoption, especially where the birth father is absent/unknown (on the premise that every detail may be important and valuable to a person who has been adopted)?