

Obj File Ref: OCG15/0352

Director  
Legislative Review Unit, Legal Services  
Department of Family and Community Services  
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Dear Director

Thank you for the opportunity to comment on the Regulatory Impact Statement and proposed draft Adoption Regulation 2015 which will replace the Adoption Regulation 2003.

Please see enclosed the Office of the Children's Guardian's submission in response.

Yours sincerely



**Kerryn Boland**  
**Children's Guardian**  
8 July 2015

## Office of the Children's Guardian response

### Regulatory Impact Statement and proposed draft Adoption Regulation 2015

#### 1. Introduction

The Office of the Children's Guardian (**OCG**) welcomes the opportunity to comment on the Regulatory Impact Statement and proposed draft Adoption Regulation 2015 (**proposed Regulation**).

By way of background, the Children's Guardian's current functions in relation to adoption are summarised as follows:

- The Children's Guardian can accredit charitable or non-profit organisations as adoption service providers and monitor accredited adoption service providers. The Children's Guardian also accredits and monitors designated agencies which arrange statutory and/or supported out-of-home care (**OOHC**).
- As a streamlined process for accrediting organisations to provide both OOHC and adoption services has now been established, the OCG has developed a single draft set of Standards which will apply to agencies that provide statutory OOHC and/or domestic adoption services. Following consultation with the sector, the draft Standards are currently being piloted.
- The OCG administers the Working with Children Check scheme in NSW, which requires principal officers of accredited adoption service providers, prospective adoptive parents and adults residing with prospective adoptive parents to apply for or hold a working with children check clearance.

Against that background, the OCG's comments on the proposed Regulation are set out below.

#### 2. Selection process

##### *Publishing alternative selection criteria*

Clauses 12 and 171 of the current Adoption Regulation 2003 (**current Regulation**) prescribe the selection criteria against which prospective adoptive parents are to be assessed. Alternatively, a principal officer can refer to any criteria for assessment, instead of the prescribed selection criteria, provided the criteria are notified to the Secretary.

The proposed Regulation requires that alternative selection criteria are both notified to the Secretary and made publicly available.

This amendment is supported as it will promote transparency and increased openness in the assessment and selection of prospective adoptive parents. It will enable informed decision making by prospective applicants as to the provider's required capacities to become adoptive parents and the requirements for assessment.

The consequence of the word "alternative" in cl 12 of Schedule 1 in the proposed Regulation, however, may be unclear to an adoption service provider. A provider may not be sure whether it can develop its own selection criteria which are completely different from, or possibly even inconsistent with, the criteria listed in cl 45 and 59 of the proposed Regulation. Adoption service providers may benefit from clarification through reference in cl 12 of Schedule 1 to cl 46(4) and 60(4) of the proposed Regulation which state that the alternative selection criteria can be any criteria instead of the prescribed selection criteria. This may particularly assist new adoption service providers which enter the sector as a consequence of the new single Standards and accreditation process for designated agencies and adoption service providers.

### ***Reviewing approvals of adoptive parents***

Under the current Regulation, an approval that an applicant is suitable to adopt has effect for 4 years (or longer if determined by the relevant decision-maker). The Children's Guardian has previously expressed a view that while 4 years is an appropriate period of time for an application to remain current, updates on the particulars of the application should be required on a regular basis.<sup>1</sup>

The proposed Regulation requires approved applicants to notify the relevant decision-maker of any significant change in the applicant's circumstances that might affect their approval.

This new requirement is supported. Prospective adoptive parents will bear a greater responsibility to continually reflect on their own readiness and capacities to meet the needs of an adopted child and inform the adoption service provider of significant changes.

This new requirement reinforces the object and principles of the *Adoption Act 2000 (Act)* that adoption is a service for children, and their best interests are the paramount consideration.<sup>2</sup>

The proposed Regulation includes examples of what might constitute "significant changes".

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<sup>1</sup> Page 9, Children's Guardian's submission to the statutory review of the Adoption Regulation 2003.

<sup>2</sup> Sections 7(a) and 8(1)(b) and (c).

This will strengthen adoption service providers' practice in monitoring prospective adoptive parents who are waiting for placement. The examples provide additional guidance as to factors which providers may have to manage an applicant's expectations about during the period of approval.

### ***Adoptive parent education and training for authorised carers***

The current Regulation allows education and training to be provided to authorised carers who want to adopt a child in their care only *after* the authorised carer has submitted their application to adopt.

The proposed Regulation allows education and training to be provided any time before or after an application to adopt has been made by an authorised carer.

The amendment is supported as it will:

1. Encourage adoption service providers to develop policy and practice that recognises the role of education in developing carer capacity for autonomous adoptive parenting;
2. Support practice in preparing authorised carers to transition to adoptive parenting, including building their capacity to meet the complex needs of children in their care within a context of open adoption; and
3. Enable providers to offer pre- and/or post-assessment training, and therefore support a child-focused, best practice training and development model.

### ***Notification of decision to decline to assess an application***

The current Regulation requires decision-makers to notify applicants of decisions to approve the application, approve the application with conditions or decline the application. The decision-maker must advise the applicant that they have a right to the reasons for the decision and the right to a review of that *assessment* decision.

The proposed Regulation will require an accredited adoption service provider to notify the applicant of a decision to decline to assess their application, their reasons for that decision and the applicant's right of review. This additional requirement will uphold the rights of applicants by affording them procedural fairness and allowing them to make informed decisions about whether to exercise their right of review.

The amendment is further supported as it encourages greater transparency and accountability in an accredited adoption service provider's decision making. It will enable adoption service providers to

uphold in practice the principles and objects in the Act that adoption is a service for children, with their interests both in childhood and later life being paramount.<sup>3</sup>

### 3. Adoption process

#### *Removing the bar against placing a child for adoption with a pregnant female*

The current Regulation prohibits the placement of a child for the purpose of adoption in the care of a woman who has been approved as a prospective adoptive parent, or her husband or de facto partner, if the decision-maker knows that she is pregnant. The Children's Guardian has previously expressed a view that pregnancy may more appropriately be one factor in deciding whether or not to make a placement, rather than a determining factor.<sup>4</sup>

The proposed Regulation will require an approved applicant to notify the decision-maker of a pregnancy. The decision-maker will then have to take that information into account in deciding whether a placement will be in the best interests of a child.

The OCG supports this amendment for the reasons set out in the submission made to the statutory review of the current Regulation in 2012. The amendment is further supported as it opens up placement options for children in meeting specific needs such as culturally appropriate placements, and serves the best interests of children in line with the objects in the Act.<sup>5</sup>

The amendment will require accredited adoption service providers to clearly define in policy and practice the considerations it will use in its assessment and decision making in these circumstances. It will also require agencies to consider how they will be transparent with potential applicants in relation to its expectations in the area of placement matching and how they can support prospective parents manage the consequences of those expectations.

This amendment supports greater transparency and accountability in ensuring child-focused, placement matching. It places a greater responsibility on accredited adoption service providers to establish practice that upholds the objects in the Act which emphasise that adoption is primarily a service for children and that their needs are paramount.<sup>6</sup>

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<sup>3</sup> Sections 7(a) and (b) and 8(1)(a), (b) and (c).

<sup>4</sup> Pages 10-13, Children's Guardian's submission to the statutory review of the Adoption Regulation 2003.

<sup>5</sup> Sections 7(a) and (b).

<sup>6</sup> Sections 8(1)(a), (b) and (c).

### ***Written report from counsellors on capacity to consent for persons under 18***

The Act requires that a parent giving consent to their child's adoption must be counselled before signing an instrument of consent. As an additional protection, a counsellor who provides this counselling to a parent who is under 16 years must provide a written report for the Court on the parent's capacity to understand the effect of giving consent. This written report is currently not required for parents under 18 years. All parents under 18 years, however, are currently required to receive independent legal advice.

The proposed Regulation will require a counsellor to provide a written report for the Court if the parent is under 18.

This amendment is supported as it:

1. Encourages best practice in adoption by advocating for the rights of parents under 18 years and their children. From the adoption service provider's perspective, this additional requirement will ensure greater accountability in facilitating adoption for children;
2. Is a further protective strategy to ensure that birth parents under 18 years are provided adequate support to make informed decisions about their child's adoption. Informed decision making is significant considering that adoption changes the identity of a child permanently, and the grief for a birth parent associated with living with an adoption decision can be life-long;
3. Affords the adopted person in later life the opportunity to understand the informed decision making of his or her birth parents in the context of open adoption relationships and life story work; and
4. Appropriately responds to learnings from past adoption practices in NSW and Australia.

## **4. Adoption records and information**

### ***Retention of adoption records***

Section 175 of the Act requires that particular information pertaining to a child's origin, identity of birth parents and medical history be preserved.

The proposed Regulation includes a note directing the reader to the requirements under s 175 of the Act, and does not prescribe how the requirement to preserve is to be fulfilled.

The OCG agrees that further guidance could be provided to adoption service providers by policy and procedure, rather than regulation, given that policy and procedures can be more readily updated as required by technological advances in relation to records archiving and storage.

As the proposed new single Standards and accreditation process for designated agencies and adoption service providers may see new adoption service providers enter the sector, more guidance to organisations about their requirements to preserve adoption records may be required.

Consideration could be given particularly to developing more detailed guidance about the interaction between the record-keeping and preservation requirements in s 170(1) of the *Children and Young Persons (Care and Protection) Act 1998* and ss 31 and 175 of the Act, especially for organisations accredited both as designated agencies and accredited adoption providers.

### ***Entitlements of adopted persons to information***

The current Regulation limits the rights of adopted persons and adoptive parents regarding the reason why an adopted person was placed for adoption to the reason stated or recorded *before* placement for adoption.

The proposed Regulation will enable adopted persons and adoptive parents to access information about the reasons the adopted person was placed for adoption, regardless of the date the information was recorded.

This amendment is supported as it upholds the objectives and principles of the Act that requires the best interest of the child to be the paramount consideration and to ensure that the law assists a child to know and access information about their birth heritage.<sup>7</sup>

The amendment encourages openness in adoption practice and recognises that identity formation is a life-long process for adopted persons. It enhances an individual's ability to access information related to the reasons why an adopted person was placed for adoption, which is significant to the process of reconciling a person's adopted identity.

### ***Unacknowledged birth fathers***

Under s 133A of the Act, a man is presumed to be a child's father only if his name is recorded on a child's original birth certificate or he is presumed at law to be the child's father. Nevertheless,

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<sup>7</sup> Sections 7(a) and (c) and 8(1)(a).

information is often recorded on adoption files about a child's birth father, usually provided by the birth mother at the time of the adoption. A father identified on a child's adoption record whose paternity has not been presumed under s 133A of the Act is currently referred to as an "unacknowledged birth father".

The draft Regulation makes three key changes in relation to unacknowledged birth fathers, all of which are supported by the OCG.

1. The language of "unacknowledged" is replaced with "putative". In so doing, the change recognises the legitimacy of information provided by the birth mother at the time of the adoption in relation to the child's paternity.
2. It clarifies that a man may be considered to be a child's "putative" father based on information recorded about him on file, even where the definition in s 133A of the Act does not apply. The amendment recognises the relevance of this file information and its significance to a child's paternity and identity.
3. Information sources will now be able to share information about a putative father. A putative father's identifying information, however, will not be able to be released to an adopted person without the putative father's permission. This appropriately balances the desire to assist post adoption service providers in their intermediary support to adopted people and birth fathers against preserving the privacy of men who may have been wrongfully identified.

These amendments will enable post adoption support services to help adopted people to access information and possibly develop a relationship with their birth father, consistent with the process for obtaining knowledge about and potentially connecting with a birth mother and/or sibling/s. They support open adoption practice in assisting adopted people develop whole identities and meaningful connection to heritage. Adoption law and practice should assist a child to know and have access to his or her birth family and cultural heritage.<sup>8</sup>

These amendments support father inclusive, pre and post adoption practices. They appropriately aim to redress wrongful past adoption practices, when a father's rights to informed decision making and participation in the adoption decision of their child may not have been upheld in practice.

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<sup>8</sup> Section 7(c) of the Act.



### *Prescribe International Social Service Australia as an information source*

This amendment in the proposed Regulation further upholds openness in adoption and practice in keeping with the objects and principles of the Act, and is therefore supported by the OCG.

### *Advice of death of adopted person*

Under the current Regulation, a birth parent registered on the Reunion and Information Register (**Register**) is entitled to advice about the death of their child or of a placement breakdown if the information is known to FACS or an accredited adoption service provider.

The proposed Regulation will enable an adoption service provider or FACS to advise a birth parent of the death of an adopted person or the breakdown of an adoptive placement, even if the birth parent's name is not registered on the Register.

This amendment is supported as it promotes open adoption practice. The removal of the requirement to be registered to be advised of an adopted child's death or placement breakdown recognises an adopted child's connection to family and heritage.

It also identifies the scope for an accredited adoption service provider to provide post adoption support to adopted children and their birth and adoptive families.<sup>9</sup>

The amendment further upholds the object of the Act to recognise the changing nature of adoption practice.<sup>10</sup>

The ability to approach a birth parent in relation to placement breakdown provides an opportunity for the adoption service provider to consider the suitability of birth family as a potential placement option. This could be relevant where, for example, a birth family's situation had changed and it could be considered as a permanent placement option for that child.<sup>11</sup>

### *Time periods for advance notice periods*

A party to an adoption can require advance notice before their personal information is disclosed. The current Regulation prescribes an advance notice period of 2 months, while the Act provides for 3 months. The current Regulation also allows the advance notice period to be extended to a maximum of 4 months.

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<sup>9</sup> Sections 7(a) and 8(1)(a) of the Act.

<sup>10</sup> Section 7(d).

<sup>11</sup> Sections 7(a) and (c) and 8(1)(a) of the Act.

The proposed Regulation will be consistent with the Act in providing a 3 month timeframe, and also will not include a maximum time limit for which the notice period can be extended.

This amendment is supported as it increases the ability for advance notice period to be adjusted to suit the individual circumstances of a party to an adoption. Parties will have a minimum of 3 months and potential further time based on their needs. This time is important to allow parties to emotionally prepare and access support before embarking on an often sensitive and complex process of reunion with birth family.

The newly defined timeframes appropriately balance the rights of the party applying for adoption information with the rights of the party needing time to prepare for potential reunion.

**Office of the Children's Guardian**  
**July 2015**