



the Children's Guardian.

**Submission to the statutory review of the
*Adoption Regulation 2003***

PART 1 PRELIMINARY

Do any of the definitions in clause 3 of the Regulation require updating or clarification?

The current definitions are clear.

Should the definition of “non-identifying information” be broadened?

Consideration could be given to including non-identifying information about the placement location.

PART 2 ACCREDITED ADOPTION SERVICE PROVIDERS

Is the penalty of 25 points, for failure to deliver all records kept to the Director General, sufficient?

Given that the maximum penalty for failure to display the notice of accreditation is 50 penalty units, consideration should be given to raising the maximum penalty for failure to deliver all records to the Director-General to 50 penalty units.

As a *maximum* penalty, this would allow appropriate discretion to be exercised in imposing a penalty that takes into account all the relevant circumstances and reflects the seriousness of the offence in a particular case.

Given the penalty should the clause be more specific about how long the former accredited provider has before it must deliver records?

Clause 5E of the *Adoption Regulation 2003* requires a former accredited provider to deliver records to the Director-General “[a]s soon as practicable after it ceases to be accredited as an adoption service provider or otherwise ceases to provide adoption services”. A clear and objectively measurable time frame for compliance is required, particularly given that non-compliance attracts a penalty.

It is suggested that the former accredited provider be required to provide all records to the Director-General within 21 days of ceasing to be an accredited service provider. If it is not reasonably practicable to give access within 21 days, then before that period has expired the former accredited service provider should be required to

- explain to the Director-General's satisfaction the reasons why the records cannot be provided within that period, and
- provide the records by an alternative date approved by the Director-General, unless the Director-General is satisfied that the former accredited provider is not able to provide the records for reasons beyond its control.

Should the Regulation provide greater detail about *how* records should be lodged with the Director-General?

Clear instructions should be given about the manner in which records are to be lodged with the Director-General. However, it is not necessary to provide prescriptive detail in the Regulation itself. If the Regulation required records to be lodged in a form or manner approved by the Director-General, the detailed requirements (and alternatives if and where appropriate) could be set out in administrative directions. This would allow greater flexibility to reconsider required forms for lodgement of records as technology changes.

Should there be a definition of 'all records'? What records should it capture?

While a definition in the *Adoption Regulation* of "all records" might be helpful in providing certainty, there is also a risk that a definition may inadvertently exclude a category or categories of records.

The *Adoption Act 2000*, the *Adoption Regulation* and the *NSW Adoption Standards* describe a range of information (or records) that must be collected and preserved. Standard 5.2 of the *Adoption Standards* provides a useful, but

non-exhaustive list of examples of such information. Care would need to be taken to ensure that any definition captured this full range of information.

Consideration should be given to providing a definition that refers to all records/information collected and kept by the adoption service provider for the purposes of the Act and the Regulation, including records/information described in the *Adoption Standards*.

Does the legislation need to explicitly state that records cannot be destroyed and how they should be kept?

The legislation should explicitly state that adoption records cannot be destroyed. In this respect it is noted that the *Adoption Regulation* does explicitly state that case records cannot be destroyed (cl 73(3)).

The legislation should also provide clear direction about how records are to be kept. It is recommended that the *Adoption Regulation* state that:

- any record made under the *Adoption Act* or the *Adoption Regulation* may be kept in electronic or non-electronic form, and
- if a record is to be kept in electronic form only, then it must be capable of being readily printed on paper.

This is consistent with clause 8 of the *Children & Young Persons (Care & Protection) Regulation 2000*.

PART 3 SELECTION OF PROSPECTIVE ADOPTIVE PARENTS

Is 12 months sufficient time for the validity of an EOI?

The existing 12 month timeframe is supported. Circumstances of applicants may change and the information within an EOI must be current in order for it to be useful to adoption service providers. Allowing a longer period of validity for EOIs would increase the need to review and update EOIs.

Should the Regulation make clear that foster carers seeking to adopt children already placed in their care and interfamily [sic] adoptions be exempt from the EOI process?

The Regulation should clearly state that foster carers, who are seeking to adopt a child already in their care, are exempt from the EOI process. The Regulation should also state that intrafamily adoptions are exempt from the EOI process - in these cases the child or young person will generally already be living with the prospective adoptive parent.

In relation to clause 10, are there any other documents necessary? Are all of these documents necessary at this stage of the application process?

All documents referred to in clause 10 are necessary at this stage of the application process. Birth certificates will assist in establishing the applicant's identity. Marriage and divorce records will establish whether the applicant has a spouse who should be assessed as part of the application. Medical reports may be useful in preliminary identification of health concerns that may affect the applicant's suitability to adopt.

A requirement for criminal history check documents at the point of application would also facilitate the screening out of unsuitable applicants at an early stage. However there is also clearly a need to conduct criminal history checks at the point of assessment of suitability to ensure that checks are up to date. Requiring these checks at the point of application in addition to requiring them at the point of assessment may be result in unnecessary duplication of effort and resources.

Is there any other information the Director-General should be required to provide to a person/ persons submitting an EOI?

The current requirements are adequate however this information should be required to be communicated in writing, in addition to verbally or by other means.

Are the criteria appropriate? Are there any others which could be considered?

The clause 12 criteria for assessing suitability of persons to be approved to adopt, and selection of persons to adopt, children are appropriate. However, consideration should be given to the need for:

- consistency in basic assessment criteria which are essential to the safety and well-being of adoptive children, and
- particular checks to address criteria going to the safety and well-being of adoptive children – particularly in relation to criminal history.

Consistency in assessment criteria

The assessment criteria set out in clause 12 of the *Adoption Regulation* provide good guidance for determining suitability of adoption applicants. However, the discretion granted (in clause 13(3A)) to adoption agencies to disregard the assessment criteria in clause 12 and to apply other assessment criteria instead may lead to inappropriate inconsistencies in outcome and ‘forum shopping’ by adoption applicants.

The requirements that an adoption applicant is “of good repute and a fit and proper person to fulfil the responsibilities of a parent” (*Adoption Act*, ss27 and 28) and that each household member is of “good repute and is a fit and proper person to associate with a child” (*Adoption Regulation*, cl 13(4)) do apply in all cases. However these are broadly stated guiding principles – more specific criteria are required to determine whether a person is “fit and proper” for adoption purposes.

It is appropriate to allow some scope for discretion in assessment processes for adoption applicants. However, serious consideration should be given to identifying basic criteria – those which are critical in estimating risk to the safety and well-being of adoptive children – as essential in the assessment of adoption applicants undertaken by all adoption agencies.

Checks for particular records

Clause 12 requires consideration of the criminal history (if any) of adoption applicants, their spouses and household members. Clause 12 does not, however, expressly require checks for any particular types of records relating to this. Consideration should be given to expressly requiring particular checks relevant to this criterion.

In considering whether there is a need to expressly require particular checks, it should be noted that adoption applications are not currently subject to a legislative requirement for Working With Children Checks (WWCC). WWCCs are, however, required for engagement in “fostering [as an authorised carer] and other child care” (see ss33 and 37 of the *Commission for Children and Young People Act 1998* and clause 20 of the *Children and Young Persons (Care and Protection) Regulation*). WWCCs are also required for adult household members of authorised carers and children’s services (now known as early childhood education and care) providers (*Commission for Children and Young People Act*, s45).

This means that there is a significant difference between records which can be checked in assessment of prospective authorised carers and children’s services (early childhood education and care) licensees and those which can be checked in assessment of adoption applicants. For example, records relating to spent convictions and offences dealt with by recognizance (in certain cases) cannot be

considered in assessing adoption applications.¹ These records can, however, be considered in assessing prospective authorised carers and children's services (early childhood education and care) licensees as part of a WWCC.² It should be noted, however, that only those records relating to a specified range of offences can be considered in WWCCs.³

Changes to the WWCC provisions of the *Commission for Children and Young People* are due to be made some time later this year. Consideration should be given to extending the WWCC provisions to adoption applications.

If WWCC provisions are extended to adoption applications, adoption applicants and their adult household members will be subject to mandatory national criminal history records checks for a specified range of WWCC offences.⁴ These checks would include criminal charges, whether or not heard, proven, dismissed, withdrawn or discharged,⁵ as well as spent convictions and recognizance offences falling under s579 of the *Crimes Act*. In addition, adoption applicants and their adult household members will be subject to mandatory checks for apprehended violence orders made on the application of a police officer or other

¹ The *Criminal Records Act 1991* prohibits consideration of spent convictions unless a specific exemption from this prohibition has been made – see s12 of the *Criminal Records Act*. Offences dealt with by recognizance cannot be considered if certain conditions have been met – see s579 of the *Crimes Act 1900*.

² See s15 of the *Criminal Records Act* and s38(3)(a) of the *Commission for Children and Young People Act* re consideration of spent convictions in WWCCs. See s38(3)(c) of the *Commission for Children and Young People Act* re consideration of offences dealt with by way of recognizance.

³ See the definition of 'relevant criminal record' in s33(1) of the *Commission for Children and Young People Act*.

⁴ National criminal records fall within the definition of 'relevant criminal record' in s33(1) of the *Commission for Children and Young People Act*.

⁵ See s38(3)(b) of the *Commission for Children and Young People Act*.

public official for the protection of a child (or a child and others), and for any child protection prohibition orders issued against them.⁶ They would also be subject to mandatory checks for employment proceedings with respect to 'reportable conduct' and acts of violence committed in the course of employment and in the presence of a child.⁷

Such checks would greatly assist in the assessment of the suitability of adoption applicants, and would bring assessment of prospective adoptive parents into line with assessment of prospective authorised carers and children's services (early childhood education and care) licensees.

If the WWCC provisions are not extended to adoption applications, then amendments should be made to the adoption legislation to require similar checks for adoption applications. This would necessitate an accompanying amendment to the *Criminal Records Act 1991* to allow consideration of spent convictions (with an amendment in the adoption legislation to reflect this). Amendment to the adoption legislation would also be necessary to allow consideration of offences dealt with by recognizance and falling under s579 of the *Crimes Act*.

As indicated above, under current legislation, criminal records checks for WWCC purposes are limited to a specified range of offences. If WWCC provisions are extended to adoption applications, but it is considered that adoption applications warrant criminal history record checks beyond the specified range of WWCC offences, a requirement for additional offences checks should be made explicit in the adoption legislation. Again, amendments to the *Criminal Records Act* and to adoption legislation, as described above, would be needed if checks for

⁶ See s34 of the *Commission for Children and Young People Act*, and the definition of 'relevant apprehended violence order' in s33(1) of that Act.

⁷ See s34 of the *Commission for Children and Young People Act*, and the definitions of 'relevant apprehended violence order', 'relevant employment proceedings' and 'reportable conduct' in s33(1) of that Act.

additional (non WWCC) offences were to include spent convictions and all offences deal with by recognizance.

In addition to the matters raised above, outcomes from the Carer Screening (Probity) Roundtable may be relevant in reviewing checking requirements for adoption applications.⁸

Does the decision making process adequately provide for natural justice for applicants?

The decision making process provides for natural justice for applicants. There are provisions to provide declined applicants with reasons in writing and clause 72 of the Regulation prescribes the decision as reviewable in the ADT.

Is 4 years an appropriate period of time for an approval to remain current?

This is supported, however updates on the particulars of the application should be required on a regular basis and immediately prior to placement, to confirm and update the particulars of the application. Criminal history checks should also be re-conducted prior to placement.

⁸ The Roundtable is an interagency group considering requirements for authorisation of carers. The Roundtable was convened in 2011 by the Ombudsman's Office in response to concerns about inconsistency in probity checking requirements for authorised carers. The next meeting of the Roundtable is being coordinated by Community Services and ACWA, and is currently scheduled for 26 March 2012.

PART 4 ADOPTION REGISTER

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 wished to adopt? Should their original joint application instead be revived and updated as an application by a single person?

A person who has applied as a prospective adoptive parent jointly with another should not be required to reapply if their relationship breaks down. The original application should be revived.

However, some re-assessment (rather than just updating) of the application will be necessary. A change from two adoptive parents to one adoptive parent constitutes a significant change of circumstances. Reassessment is required to consider the impact of this changed circumstance on the remaining prospective adoptive parent's capacity and suitability to become an adoptive parent.

PART 5 PLACEMENT FOR ADOPTION

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 (eg. overseas, local?)

The first stated object of the *Adoption Act* is to ensure that the best interests of the child awaiting adoption, both in childhood and later life, are the paramount consideration in adoption law and practice (*Adoption Act*, s7(a)). This requires decision-makers to consider whether, in *all* the circumstances of a particular case, a particular placement would better meet the needs of a child awaiting adoption than any other alternative care arrangement.

Arguably, clause 24(2) of the *Adoption Regulation* as it is currently drafted is inconsistent with s7(a) of the Act because the blanket prohibition on placement in

cases where a female approved person is pregnant effectively prevents a decision maker considering whether, in all the circumstances of a particular case, that placement would be in the best interests of the child awaiting adoption.

It should be acknowledged, however, that where an approved person is pregnant, genuine questions may arise about whether the birth of a biological child soon after placement will impact on the prospective adoptive parents' motivation to adopt, on family functioning, well-being of the adopted child and placement stability etc. In most cases it may be best to defer making the placement to allow reassessment after the birth of the biological child.

A strong argument in favour of deferring placement until after the birth of a biological child may be made on the basis that, while an approved person is pregnant, a decision-maker's ability to properly assess whether placement will be in the best interests of the child awaiting adoption will be limited. In particular, it may be very difficult to assess the impact that the birth of a biological child will have on family functioning and on the prospective adoptive parents' capacity to care for an adoptive child.

It should be noted, however, that it may be also be extremely difficult to make such an assessment for quite some time after the birth of the biological child. For example, it has been observed that the onset of postnatal depression generally occurs within the first 4 months after the birth of a child, however symptoms may emerge at any time within the first year.⁹ Clause 24 does not, however, place a blanket prohibition on placement for adoption in any period following or even in the period immediately after the birth of a biological child.

While the difficulties of assessing the suitability of a placement where an approved person is pregnant are acknowledged, the possibility that such a

⁹ http://raisingchildren.net.au/articles/what_is_postnatal_depression_-_panda.html

placement may be in the best interests of a particular child cannot be completely discounted in every case. For example, such a placement may still be in the best interests of an older child who is known to one or both prospective adoptive parent(s). Such a placement may also better be in the best interests of a child awaiting adoption if the placement is made for an interim period before a final adoption order is made. In such cases, the final adoption order could be made some time after the birth of the biological child, and there could be ongoing assessment of the suitability of the placement throughout the period preceding the making of that final adoption order.

There are numerous other circumstances which may generally be considered to seriously impact a person's capacity to care for a child placed with him or her for the purposes of adoption. Clause 24 does not, however, list any other circumstances automatically precluding placement. Presumably this is because it is considered that even where such circumstances exist, decision-makers should retain the discretion to weigh up all the circumstances relevant to whether a particular placement would be in the best interests of the child in a particular case.

A further point worth noting is that in some cases a child awaiting adoption may have the capacity and the desire to express a view about placement with particular prospective adoptive parents. The *Adoption Act* requires that a child's views on a matter concerning his or her adoption be given due weight in accordance with the developmental capacity of the child and the circumstances (s8(1)(d)). However, clause 24(2) of the *Adoption Regulation* would preclude any consideration of the child's views whatsoever.

Consideration should be given to amending clause 24(2) to allow a decision-maker to consider all the relevant circumstances in determining whether or not a placement should be made in cases where an approved person is pregnant. The amendment should make it clear that the pregnancy of the approved person

must be considered in any decision whether or not to make a placement. The existing requirement in clause 15(e) that an applicant notify the decision-maker if the applicant or the applicant spouse/de facto partner becomes pregnant should be retained to facilitate such a consideration. The amendment to clause 24 should also make it clear that the decision whether or not to make a placement must be based on the best interests of the child awaiting adoption.

Do the provisions of this Part adequately provide for the consideration of the intentions of birth parents for their children in the selection of adoptive parents?

This focuses on cultural heritage, identity or ties, religious upbringing intentions and the domestic arrangements of proposed adoptive parents. In practice, as part of consent process, birth parents are provided with opportunities to make more detailed requests regarding the qualities of the adoptive parents that they wish their child to be placed with. The legislation could be broadened to encompass other wishes expressed by the birth parents.

Clause 27 provides for situations where compliance with the expressed wishes of a parent or guardian is impracticable.

PART 6 ADOPTION PLANS

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

Allowing for aspects of a plan to be ongoing and/or aspects of a plan to have differential timeframes would support flexibility in planning as well as ensuring that planned activities and events actually occur. This may also support the adoptee to exercise some decision-making regarding their changing contact needs.

PART 7 CONSENTS TO ADOPTIONS

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?

This requirement should be retained. A person being placed on the register of counsellors should have an up to date criminal records check.

PART 11 ADOPTION INFORMATION

Is there information which should be included and is not?

An adopted person should have access to any medical history of his/her birth family.

Are the provisions of this part of the Regulation clear? If not, please provide details about what aspects are confusing?

The provisions in the legislation are clear.

GENERAL QUESTIONS

Should the Regulation make broader provisions for collecting information from the 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)?

The inclusion of broader provisions to allow for the collecting of information about the birth parents is supported. As much detail as possible about the child's birth family should be collected and preserved.