The Adoption and Children Act 2002, due to come fully into force on 30 December 2005, effects a long-needed and radical reform of adoption law. The Act has had a very lengthy gestation and is widely regarded as being long overdue. After setting the reforms in a general historical and policy context, Caroline Ball examines, critically, the main provisions of the Act.

The long-awaited Adoption and Children Act 2002 represents much more than just another in a line of reforming statutory milestones stretching back to the introduction of legal adoption in 1927, when the Adoption of Children Act 1926 came into force in England and Wales. Under the new law, essentially only the legal concept of adoption – the irrevocable legal transfer of a child from the birth to the adoptive family with the consent of the birth parent(s), or a court decision to dispense with that consent – remains unaltered. The intention of policy makers and legislators is that the 2002 Act should, rather late in the day, reform the law to recognise the changed nature of adoption practice apparent since the 1980s.

Background

The objective of the, then controversial, 1926 Act (Lowe, 2000; Ball, 2003; Cretney, 2003) was to replace the widespread practice of unregulated de facto adoption with a legal route for the permanent and secure transfer of orphans and illegitimate babies from their birth family to relatives or childless couples to form new families. Contrary to the expectation of the 1925 Child Adoption Committee, which had anticipated that there would always be more people wishing ‘to get rid of children by way of adoption’ than couples wanting children (Home Department, 1925, para 19), adoption proved popular. It was popular, both for the purposes for which it was intended and also as a device whereby single mothers could, through adoption, save their child much of the, then very real, stigma and legal disadvantage of illegitimacy. It was suggested in 1949 that as many as one-third of adoptions of illegitimate children were adoptions by the birth mother (Lowe, 2000, p 315). More controversially, step-parent adoption – the adoption of their own children by single or previously married mothers together with their spouses – also proved increasingly attractive (Masson et al., 1983). The popularity of adoption is apparent from the number of orders made annually. They rose, with fluctuations, from nearly 3,000 in 1927 to a high of almost 25,000 in 1968.

From 1970 onwards, for well-documented reasons relating to improved contraception, the legalisation of abortion, changing social attitudes and the availability of welfare benefits and housing for single mothers, the number of babies available for adoption dropped dramatically. (For greater detail see Lowe, 2000; Ball, 2002; Cretney et al., 2002.) The number of orders made annually fell to 10,690 in 1980 and to a low of 4,387 in 1998 before the slight but fluctuating rises discernible since (5,354 in 2003). Over the same period the proportion of babies adopted under the age of one year dropped significantly and, latterly, government policy has favoured legal permanency as the preferred outcome for children in care unable to return to their birth families (Department of Health, 2000; Performance and Innovation Unit, 2000).

The reform of adoption law 1926–1976

For the first 50 years after its introduction, the law reflected the fact that the vast majority of applications were for the adoption of illegitimate babies by strangers or of older children by the mother, often with a step-parent. Only a minute proportion of children were
adopted out of local authority care; Lowe (2000, p 315) quotes the figure of 3.2 per cent of all adoptions in 1952. Throughout this period, reform of the statutory framework was largely directed towards tighter regulation of the adoption process to eliminate perceived abuses, and the gradual removal of disparities in the legal status within families, especially for purposes of inheritance, between birth and adopted children.

Study of the departmental committee reports which preceded reforming legislation during this period provides fascinating perspectives on contemporary concerns and attitudes. These policy insights help to explain the reasons for the development of an exclusive model of adoption practice supported by laws which, through mechanisms that increasingly cloaked the process in secrecy, separated the child for all time and for all purposes from his or her birth family (Home Department, 1937; Home Department, Ministry of Health and Ministry of Education, 1946; Home Office and Scottish Home Department, 1954; Home Office and Scottish Education Department, 1972). During this period, effectively law and practice encouraged the fiction that the adopted child’s birth family did not exist and many people adopted as babies grew up not knowing, often until late in life, that they were adopted (Kornitzer, 1968).

A changed adoptive population
The drop in the number of babies available for adoption in the UK from the early 1970s was not matched by any significant reduction in the number of childless couples seeking to adopt, even when, from the 1980s onwards, medically assisted reproduction remedied infertility for a fortunate few. There were two parallel but quite separate responses. As in all other developed countries, couples with means, determined on the adoption of a baby, started to look to the ‘Third World’ and Eastern Europe through a largely unregulated process, too often involving a lucrative trade in babies to the benefit of middlemen. Other childless couples were encouraged by social workers, given greater powers under the Children Act 1975 and seeking a permanent home for children with disabilities or unable to return to their birth families from local authority care, to adopt ‘hard-to-place’ children. The placement of these often very damaged and demanding children too often lacked adequate pre- and post-adoption support, resulting in high levels of disruption and many, particularly older, children returning to local authority care (Thoburn, 1990; Fratter et al, 1991; Murch et al, 1993; Lowe et al, 1999).

The consolidating Adoption Act 1976 incorporated parts of the Adoption Act 1958, the last major reform of adoption law passed, while the number of orders made annually was still rising, with the relatively radical reforms based on the recommendations of the Houghton Committee (Home Office and Scottish Education Department, 1972) and enacted in Part I of the Children Act 1975. Such was the delay in implementation and the pace of practice change, that by the time the 1976 Act finally came into force in 1988 it was, being predicated on an exclusive model of adoption that had virtually ceased to exist, already out of date. The regulatory framework provided by the 1976 Act fails to recognise the very different needs of older children and their adoptive families in relation to maintaining continuing contact with significant people from the past and the need for support not only before but also well beyond the making of an adoption order. As Lowe (1997) suggests, symbolically important as it undoubtedly is, for many adoptive families, the making of the order, rather than being an end, is simply a very important milestone in a continuing process.

Safeguarding the welfare of babies adopted from overseas was not addressed in the Adoption Act 1976 or for years after its implementation. The Adoption (Intercountry Aspects) Act 1999 was intended to incorporate the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption introduced in 1993 into domestic law, but ratification was delayed. For too long the adoption of children from abroad was subject to a significantly lower level of scrutiny in terms of the
suitability of the adopters and the welfare of the children than was mandatory for domestic adoptions (Duncan, 1995; Triseliotis, 2000).

The reform process
Only a year after the 1976 Act was finally fully implemented, and in the same year that radical reform and consolidation of the rest of child law was enacted in the Children Act 1989, a working group of departmental officials and a Law Commissioner were set up to review adoption law and report to ministers. In addition to the essential ingredients of making adoption a more child-centred and better supported process and regulating inter-country adoption, the 1992 review identified substantial areas of the current law as being in need of reform, either through amendment or innovation. These included local authority adoption services, dispensing with parental consent, freeing for adoption, step-parent adoption, a secure alternative to adoption for some children and recognition of a continuing role for birth families and others from their past in the life of some adopted children (Department of Health and Welsh Office, 1992).

Progress between the publication of the 1992 report and legislation, described in detail elsewhere, was frustratingly slow, with two White Papers (Department of Health 1993 and 2000) and several false starts (Ball, 2002). The consequences of delay were not, however, entirely negative. There is little doubt that some of the reforms finally achieved would have been unlikely had they not been influenced both by the findings of Department of Health-funded and other research into practice under current legislation, published in the late 1990s (see, for instance, Fratter, 1996; Howe, 1998; Department of Health, 1999; Lowe et al., 1999), as well as by the well-orchestrated lobbying of members of both houses by the BAAF-led Adoption Law Reform Group.

The Adoption and Children Act 2002
Whatever the debate over substance and detail, key principles, themes and aspirations emerged from practice experience and research evidence to inform the quest for a new legislative framework. The search was for a more inclusive and flexible model for the permanent placement of a child with a new family, without losing the security of adoption for those for whom it is appropriate. The rest of this article will outline the major changes to adoption law that the 2002 Act introduces and, where appropriate, critically explore the extent to which implementation within proposed regulations and guidance appear likely to meet the objectives of those who have worked so hard and so long for reform of the law. The major changes that will be considered are:

- the welfare principle and alignment with the Children Act 1989;
- increased local authority responsibilities for adoption services;
- eligibility to adopt;
- placement for adoption with consent and by order;
- dispensing with parental consent;
- post-adoption contact;
- the regulation of intercountry adoption;
- access to information for birth relatives;
- amendments to the Children Act 1989:
  - parental responsibility for unmarried fathers;
  - parental orders rather than adoption for step-parents;
  - the introduction of special guardianship;
  - the meaning of ‘harm’;
  - care plans and reviews;
  - advocacy services.

The welfare principle and the checklist
It has long been recognised that the welfare principle in the 1976 Act, which requires courts and agencies to give ‘first consideration to the need to safeguard and promote the welfare of the child throughout his childhood’, fails sufficiently to emphasise the truth that decisions taken in relation to a child’s adoption will go well beyond childhood to have lifelong impact. The new principle not only
appropriately extends the period to be considered but also adds the unambiguous element of the paramountcy of the child’s welfare (Adoption and Children Act 2002, section 1(2)). The 2002 Act is aligned with the Children Act 1989 in that section 1(4), mirroring the checklist in the 1989 Act (section 1(3)), and sets out the matters to be taken into account (among others) when considering the child’s welfare throughout life in the context of adoption decision-making.

The adoption service: assessment, services and allowances

The Adoption Act 1976 (section 1(1)) for the first time required all local authorities to establish an adoption service, with responsibility for providing services ‘designed to meet the needs, in relation to adoption of:

(a) children who have or may be adopted,
(b) parents and guardians of such children, and
(c) persons who have adopted or may adopt a child’,

and for that purpose to provide the requisite facilities. Alternatively, local authorities might arrange for the provision of adoption services by approved adoption agencies.

As the number of children adopted from care grows, in part driven by performance indicators, the adoption work of local authorities expands in volume and in complexity. This is because many of the children for whom adoptive homes are being sought are likely to have been deeply damaged by experiences within their birth families and subsequently by moves in care and delays in the adoption process. As a consequence, many suffer a range of emotional and behavioural disabilities which place heavy demands on the adoptive families. While in the 1976 Act there is provision for the exceptional payment of adoption allowances to support the adoption of ‘hard-to-place’ children, the allowances were discretionary and, being means tested, generally at a lower level than the boarding-out allowances paid for children in foster care. In the 1990s, research showed that practice regarding post-adoption support and the payment of adoption allowances varied very widely between local authorities (Lowe, 1997). Transitional regulations (Adoption Support Services (Local Authorities) (England) Regulations 2003) are currently in force. These will be replaced by new regulations, which exclude some financial assistance for adopters from means testing (the Adoption Support Services Regulations 2005, Rule 15(4) and (5)), when the 2002 Act comes into force.

The new Act requires local authorities to provide information and support services before, during and after adoption for children, birth families and adopters, and to assess the needs of individuals requesting services. Unfortunately, despite strong support for the creation of such a duty when the Bill received its second reading in the House of Lords (Hansard, 2002a, H L Vol 636, cols 20–33, 46–115), the Act does not place a duty on the local authority to provide the services if the assessment suggests that they are required. Nor does the Government appear to be honouring its commitment given to Parliament during the passage of the Bill, to issue directions to health and education authorities requiring their co-operation in the planning and delivery of adoption and support services. In advance of implementation of section 4 of the 2002 Act, the 2003 regulations under the 1976 Act spell out local authorities’ adoption services’ responsibilities in greater detail than in the past (SI 2003/370). At the same time, the Department of Health published new Adoption Support Services Guidance for which the Commission for Social Care Inspection has responsibility for inspection.

Eligibility to adopt

Under the 1976 Act, only married couples or single people can adopt. Where a child seeking adoption is placed with an unmarried couple, however stable their relationship and however committed they both are to adoption, only one of them can become the child’s adoptive parent. Although the other partner can acquire a residence order under the Children Act...
1989 (section 8), this does not provide the equality of legal parenthood required. The Bill originally mirrored the restrictions on eligibility to adopt in the 1976 Act. However, sustained, well-articulated pressure from BAAF and almost all the leading child care organisations persuaded the Government to allow a free vote on a private members’ amendment which lifted the restriction at third reading in the House of Commons. An opposition attempt subsequently to restrict the definition of ‘couple’ to heterosexual couples was defeated by a large majority. Intense lobbying by individuals and organisations opposed on religious or other grounds to adoption by unmarried couples, combined with the natural conservatism of many peers, initially succeeded in getting the amendment reversed in the House of Lords. It was then reinstated by the Commons and a further attempt to reverse it in the Lords was narrowly defeated when several peers, who had previously resisted the change, were persuaded of the strength of the case.

Under section 50, unmarried heterosexual and same-sex couples will be equally eligible with married couples to adopt. Draft regulations on arranging adoptions and the assessment of prospective adopters were published in 2003. The consultation period ended in May 2004 but, despite the proposed timetable of all regulations being in place by the end of 2004 to allow plenty of time for training prior to implementation of the Act, these regulations and many others are, at the time of writing, still awaited.

Placement with consent and placement orders
The freeing for adoption provisions in the 1976 Act were enacted following recommendations by the Houghton Committee. They were designed to ease the adoption process for mothers who had decided on adoption before the child’s birth, and to protect prospective adopters of children in care whose parents were refusing their consent from the trauma of contested adoption proceedings. In the very small number of cases of babies being relinquished for adoption at an early stage, the freeing for adoption procedures in the 1976 Act, where they have been used, appear to have worked in the way the Houghton Committee intended. Under the 2002 Act, they are replaced with the placement by consent provisions in sections 19 and 20. A parent wishing to relinquish a child for adoption may do so either for placement with named adopters or with adopters to be chosen by the agency. A parent, having consented to placement, may make a declaration that he or she does not wish to have any further involvement in the adoption proceedings. This declaration may be revoked at any time before an application for an adoption order is made (Adoption and Children Act 2002, section 20).

In cases in which parents were refusing their consent to adoption and local authorities were seeking freeing orders, either when children were well established with or in advance of identifying prospective adopters (Department of Health and Welsh Office, 1992, paras 14.3–14.5), the 1976 Act freeing provisions proved very unsatisfactory in practice. In the former cases they resulted in delay and consequent disadvantage to birth parents wishing to contest the adoption. Where adopters were not yet identified, many freed children were left in a legal limbo when placements were not made or broke down (Murch et al, 1993).

To replace the discredited freeing procedure, placement orders, to be applied for prior to the child being placed, were initially proposed in the 1992 report. They received support in principle although there was considerable debate as to detail, with further consultation following the publication of the 1993 White Paper. In the event, the placement order provisions in the 1996 draft Bill proved contentious. The requirements proposed for the making of a placement order, which could result in the final legal severance of the child from the birth family through adoption, were strongly criticised as being considerably less stringent than the threshold conditions for the making of a (revocable) care order (Children Act 1989, section 31(2)). Initially, the Adoption and Children Bill failed to address these concerns. How-
ever, the strength of the case for there being a potential breach of Article 8 of the European Convention on Human Rights (ECHR) appeared to have been recognised because the Government amended the provision at an early stage. Under section 21(2) of the 2002 Act, the criteria for the making of a placement order on a child who is not an orphan or already the subject of a care order are two-fold: the threshold conditions for the making of a care order under the 1989 Act, section 31(2) have to be satisfied, and parental consent has to be dispensed with on the grounds that the welfare of the child requires it (2002 Act, section 52(1)(b)).

The issue of party status for birth parents at the adoption hearing is bound up with the placement order debate and proved equally contentious. The Act provides that where they have given advance consent to placement for adoption, or where that consent has been dispensed with and a placement order made, birth parents may only oppose an application for an adoption order with leave of the court, and that leave will only be granted if there has been a change in circumstances. During the passage of the Bill through both houses, serious concerns were expressed that putting the onus on birth parents to make the application does not provide adequate procedural safeguards to guarantee that they have a fair hearing and respect for family life (ECHR, Articles 6 and 8). Amendments were unsuccessfully proposed which would have ensured that parents should always have a right to be parties to the adoption proceedings so that they would have a right to be heard (with guidance to the Legal Services Commission to fund their participation).

Party status and consequent legal representation for children in adoption proceedings were debated at various stages during the passage of the Bill. The Government’s line was that the duty on courts and agencies set out in section 1(4)(a) to have regard to ‘the child’s ascertainable wishes and feelings regarding the decision (considered in the light of the child’s age and understanding)’ precluded the need for party status in adoption proceedings. However, section 122 of the 2002 Act, which came into force in December 2004, amends the 1989 Act (section 41) to provide that placement order applications become specified proceedings. The effect of this is that, as with care and related proceedings, a children’s guardian will be appointed and the child will be separately represented in applications for the making or revocation of a placement order, unless the court considers the appointment unnecessary.

**Dispensing with parental consent to placement or adoption orders**

The consent of the birth parents (excluding the unmarried father without parental responsibility), freely given with understanding of the consequences of the order, has always been a legal requirement of adoption. Since the 1926 Act, courts have also had the power to dispense with parental consent to adoption provided statutory criteria were satisfied. The 1976 Act allows parental consent and dispensing with that consent to be dealt with either at the hearing of the adoption application, or in advance of that hearing, when an application for an order freeing the child for adoption is made. In order for a parent’s consent to be dispensed with, one of the criteria set out in section 16(2) has to be satisfied. In the 1980s it was estimated that nearly 20 per cent of adoptions involved dispensing with parental consent, mostly on freeing applications (Murch et al, 1993). The most commonly relied on and widely criticised of the grounds is that the parent is withholding agreement ‘unreasonably’ (1976 Act, section 16(2)(b)). As the interdepartmental group reviewing adoption law recognised, application of this provision generally results in the court’s view of reasonable refusal to consent being substituted for that of the parents, who are then branded ‘unreasonable’ (Department of Health and Welsh Office, 1992). The review proposed a single new ground, in addition to the parents being unable to be found or incapable of giving agreement, which recognised that the gravity of the decision, in relation to fundamental rights, was such that it required a more
stringent test than simple application of the principle that the child’s welfare is paramount:

The test should require the court to be satisfied that the advantages to the child of becoming part of a new family are so significantly greater than the advantages to the child of any alternative option as to justify overriding the wishes of a parent or guardian. (p 4)

This was rejected by successive governments from the 1996 draft Bill onwards in favour of the ‘welfare of the child’ test (2002 Act, section 52(1)(b)). When rejecting robust efforts to convince the Government that this is an insufficiently clear threshold to be met before parents could lose their relationship with their child for ever, Baroness Andrews suggested that because of the factors to be considered under the checklist (section 1(4)) ‘[I]t is not a judgment that can be taken lightly . . . It is not a test that would be met in marginal cases’ (Hansard, 2002b, col 264). The Government also rejected suggestions that Human Rights Act 1998 challenges to this ground for dispensing with consent may succeed on the basis of ECHR jurisprudence under Article 8 (the right to a private and family life). In both Soderbach v Sweden ((2000) 29 EHRR 95) and Johansen v Norway ((1997 23 EHRR 33) the ECHR endorsed the need for exceptional circumstances to justify permanent severance of the parent–child relationship. Decisions to dispense with parental consent, challenged under the 1998 Act, will presumably require demonstration that the child’s welfare is dependent on the right to private and family life within an adoptive family to such an extent as to outweigh the Article 8 rights of the birth family.

Post-adoption contact with birth families
Only 20 years ago, such was the extent to which an adoption order created the fiction that the birth family ceased to exist, that continuing contact with birth families after adoption was experienced by very few children and was regarded with deep suspicion by the courts. Much has changed. The value to many adopted children of maintaining some links with their birth families and other significant people from the past after the making of the adoption order is well recognised. It is supported by section A of the 2001 National Adoption Standards, and, when the Act is in force, also by the welfare checklist in section 1(4). This change in adoption practice has taken place, driven by research evidence and the older adoptive population, for the most part without any recourse to the courts. Indeed, where applications have been made, in all but a very few cases the courts have been reluctant to impose a condition of continuing contact on adopters, although they have been prepared to grant leave for applications for contact orders when adopters have reneged on undertakings (Re T (Adopted Children: Contact) [1995] 2 FLR 792).

Under the 2002 Act, contact when a child is placed for adoption and contact following an adoption order are dealt with separately. Any existing contact arrangements under the Children Act 1989 (sections 8 or 34) are ended when a child is placed for adoption and no further applications may be made under that Act. Instead, where an adoption agency is authorised to place a child for adoption, or is placing a child under six weeks old, contact arrangements are made under sections 26 and 27 of the 2002 Act. Courts making placement orders must review existing and proposed contact arrangements and invite the parties to the proceedings to comment on them. Where agreement is not possible, the court may order the person with whom the child is placed to allow contact, on any conditions considered appropriate, between the persons named and the child. There is provision for suspension of arrangements for up to seven days in an emergency.

Initially, only parents and guardians were allowed to apply as of right for contact with a placed child. In recognition of the important part that siblings, grandparents and other relatives may continue to play in the life of a child placed for adoption, following informed debate, the Government introduced an amendment to the Bill allowing relatives (as defined in section 141(1)) to apply as of right
(section 26(3)(a)-(e)). Anyone else will require the leave of the court.

The provisions relating to contact in sections 26 and 27 only apply when a child is placed for adoption and come to an end when an adoption order is made. Contact issues will have to be thoroughly explored prior to the making of the order and in future, as at present, continuing contact with the birth family or other people important to the child will be much more likely to take place by agreement rather than under an order. If agreement is not possible, applications for contact made within the adoption proceedings or subsequently are dealt with under section 8 of the 1989 Act. Birth parents may apply as of right for a section 8 contact order in the adoption proceedings; relatives will require leave to do so. Once an adoption order has been made, birth parents will also require leave of the court to apply. Unlike the position under the 1976 Act, courts’ powers in relation to ordering contact under the 2002 Act are confined to making section 8 orders. There is no provision under the Act for attaching conditions to adoption orders.

The regulation of intercountry adoption
The 2002 Act (Chapter 6) incorporates many of the measures in the Adoption (Intercountry Aspects) Act 1999 with additional safeguards and penalties. Although sections 83–87 of the 2002 Act have only come into force so far, for the purposes of making regulations (SI 2004/3203), the regulation of intercountry adoptions under existing legislation has already been considerably tightened up. On 1 June 2003, the Government ratified the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, which means that anyone in England and Wales who wants to adopt a child from overseas has to undergo the same procedure as they would to adopt a child domestically, regardless of the country they wish to adopt from or the nature of their relationship to the child. The maximum penalty for failing to comply with the requirements set out in regulations prior to adopting a child from overseas has been increased to 12 months’ imprisonment and/or an unlimited fine upon conviction. (Previously, the maximum penalty was three months’ imprisonment and/or a maximum fine of £5,000.)

Access to information for birth relatives
Adopted adults have had the right since 1976 to have access to their original birth certificate, though for many actually tracing birth relatives has been fraught with difficulties. For birth relatives searching for an adopted child or sibling, and with no corresponding right to information which might aid the search, the chances of success have been remote in the extreme. The Adoption Contact Register, established under the Children Act 1989, allows adopted people to register their interest in contacting birth relatives in Part I and relatives searching for an adopted person to register their interest in Part II. If there is a match, it is up to the adopted person to initiate contact. The Register was not well publicised and has a low link rate, as do other organisations such as the National Organisation for the Counselling of Adoptees and Parents (NORCAP). The Register is seen by searching relatives as expensive, overly bureaucratic and much needing an element of counselling support (Mullender and Kearn, 1997).

The difficulties faced by people searching for their adopted relatives were movingly articulated in Grand Committee during the passage of the Bill in an attempt to open up access to identifying information. In response to a persuasive parliamentary and media campaign, for the first time section 61 of the 2002 Act will allow adoption agencies, having consulted with the person about whom information is sought, to disclose otherwise protected information about an adopted adult to a person seeking such information. Section 61 only applies to post-commencement cases. Section 98, which came into force in December 2004, makes similar provision for people adopted pre-commencement; the vast majority for several years to come. The Government was urged to place a duty on agencies to respond to requests, but resisted on the grounds that the volume of applications might ‘put at risk the ability
of those agencies to focus on the essential
task of improving current and future
arrangements for adoption’ (Hansard,
2002b, col 290). Given the numbers of
children adopted prior to the 1970s when,
as the then director of the Post Adoption
Centre suggested, ‘The experience of
most women who parted with a child for
adoption . . . was that there was not even
a hairline crack in the wall of silence, let
alone a suggestion of openness’ (Sawbridge,
1991, p 116), it appears likely that many
birth relatives will start to search. Support
for searching relatives will be largely
provided through local authority
commissioned adoption support services
supplied by agencies registered with the
National Care Standards Commission in
England and the National Assembly in
Wales.

Amendments to the Children Act 1989

Parental responsibility for unmarried
fathers
Section 4(1A) of the 1989 Act, introduced
by section 111 of the 2002 Act, makes it
much easier for unmarried fathers to have
parental responsibility for their child. The
change came into force on 1 December
2003. Any unmarried father named on the
birth certificate from that date will have
parental responsibility for the child. Un-
fortunately, given the evidence of wide-
spread ignorance regarding unmarried
fathers and parental responsibility, the
opportunity was missed when the pro-
vision came into force, not only to pub-
licise the change but also to emphasise
the fact that it does not have retrospective
effect. The consequence is that for
another 16 years it is likely that many
unmarried fathers named on birth certi-
ficates prior to 1 December 2003 will
mistakenly believe that they automatically
have parental responsibility, whereas they
can only acquire it by marriage to or
formal agreement with the mother or by
court order.

Parental responsibility for step-parents
Readers with long memories will
remember an earlier, initially successful,
attempt to discourage step-parent adop-
tion by restricting the circumstances in
which courts would allow step-parents to
adopt to those in which the matter could
not better be dealt with by variation of an
existing custody order or the making of a
custodialship order (Children Act 1975,
section 10(3) consolidated into the Adop-
tion Act 1976, section 14(3) and repealed
by the Children Act 1989, section 108).
The intention, well addressed in the
Houghton report (Home Office and
Scottish Education Department, 1972),
was to avoid the artificial legal separation
of the child from half of his or her birth
family brought about by adoption by the
mother and her new husband. After an
initial dramatic drop in step-parent
adoptions, judicial reminders in the early
1980s that the ban was not absolute were
followed by a substantial rise in the
numbers of applications and orders (for
more detail, see Ball, 2003, p 17).

Section 112 of the 2002 Act allows
step-parents to acquire parental responsi-
bility without adoption. It inserts a new
section 4A into the 1989 Act, under
which a step-parent may acquire parental
responsibility for the child of his or her
spouse, either with the agreement of all
with parental responsibility or a court
order. The advantage to the child is that
the parental responsibility of the other
birth parent is not removed, neither are
inheritance rights in relation to the birth
family affected. Parental responsibility
acquired under section 4A can only be
brought to an end by court order made on
the application of anyone with parental
responsibility or, with leave, the child.
The result is not an absolute ban on the
making of step-parent adoption orders.
However, given the considerations apply-
ing to the exercise of powers under the
2002 Act (section 1) and especially ‘the
likely effect on the child (throughout his
or her life) of having ceased to be a
member of the original family and become
an adopted person’ (section 1(4)(c)),
relationships with relatives and others
(section 1((4)(f)), and the ‘no order’
principle (section 1(6)), it appears that the
circumstances for making such an order in
future would have to be exceptional.

Special guardianship
The Review of Adoption Law (Department
of Health and Welsh Office, 1992) recognised that for some, mainly older, children in care and seeking a family for life, or living with relatives or others and needing legal security, the total legal separation from their birth family effected by adoption was not appropriate. At the same time, the only alternative, a residence order coming to an end, except in exceptional circumstances, at 16 and giving only limited parental responsibility to carers, did not provide sufficient long-term security. The working group recommended a new mid-way order, *inter vivos* guardianship, which would give the carers a status similar to a guardian despite the fact that the birth parents were still alive, and correspondingly restrict the birth parents' exercise of parental responsibility without removing it. The Conservative Government did not propose introducing *inter vivos* guardianship in their 1993 White Paper (Department of Health, 1993), neither was it included in the draft Bill published for consultation in 1996 (Department of Health, 1996).

Committed, with high-profile support from the Prime Minister, to increasing the number of children able to leave public care to live permanently in families, the Government reintroduced the concept, renamed as ‘special guardianship’ among the proposed reforms in their 2000 White Paper, *Adoption: A new approach* (Department of Health, 2000). Section 115 of the 2002 Act introduces special guardianship into the 1989 Act in sections 14A–G. Consultations on draft regulations relating to amendments to the 1989 Act have taken place, but at the time of writing the regulations are not yet available.

**The meaning of ‘harm’**

In response to research evidence of the extent to which children exposed to domestic violence suffer harm because a parent is being harassed or intimidated, section 31(9) of the 1989 Act is amended by the 2002 Act (section 120) to add to the definition of harm ‘including, for example, impairment suffered from seeing or hearing the ill-treatment of another’. The amendment, which came into force on 31 January 2005, affects all proceedings in which the court applies the welfare checklist in section 1(3) of the 1989 Act, which include contested applications for contact or residence orders.

**Care plans and reviews**

Care orders, which give local authorities parental responsibility for a child, effect an apparent substantial infringement of the right to family life under Article 8 of the ECHR. Because of this, care orders can only be justified if the infringement satisfies three conditions: being in accordance with the law; being in pursuit of one of the legitimate aims provided for in the Article; and being necessary in a democratic society. Section 118 of the 2002 Act amends section 26 of the Children Act 1989 in response to judicial criticism of the extent to which local authorities may breach Article 8(2) when they fail to follow a care plan which formed the basis of the court’s decision to make a care order (*Re W and B (Children: Care Plan)* [2001] 2FCR 450 and *Re S (Children: Care Plan) Re W (Children: Care Plan)* [2002] 2AC 291). The amendment, which came into force in May 2004, provides for regular reviews of care plans by an independent reviewing officer (IRO). The IRO has the power to refer the case to a CAFCASS officer for possible referral back to court.

The provisions in section 121 of the 2002 Act, placing a duty on local authorities to provide and keep updated care plans with a prescribed content, to be known as section 31A care plans, to courts considering making a care order, amend section 31 of the 1989 Act. They are not yet in force.

**Advocacy services**

Advocacy support for looked after children seeking to make a representation or complaint under the 1989 Act complaints procedure was identified as a priority need by respondents to the consultation paper *Listening to People* (Department of Health, 2000). Section 119 of the 2002 Act further amends section 26 of the Children Act 1989 to require local authorities to arrange assistance by way of advocacy for care leavers and looked after
children, and to publicise the arrangements. The detailed requirements set out in regulations came into force on 1 April 2004.

Conclusion
The author has suggested elsewhere that:

If the Government is to meet its target of increasing the numbers of children adopted from care, and if, crucially, those adoptions are to have the chance of succeeding through being inclusive in nature and well supported professionally and financially for as long as is necessary, the Act will have been worth waiting for. (Ball, 2002, p 195)

Just as many of the new provisions have been informed by research evidence, so will rigorous research into practice under the new statutory framework be essential to inform future developments.

References
Adoption Support Services (Local Authorities) (England) Regulations 2003, SI 1348
Department of Health, Adoption Now: Messages from research, Chichester: John Wiley & Sons, 1999
Department of Health, Listening to People, London: DH, 2000

Fratter J, Adoption with Contact: Implications for policy and practice, London: BAAF, 1996
Hansard, House of Lords, Vol 636, cols 20–33 and 46–115, 2002a
Hansard, House of Lords, Vol 637, cols 264 and 290, per Lord Hunt of Kings Heath, 2002b
Howe D, Patterns of Adoption, Oxford: Blackwell, 1998


SI 2003/370) The Local Authority Adoption Services (England) Regulations 2003

SI 2004/3203 Adoption and Children Act 2002 (Commencement No 7) Order 2004

The Adoption Support Services Regulations 2005, SI 691


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