



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 65

Adoption and Its
Alternatives
A Different Approach
and a New Framework

September 2000
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Report/Law Commission, Wellington, 2000
ISSN 0113-2334 ISBN 1-877187-57-7
This report may be cited as: NZLC R65
Also published as Parliamentary Paper E 31AX

This report is also available on the Internet at the Commission's website: <http://www.lawcom.govt.nz>

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28 September 2000

Dear Minister

I am pleased to submit to you Report 65 of the Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework*.

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Phil Goff
Minister of Justice
Parliament Buildings
Wellington

The Hon Margaret Wilson
Associate Minister of Justice and Attorney-General
Parliament Buildings
Wellington

Preface

THE 1955 ADOPTION ACT is the creature of an era when mainstream society frowned upon women who had premarital sexual relationships and branded children born out of wedlock with the stigma of illegitimacy. To a generation whose young men had been conscripted, adoption was a measure that dealt tidily with illegitimacy and infertility and was seen rather differently than today. The Act entrenched the theory that all were winners and that the mother could resume her life as if nothing had happened; the adoptive parents gained a much wanted child; and the child could be treated as if born in wedlock to the adoptive parents.

Nowadays these issues are seen through a lens of human dignity. The status of illegitimacy has been abolished,¹ children are acknowledged to have rights, and blood ties are a recognised fact that no legislation can alter. The law, however, must still take into account the reality that some parents cannot or will not accept responsibility for the proper care of their children.

The Commission recommends the enactment of a Care of Children Act, which will encompass adoption as one of a number of options for the care of a child. A Care of Children Act should place at the forefront of consideration the best interests of the child, applying in this sphere the policy already seen in the Guardianship and the Children, Young Persons and Their Families legislation. It is essential to recognise that children's circumstances differ infinitely and that each child's development is a dynamic process.

The proposals recognise the importance to the child of the fundamentals of love and security. Nothing in our report challenges the value to a child of being raised within a family consisting of two parents contributing to the welfare of one another and of their children. It is, however, to be recognised that nowadays many people decide to have or raise children alone outside marriage and that the desire to parent and bring up children extends to those of homosexual orientation. It is no longer uncommon for lesbian women to undergo artificial insemination, intending to bring up the resulting child within a lesbian relationship.

¹ Status of Children Act 1969.

The Commission's proposals emphasise as predominant the interests of the child while recognising as important other interests, especially of the birth mother, the child's other blood relations, the adoptive parents and the wider public interest. They are designed to empower those with special expertise in our community, including the Adoption Information Services Unit of the Department of Child, Youth and Family Services and the judges of the Family Court, to bring about the optimum result for the child, the family and the wider community.

Our discussion paper *Adoption: Options for Reform*² drew a wide response from individuals, community groups, charitable and religious organisations, government departments and Family Court judges. This response and the subsequent consultation has enriched our understanding of the significance and effects of adoption and has guided us in the formulation of our recommendations in this final report. We are indebted to those who took the time to read our discussion paper and who responded to our questions and shared their observations and experiences with us. A list of persons and organisations who made submissions appears at page 229.

The governmental and parliamentary process yet to come will offer the wider community further opportunity to bring their wisdom and experience to bear on the proposals contained in this report.

We have been assisted by a number of individuals who have met with us and commented upon drafts of this report, including Denese Henare, former Law Commissioner; the Law Commission's Māori Committee; the Principal Family Court Judge, His Honour Judge PD Mahony; Judges Adams, Brown, Costigan, Moss, Robinson and von Dadelszen; and Bill Atkin, Reader in Law, Victoria University of Wellington; and Robert Ludbrook, Legal Adviser to the newly established Commissioner for Children, New South Wales, Australia, who reviewed the final draft. We are grateful for their assistance. We would also like to record our thanks to the Adoption Information Services Unit, for their willingness to assist in answering our questions and sharing information with us. The form of the proposals is the responsibility of the Law Commission, not of those who guided us.

² Law Commission *Adoption: Options for Reform: A Discussion Paper*: NZLC PP38 (Wellington, 1999).

The Commissioner responsible for this report was the Honourable Justice Baragwanath, President of the Law Commission. The research and writing was undertaken by Helen Colebrook and Megan Noyce.

List of abbreviations

Adoption Act 1955	Adoption Act
Adoption (Intercountry) Act 1997	Adoption (Intercountry) Act
Adoption Information Services Unit of the Department of Child, Youth and Family Services	AISU
Adult Adoption Information Act 1985	Adult Adoption Information Act
Births, Deaths, and Marriages Registration Act 1995	Births, Deaths, and Marriages Registration Act
Registry of Births, Deaths and Marriages	BDM
Children, Young Persons, and Their Families Act 1989	CYP&F Act
Citizenship Act 1977	Citizenship Act
Department of Child, Youth and Family Services	CYFS
Family Proceedings Act 1980	Family Proceedings Act
Guardianship Act 1968	Guardianship Act
Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption	Hague Convention on Intercountry Adoption
Intercountry Adoption New Zealand	ICANZ
National Ethics Committee on Assisted Human Reproduction	NECAHR
Status of Children Act 1969	Status of Children Act
Status of Children Amendment Act 1987	Status of Children Amendment Act

United Nations Convention
on the Rights of the Child

UNCROC

United Nations Declaration
on Social and Legal Principles
relating to the Protection and
Welfare of Children, with
Special Reference to Foster
Placement and Adoption
Nationally and Internationally

UN Declaration on Child
Placement

Navigating this report

ADOPTION LAW is often referred to as the “Cinderella” of family law – neglected, at times underfunded, but of vital importance in the larger scheme of things. It has been the task of the Law Commission to review the law of adoption, and to recommend whether and how the legal framework should be modified to better address contemporary social needs.³ We began this process by identifying the areas of adoption law that we considered to be out of date, we reviewed systems of adoption in other relevant jurisdictions, and in our discussion paper *Adoption: Options for Reform*⁴ we offered for public discussion some proposals for reform.

During this process we have identified a real need for adoption to be viewed not as a discrete area of family law but as an important option amongst a number of other options for the future care of a child whose parents, are for some reason, unable to fulfil that task. To that end, the Commission has gone beyond the ambit of its terms of reference and recommends the enactment of a Care of Children Act, which will encompass adoption as one of a number of options for the care of a child.

To assist those attempting to navigate this report, it has been divided into three parts. “Part I – Context” sets out the background information necessary to place the bulk of the report in its proper context. “Part II – Proposals for Reform” sets out our proposals for a Care of Children Act and shows where the various legal options for determining the care of children will fit. “Part III – Adoption Reform” discusses adoption law and sets out the Commission’s recommendations for reform. A list of our recommendations appears at the end of Part III.

³ See appendix A for our full terms of reference.

⁴ Law Commission, above n 2.

PART I – CONTEXT

Chapter 1 describes the systemic inadequacies that have led to our proposal for a Care of Children Act and provides a number of case studies that demonstrate the context in which adoption law operates. Chapter 2 places the concept of adoption in its historical context and traces the way the concept has evolved throughout New Zealand’s history, particularly focussing upon developments since the enactment of the Adoption Act 1955. Chapter 3 provides a basic explanation of current adoption law (as found in the Adoption Act, the Adult Adoption Information Act and the Adoption (Intercountry) Act) and the related legal concepts of guardianship, care and protection, and wardship.

PART II – PROPOSALS FOR REFORM

Chapter 4 sets out the reasons for our recommendation to enact a Care of Children Act. Chapter 5 explains our proposals for this legislation. It sets out our proposals for reformulating the legal concept of adoption and our recommendations for revising the legal effects of an adoption order. Our recommendation that a parenting plan must accompany an adoption order will afford some legal recognition to the concept of open adoption. This section also identifies and explains the other orders that will be available in the Care of Children Act. Chapter 6 then sets out a snapshot of our proposals for the framework of the Care of Children Act.

PART III – ADOPTION REFORM

Our discussion of the problems to be found within current adoption law, the options we considered for reform, and our final recommendations for reform are to be found at chapters 7–18 of the report. A more detailed summary of our proposals for adoption law reform and how it will fit into the Care of Children Act can be found in chapter 6. In brief, part III of the report sets out the following recommendations:

- guiding principles should be a part of adoption legislation;
- adoption legislation should provide for support services to be available throughout the adoption process;
- issues of jurisdiction, citizenship and intercountry adoption should be clarified;
- amendments should be made to the definition of who is eligible to be adopted;

- categories of persons eligible to adopt a child should not be limited, although suitability should be carefully assessed on a case-by-case basis;
- procedural requirements for giving consent to an adoption application should be strengthened;
- there should be full access to adoption information for adopted persons, birth parents and adoptive parents; and
- the applicability of the crime of incest and the law of forbidden marriage to adoptive families should be clarified.

We also make some suggestions regarding how surrogacy arrangements might be regulated by the Care of Children Act.

APPENDICES

The appendices to this report reproduce some of the information relied upon in our review. This includes the key international conventions, statistics relating to adoption in New Zealand, and information about cultural adoption practices in other jurisdictions.

Part I
Context

1

Introduction

OVERVIEW

- 1 **T**HE FAMILY⁵ as a social unit is the foundation of our society. It provides security, a sense of identity for the child, and is “the natural environment for the growth and well-being of all its members . . . particularly children”.⁶ Where for some reason such relationship is unavailable or fails, society must provide systems and resources to safeguard the welfare of the child.
- 2 New Zealand was party to the preparation of the UN Declaration on Child Placement,⁷ which provides:

Article 3

The first priority for a child is to be cared for by his or her own parents.

Article 4

When care by the child’s own parents is unavailable or inappropriate, care by relatives of the child’s parents, by another substitute – foster or adoptive – family or, if necessary, by an appropriate institution should be considered.

Article 5

In all matters relating to the placement of a child outside the care of the child’s own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration.

⁵ Whether this is the Western concept of the nuclear family or the concepts of extended family that other cultures have, for example, Māori “whānau”.

⁶ Preamble, United Nations Convention on the Rights of the Child (UNCROC) adopted by General Assembly resolution 44/25 of 20 November 1989.

⁷ United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally, adopted by General Assembly resolution 41/85 of 3 December 1986. See appendix F for the text of this Declaration.

- 3 Our law at present lacks any coherent set of provisions to provide systematically for these interests. The major legislation comprises an Adoption Act of 1955, which antedates the Status of Children Act 1969 and reflects value judgments that are inconsistent with today's standards, a separate Guardianship Act of 1968, which deals with some of these interests, and a Children, Young Persons, and Their Families Act of 1989,⁸ which provides for "at risk" children. The Guardianship Act and the CYP&F Act place the child's interests at the centre of each stage of the process; the Adoption Act does not give the interests of children such priority.
- 4 The current practice of open adoption challenges the emphasis upon secrecy that has permeated adoption law since 1955.⁹ Just as the status of illegitimacy has been removed from New Zealand society,¹⁰ so the concept of an effective transfer of legal title to a child, often a reaction to the stigma of illegitimacy, has been discredited.
- 5 How we treat our children, especially those who lack adequate parental care, is a measure of our community. There have been major changes over the past half century, both in our society and in our perception, of the significance of a child's personal status and of the role of the family. It is time to undertake a fundamental reappraisal of our laws and institutions in this sphere.
- 6 Accordingly, in March 1999 the Minister of Justice asked the Law Commission to "recommend whether and how the framework [of adoption law] should be modified to better address contemporary social needs". We published a discussion paper in October 1999 in which we drew attention to the deficiencies of the current legislation and invited public discussion of improvements that might be made. We have received over 150 submissions from individuals, families and community groups and have consulted widely with interested organisations.
- 7 It is evident that the lack of a coherent and principled approach to the placement, protection and care of New Zealand children whose birth families cannot or will not provide properly for them disadvantages these children. Adoption cannot be viewed in

⁸ CYP&F Act.

⁹ Section 23 Adoption Act 1955, Adoption Regulations 1959, and sections 23, 24 and 63 Births, Deaths, and Marriages Registration Act.

¹⁰ Status of Children Act.

isolation from the wider issue of the placement of children needing alternative care. Rather, it represents one end of a spectrum of available options.¹¹

- 8 Rather than simply updating the current adoption legislation,¹² we recommend consolidation of the legislation relating to parenting and care of children. Adoption, with the changes we recommend as a result of our review, will represent the most permanent of the options on the spectrum. Guardianship (including a new form entitled “enduring guardianship”)¹³ provides for a variety of other options which will represent other points on the spectrum. Such consolidation will remove the current disjunctions and promote a principled, coherent and flexible approach to the determination of who should be entrusted with the responsibility of providing care for a child.¹⁴

REVIEWING THE CONCEPT AND FUNCTIONS OF ADOPTION

- 9 Reform must be grounded in reality. Adoption in the twenty-first century serves a variety of purposes for a wide range of people. Current legislation fails to serve many of these people properly. We propose a system for reconciling the needs of all those involved in or contemplating adoption.
- 10 It is first necessary to identify the categories of people involved and the purpose that adoption serves for them. Adoption affects the whole community, but the people immediately involved are:
- children who may be adopted;
 - people who have been adopted;
 - birth parents;
 - prospective adoptive parents;
 - adoptive parents; and

¹¹ This spectrum also includes guardianship (encompassing temporary and permanent guardianship and *whāngai*) and the wardship jurisdiction of the High Court and Family Court.

¹² See chapter 3 for a summary of current adoption legislation and the related concepts of guardianship and wardship.

¹³ See chapter 5.

¹⁴ See chapter 5 for a more detailed discussion of our proposals for a spectrum of options.

- relatives and whānau of adopted persons (extended family of birth parents, adoptive parents).

11 We have identified two main categories – New Zealand and overseas – and several subcategories of adoption.

New Zealand:

- adoptions where the birth mother¹⁵ has given up the child within the first few months of the child’s life because she believes she cannot offer the child the stability and security it deserves;
- adoptions where the child has come into the care of the State because the birth parent(s) have failed to care for the child in a satisfactory manner; and
- adoption of a child to obtain legal recognition of social relationships (for example, step-parent adoptions and adoptions to regulate status after a surrogacy arrangement).

Intercountry:

- adoption of an orphaned or abandoned child from another country; and
- adoption of a relative from another country (usually Pacific Islands) to secure New Zealand citizenship.

Case studies

12 We offer some case studies illustrating some of the people described above and their needs. Some are based upon cases that have come before the Family Court, some are hypothetical.

Adoption soon after birth

Anna is 17 when she is raped and conceives a child. Her religious beliefs rule out abortion as an option. Her family is overseas so she relies on members of her church for support. A church member suggests that she give her child up for adoption to an infertile couple who also belong to the church. Someone recommends a lawyer who “handles adoptions”. She is unsure whether she should relinquish

¹⁵ In most cases of adoption, the birth mother, and not the father or other members of their families, is the decision-maker. We therefore refer to her while recognising that in some cases others may be involved. Where we do refer to birth parents, we recognise that in many cases this is likely to be referring to only the birth mother.

her child but cannot see how she could provide adequate care and agrees to give the child to the couple. The baby is born prematurely and she breastfeeds for several weeks. Although quite unsure about adoption, she signs the consent because not to do so would let down the adoptive parents. The next day she flies to Australia to join her parents. She feels she has made the wrong decision and discovers that she would be entitled to State financial support in Australia. She attempts to revoke her consent to the adoption, but the law does not allow it.¹⁶

Open adoption

Lisa is 17 and unexpectedly discovers that she is pregnant. She has sought advice on her options at the Family Planning Clinic and has decided to proceed with the pregnancy, but is unsure about whether she wants to keep the baby. She remains good friends with her boyfriend Sam, the baby's father, but they do not intend to enter into a long-term relationship and he agrees to abide by whatever decision she chooses to make in respect of the child. After some initial hesitation she has discussed the pregnancy and how she feels about it with her family. Her parents are shocked and concerned about the pregnancy but have told her that they will support her in whatever decision she makes. Lisa contacts the AISU¹⁷ to learn more about adoption and as the birth of the child draws closer, she is encouraged to look through profiles of prospective adoptive parents. She likes the sound of Sue and Jim and asks to make contact with them. They talk on the phone and arrange to meet. Prior to the birth Lisa is fairly certain that she will give the child up for adoption. In the days after the birth of a baby girl Georgia she is not so sure. The social worker tells her to take whatever time she needs to decide what is best for her and her baby. Lisa thinks about her options and discusses her feelings with a counsellor. She intends to go to university but cannot see how she could cope emotionally or financially with a young child. On the other hand she cannot bear to think about never seeing Georgia again. She decides that she would like to meet the couple that she spoke to earlier. Sue and Jim meet Lisa at a café. The meeting is a little fraught at first, but they soon find that they have much in common, and as Lisa talks with

¹⁶ See chapter 10 for a discussion of support services and chapter 14 for a discussion regarding consent to an adoption.

¹⁷ The Adoption Information Services Unit (AISU) is the Unit within the Department of Child, Youth and Family Services (CYFS) which handles adoptions.

them she likes them more and more. Sue and Jim want to know how she and Georgia are doing and are at pains to reassure her that they don't want her to feel that she is under pressure to make a decision. They talk about how they came to consider adoption, and the positive and negative aspects of it that concern them. Jim and Sue believe that all children should know their origins and have the benefit of getting to know their entire family, the family of origin and the new family. Lisa begins to see possibilities that had not occurred to her before. She decides that she would like Sue and Jim to parent Georgia. Lisa informs the social worker that she would like to consent to Sue and Jim adopting Georgia. They all meet together and work out an adoption plan to reflect the way that they envisage the adoption will work. They all agree that Lisa will visit Georgia regularly and that Georgia will grow up knowing that Lisa is her birth mother. Lisa's family are also welcome to visit. They all appreciate that open adoption may not be easy. There may be times when it is hard for Lisa to have contact with Georgia, Sue and Jim or when she may mourn or regret her decision not to parent Georgia. Sue and Jim want Lisa to understand that there are times when visiting may be inconvenient or that there may be times when they feel that Georgia needs a little time out, but that Lisa should never feel that she is not welcome. They agree to discuss matters openly and to respect each other's feelings. Two years later, their relationship is working well. Georgia is a happy, secure little girl. Lisa feels comfortable with her decision (although not without some regret) and is pleased to see how well Georgia is being parented by Sue and Jim. Sue and Jim feel secure in parenting Georgia and value the relationships that they have formed with Georgia's extended birth family.¹⁸

*Adoption following care and protection*¹⁹

Sharon is nineteen and has a two-year-old boy named Jayden. She does not know the identity of his father. Sharon and her partner Wayne are IV drug users and alcoholics. Because of an earlier head injury, Sharon has a short fuse and has difficulty coping with day-to-day life let alone her child. Sharon and Wayne's relationship is

¹⁸ See chapter 10 for a discussion of support services and chapter 5 for a discussion of parenting plans, which will encourage parties to address issues of openness in adoption.

¹⁹ See chapter 5 for a discussion of how the range of placement options should be consolidated within a Care of Children Act. See chapter 14 for a discussion on dispensing with consent.

unstable and characterised by violence, both between Sharon and Wayne and towards Jayden. Jayden has been to the doctor several times with suspicious injuries, which have been explained away as childhood accidents. Jayden is eventually admitted to hospital with multiple fractures and contusions. Examination reveals a long history of abuse, which Sharon and Wayne admit. They are prosecuted and convicted for child abuse. Jayden cannot be cared for by Sharon's extended family. He is placed in temporary foster care for some time, but when it becomes clear that Sharon will never be in a position to resume care of Jayden, the social worker starts to look around for a permanent family placement to ensure him the nurturing and stability that he has so far lacked in his life.

Susan was unaware that she was pregnant until five months into the pregnancy, by which time it was too late for the abortion she would otherwise have sought. As a result of birthing complications, her daughter Katy was born with severe cerebral palsy and epilepsy. Susan does not want to care for Katy and does not want to involve her aged parents. She wants Katy to be placed for adoption. Because of Katy's serious physical problems and because there is no one willing to care for her, the social worker seeks a declaration that Katy is in need of care and protection. The declaration is granted and the AISU seeks prospective adopters willing and suitably skilled to care for Katy and provide for her special needs.

*Step-parent adoption*²⁰

Simon, a five-year-old boy, lives with his mother Clare and his stepfather Stewart. He spends every second weekend with his father Rangi. His mother and stepfather have a two-year-old daughter, Samantha. Rangi is tired of paying child support. Stewart and Clare seem to be relatively well off financially anyway. A friend suggests that if Clare and Stewart adopt Simon, Rangi will no longer have to pay child support. If they have an "open adoption", Rangi will still get to see Simon anyway. Rangi approaches Clare and Stewart with this idea, and they like it. Simon has just begun to question why his last name is different from theirs, and this might make him feel like a proper member of the family. They agree that it will be an open adoption and that Rangi will still have access to Simon. They apply for an adoption, and the judge tells them that he does not understand why they are doing this. Adoption will sever Simon's legal links to Rangi's side of the family. He is also concerned that openness in

²⁰ See chapter 13 for a discussion of step-parent adoption.

adoption is not legally enforceable and therefore Clare and Stewart could prevent Rangi from exercising access once the adoption order is made. He also observes that Rangi's Māori heritage is very important and access to this side of his family could be jeopardised by the adoption. The judge refuses to grant an adoption order.

James lives with his mother Doris and her husband Jake. Jake is not actually his real father, but he has acted like a father since James was a baby. James' real father skipped out when he discovered Doris was pregnant. James is eight now, and they all want Jake to be legally recognised as James' father. Doris and Jake decide that Jake will apply to adopt James. They are a bit startled when the lawyer tells them that this means that Doris as well must adopt James, but they go ahead anyway.

*Surrogacy adoption*²¹

Sarah was forced to have a radical hysterectomy after a cancer scare. She has been in remission for five years. She and her husband Brent would like to have children, and they see no reason why Brent should not be the biological father of that child. Sarah's twin sister Melanie has offered to be a surrogate mother for Sarah and Brent. This would involve Melanie being inseminated with Brent's sperm, becoming pregnant, and giving the child to Brent and Sarah to raise. Melanie has two children already and does not plan to have more, although she does enjoy being pregnant. Melanie has a friend who is a nurse who will help them to arrange the insemination. Melanie becomes pregnant and gives birth to a healthy baby girl. DNA testing confirms that Brent is the father. Brent and Sarah plan to adopt the baby.

Katherine and Matthew would love to have a baby. Katherine has had several miscarriages already and has been told it is extremely unlikely that she will ever carry a baby to term. Katherine's best friend Natasha has offered to carry the baby for them. This would involve extracting eggs from Katherine, fertilising them with Matthew's sperm, and implanting them in Natasha. They approach a fertility clinic together to see if this can be done. They are told that because the procedure is relatively new to New Zealand, they must get ethical approval from the National Ethics Committee on Assisted Human Reproduction (NECAHR). This involves each of

²¹ See chapter 18 for a discussion of surrogacy and adoption.

them undergoing counselling and then the fertility clinic applying for approval on their behalf. The counsellors will also report to NECAHR. It takes about six months before their application is heard by NECAHR, and a decision takes a little longer. NECAHR recommends that they approach CYFS to talk about adoption, as CYFS must approve the placement of the child with Katherine and Matthew. They do this, and after several discussions with social workers, they are given the appropriate approvals. Eventually they discover that they have ethical approval and they can begin the fertility treatment. If treatment succeeds, Natasha will carry Katherine and Matthew's child, and after the birth Katherine and Matthew will apply to adopt the child.

*Intercountry adoption*²²

Jane and Tom are unable to have children and wish to adopt a child. They have heard that couples may have to wait quite a long time to adopt a New Zealand child, so they decide to adopt a child from another country. This will also help a child who is otherwise unlikely to ever experience family life. CYFS conduct a home study, to assess Jane and Tom's suitability to adopt a child, which they send to the appropriate authorities in Russia. Jane and Tom decide to use a local organisation to facilitate the adoption, and receive some education and counselling about the realities of intercountry adoption, and what they can expect to experience. Jane and Tom go to Russia and visit an orphanage where they see a child, Ilya, whom they decide they would like to adopt. The New Zealand organisation has contacts in Russia who guide Jane and Tom through the adoption process, and eventually, Jane and Tom are granted an adoption order in a Russian court and are able to bring Ilya home.

Adoption for citizenship

Sione, a 19-year-old Tongan youth, has been living with his aunt and uncle in Auckland for the past two years. Sione is considered to be part of the family. His English is improving and he has good work prospects. Sione's aunt and uncle wish to adopt him. If they do not, he will be forced to return to Tonga as his visitor's permit is due to expire. However, New Zealand's legal institution of adoption is not compatible with Tongan cultural practices, which place more of an

²² See chapter 11 for a discussion of intercountry adoption.

emphasis upon the continuum between adoption and fostering. The judge suggests that it might be more appropriate for Sione's aunt and uncle to be made Sione's guardians, but is concerned about whether guardianship would provide sufficient grounds for Sione to stay in New Zealand.²³ It is later learnt that guardianship will not provide a sufficient basis to allow Sione to remain in New Zealand. Because a guardianship order will not suffice to keep Sione with his aunt and uncle, the judge later makes an adoption order.

²³ See chapter 8 for a discussion of the purpose of adoption and chapter 11 for a discussion of citizenship issues.

2

The history of adoption in New Zealand

THE HISTORICAL CONTEXT OF ADOPTION

Early practices

- 13 **A**CCOUNTS OF THE EARLIEST known adoption practices date back to c 2800 BC.²⁴ Most early adoption, whether based upon religious practices or not, was for the purposes of succession. Greek, Roman, Chinese, Hindu and Japanese adoption practices were based on securing succession.
- 14 Roman law had two forms of adoption, *adrogatio* (or *arrogatio*) and *adoptio*. *Adrogatio* was used for religious purposes, requiring the head of an upper class family to submit to the head of another family. *Adoptio* secured the child's succession rights in the natural family and allowed him to succeed in the event of the intestacy of the head of the adoptive family. Where the person was a minor, *adoptio minus plena* was used and the child's legal relationship with its parents survived the process.²⁵

²⁴ See reference to the Acadian legend of Sargon in JB Prichard *The Ancient Near East* (Oxford University Press, London, 1958) 85–86; Code of Hammurabi 2285–2242 BC; Exodus 2:1–10 ca 1200 BC.

²⁵ WW Buckland *A Manual of Roman Private Law* (2 ed Cambridge University Press, Cambridge, 1953); I Campbell *A Compendium of Roman Law* (Stevens & Haynes, London, 1892).

New Zealand

- 15 Māori have a system of caring for children that has been equated with guardianship.²⁶ Māori may give members of their whānau a child to raise as their own.²⁷ Such children are referred to as whāngai, atawhai or taurima.²⁸ Whāngai placement is not necessarily permanent. Such placements are a matter of public knowledge, and the child knows the birth parents and other family members and usually maintains contact with them.
- 16 In 1881 New Zealand became the first country of the Commonwealth to enact adoption legislation.²⁹ This arose out of a recognition that informal adoption, described by Campbell as a “system of voluntary guardianship”,³⁰ was already taking place. Such adoption contracts were not recognised by the common law on grounds of public policy, that is, because of a fear that this might lead to “baby-farming”. If birth parents wished to reclaim their child, the adoptive parent was powerless to intervene. The Hon George Waterhouse introduced the Adoption of Children Act 1895, in order that “the benevolent might find wider scope for generous action; and that the results of their generosity might obtain some security by law”.³¹ The adoption legislation gave legal status to adoption but did not supplant the Māori practice of whāngai placement.³²

²⁶ Although more recently such whāngai arrangements have been referred to as “Māori customary adoption”.

²⁷ J Metge *New Growth from Old* (Victoria University Press, Wellington, 1995) 229–257.

²⁸ These words can be used interchangeably. Whāngai is used by most Māori, but Tai Tokerau more commonly use the term atawhai, and taurima is used in Taranaki. See Metge, above n 27, 211.

²⁹ Various Australian states and Canadian provinces enacted adoption legislation between the 1890s and 1920s. The United Kingdom did not enact adoption legislation until 1926.

³⁰ ID Campbell *The Law of Adoption in New Zealand* (Butterworths & Co, Wellington, 1957) 1.

³¹ (4 August 1881) 39 NZPD 281.

³² *Arani v Public Trustee* [1920] AC 198, (1919) NZPCC 1 (PC). For a description of the history of legal recognition of Māori customary adoption see below chapter 9.

ADOPTION IN NEW ZEALAND

- 17 Social needs and perspectives change throughout history – what is considered to be acceptable practice by one generation can be completely unacceptable in another. That has been the experience in the case of adoption law. The next section illustrates the changes in the way adoption has been viewed and practised throughout this century.³³ It is the changes in social needs and perspectives between the 1950s and the 1990s that present the challenges to the current law of adoption.

Early 1900s

- 18 Statutory adoption in New Zealand was initially viewed as a means of lightening the burden on the State of maintaining destitute persons. Many adoptions in the early period of legal adoption were of young children rather than babies. Tennant noted that Pākehā adopters during that time were more interested in adopting “children of ‘useful’ years”, as small babies were “uneconomic”.³⁴ Prior to the Second World War it was unusual for single women to give up their babies. Else observed that:³⁵

Right up until the 1940s, many believed that keeping an illegitimate child was a fitting punishment for the mother’s sin – and a warning to other women who might be tempted to stray.

And Smart explained that:³⁶

[H]er parental obligations were seen as little more than part of her stigma and rejection . . . having sole custody [of the child] . . . was more a form of legal punishment than a concession.

- 19 Mothers usually attempted to keep their babies, despite the difficulties involved. Adoption was mainly reserved for instances where a married woman had an extramarital child.³⁷ Where a

³³ For a comprehensive history of social welfare practice in New Zealand see B Dalley *Family Matters: Child Welfare in Twentieth-Century New Zealand* (Auckland University Press, Auckland, 1998).

³⁴ M Tennant “Maternity and Morality: Homes for Single Mothers 1890–1930” (1985) 2 *Women’s Studies Journal* 28, 39.

³⁵ A Else *A Question of Adoption* (Bridget Williams Books, Wellington, 1991) 23.

³⁶ C Smart “Law and the Problem of Paternity” in M Stanworth (ed) *Reproductive Technologies: Gender, Motherhood and Medicine* (Polity Press, Cambridge, 1987) 109.

³⁷ Else, above n 35, 23–24.

mother was not able to care for her child, institutional or foster care was the usual alternative. In such cases, the mother had to pay maintenance to the State.

The 1940s – a change in attitudes

- 20 By the late 1940s, institutions (such as Bethany, Motherhood of Man and Alexandra) involved with the care of unmarried mothers began to promote adoption, rather than keeping the child, as the most appropriate option for unmarried pregnant women. Keeping the child as a means of punishment was seen as undesirable. Such institutions emphasised that adoption allowed the mother to return to her life as if nothing had happened. Even so, in the late 1940s more women still chose to keep their child rather than have the child adopted.³⁸

Public perception of the availability of children – supply and demand

- 21 The perception of there being either a “surplus” or a “shortage” of children to adopt illustrates the way that people viewed adoption – in this period (and perhaps to a more limited extent, today) adoption was seen as a way to supply childless couples with a family.³⁹ In the late 1940s newspaper articles began referring to the “shortage” of babies available for adoption. Throughout the 1950s there were more applicants to adopt than children needing to be adopted.

The 1950s – adoption encouraged

- 22 In the 1950s single mothers were encouraged to give up their children for adoption; the prevailing view was that children were best raised in a two-parent adoptive family rather than by a single mother. A single woman who did not want to give up her child to be raised by such a family was labelled selfish.⁴⁰ The mother who chose to give up her child was praised for being responsible.
- 23 Unmarried pregnant women were usually sent to live in a different town, or even to Australia, until the baby was born. Some women had positions arranged for them as unpaid (or poorly paid) domestic

³⁸ Else, above n 35, 23–24.

³⁹ See Else, above n 35, and Dalley, above n 33.

⁴⁰ N Collins “Adoption” (1966) 2(2) NZ Social Worker 71.

help. Women who went to institutions which cared for unmarried mothers theoretically had the option of keeping their children. However, in the 1950s there were fewer babies available for adoption than there were couples waiting to adopt a child, and some homes actively discouraged mothers from keeping their babies.⁴¹ There was an unspoken presumption that an unmarried woman would give up her child. Little effort was made to explore how a single mother might be assisted in keeping her child. As the Deputy Superintendent of the Department of Social Welfare explained in the 1950s:⁴²

I am assuming that all who read this . . . think as I do that, in principle, adoptions are a good thing, and that I do not need to write about the emotional satisfaction for adoptive parents and child that can ensue from a good adoption. We will agree that adoptions should be encouraged rather than discouraged.

Financial support for solo mothers

- 24 The Destitute Persons Act 1910⁴³ and the Domestic Proceedings Act 1968⁴⁴ created a statutory means by which a woman could seek a maintenance order against the father of her children. The court could, at its discretion, set the rate that it thought appropriate for the father to pay the mother in respect of the child.⁴⁵ This maintenance continued until the child reached the age of sixteen; maintenance would continue to be payable in respect of a child over the age of sixteen if the child was engaged in full-time education.⁴⁶ These statutes provided a means by which women could seek maintenance from the putative father, but where there were difficulties, women had to resort to the court in order to enforce the maintenance agreement or order. There were further difficulties; an

⁴¹ Else, above n 35, 39.

⁴² LG Anderson "Chosen Children" NZ Parent and Child vol 1 no 4, Spring 1953, 19, quoted in Else, above n 35, 44.

⁴³ Sections 8 and 26.

⁴⁴ Sections 35, 36 and 39.

⁴⁵ Sections 8(3) and 26 of the Destitute Persons Act 1910 contained a capped rate for maintenance of children. The judge could decide to award any amount below this rate as maintenance for the child. The Domestic Proceedings Act 1968 gave the judge more discretion (section 35 Domestic Proceedings Act 1968).

⁴⁶ Section 8(3) Destitute Persons Act 1910, section 29 Domestic Proceedings Act 1968.

unmarried mother had to obtain an acknowledgement of paternity from the father or a declaration of paternity from the court in order to be entitled to seek maintenance.⁴⁷ The Domestic Purposes Benefit (DPB), introduced in statutory form in 1973,⁴⁸ mitigated these difficulties. The Act provided State financial support for single mothers, irrespective of whether the father was contributing to maintenance payments.⁴⁹

- 25 The introduction of the DPB was blamed for “creating a shortage of babies for adoption”.⁵⁰ However, the extent to which the DPB contributed to the shortage of babies available for adoption is unclear. The number of births outside of marriage fell between 1971 and 1976.⁵¹ The numbers of ex nuptial children being adopted had started to fall in 1962, before the introduction of State financial support.⁵² Else notes that a number of other factors were at work, such as a “softening” of attitudes towards illegitimate children and their mothers, the removal of the stigma of illegitimacy by the Status of Children Act 1969, the increasing availability of contraception and delays in the placement of babies.⁵³

Open versus closed adoption

- 26 Since the middle of the twentieth century, a climate of secrecy has surrounded adoption. This was effected by a variety of means. Prior to 1955 the natural mother’s consent to an adoption was not valid unless she knew the identity of the adoptive parents.⁵⁴ This was altered by section 7(6) of the Adoption Act which provides that a parent or guardian of a child may give consent to an adoption

⁴⁷ Section 38 Domestic Proceedings Act 1968.

⁴⁸ By the Social Security Amendment Act 1973.

⁴⁹ See sections 27A–31 Social Security Act 1964.

⁵⁰ C Hadfield “Adoptions 1963 to 73” (paper presented at Departmental Conference on Adoption, Department of Social Welfare, Wellington, 1973) 23, 30.

⁵¹ Statistics New Zealand *New Zealand Official Yearbook 1998* (GP Publications, Wellington, 1998) 95.

⁵² KC Griffith *New Zealand Adoption: History and Practice* (KC Griffith, Wellington, 1998) 133.

⁵³ Else, above n 35, 168–170.

⁵⁴ Form 5, Schedule, Adoption of Children Act 1895.

without knowing the identity of the prospective adoptive parents. This was described by the Attorney-General at the time as “highly desirable”,⁵⁵ and by another member of Parliament as “a humane step”.⁵⁶ Blanchard J commented in *Re Adoption of PAT* that the practice of a:⁵⁷

closed adoption process which seems to have been envisaged by the Adoption Act was in part designed to protect child and adoptive parents respectively from what were then regarded as the stigmas of illegitimacy and infertility.

The Adoption Regulations 1959 allow the identities of the adoptive parents to be kept secret by providing forms which identify the adoptive parents by a reference number, if they so wish.⁵⁸ Natural mothers were often told that they were not allowed to attempt to find their child.⁵⁹

27 Once a child is adopted, the birth record is sealed and a new birth certificate is issued. This certificate only shows the names of the adoptive parents⁶⁰ and their ages at the birth of the child. This obscuring of the factual history of the child’s life further served to entrench the culture of secrecy. This secrecy has been partially eroded by the Adult Adoption Information Act, which provides a process by which birth parents can seek contact with their children and by which adopted children can obtain their original birth certificates and make contact with their birth parents.⁶¹

⁵⁵ (26 October 1955) 307 NZPD 3349 per the Hon JR Marshall.

⁵⁶ Above n 55, 3356 per Mr Warren Freer.

⁵⁷ [1995] NZFLR 817, 819 (HC).

⁵⁸ Form 3.

⁵⁹ Else, above n 35, 123.

⁶⁰ The adoptive parents have the option of being described as “adoptive parents” on the birth certificate, but this is rarely done. See section 23(d) Births, Deaths, and Marriages Registration Act 1995.

⁶¹ Although the child or the birth parent(s) may place a veto upon access to information, sections 3 and 7 Adult Adoption Information Act. It is also important to note that in many (if not most) cases the name of the birth father was not recorded on the birth certificate.

- 28 Over the last 20 years, social workers have initiated a dramatic change in adoption practices. Since the early 1980s, research has been conducted in relation to the benefits of open adoption⁶² and the practice has grown substantially. There has been a marked increase in the number of adoptions providing for some form of continuing contact between the child and the birth parents; most adoptions now involve some degree of contact from the beginning of the adoption arrangement.
- 29 New Zealand has been described as “leading Western adoption practice with respect to openness”.⁶³ Although open adoption is being widely practised, it is not recognised in law and Family Court judges struggle to reconcile open adoption with the Adoption Act, which acts as a statutory guillotine, effecting the complete severance of ties between birth parents and children and suppressing the fact of their relationship.⁶⁴ The Adult Adoption Information Act went some way towards resolving some of these issues and allows most birth parents and adult adoptees to access identifying information.⁶⁵

Adoption as a means of regulating status

- 30 Adoption has been used at various times this century as a means of regulating the status of the child. In the middle of the century, when illegitimacy was considered an undesirable status, a parent could

⁶² Studies indicate that open adoption can be a positive experience for both birth parents and adoptive parents – see M Iwanek “A Study of Open Adoption Placements” (1987). Mary Iwanek is now the National Manager of the AISU. See also M Ryburn *Open Adoption* (Avebury, Sydney, 1994) [*Open Adoption*].

⁶³ *Open Adoption*, above n 62, 16.

⁶⁴ See for example *In the Guardianship of J* (1983) 2 NZFLR 314 (CA); *Adoption of PAT* above n 57; *In the Guardianship of P* (1983) 2 NZFLR 289 (HC); *Hamlin v Rutherford* (1989) 5 NZFLR 426 (HC). See also the United Kingdom case *Re O (a minor) (wardship: adopted child)* [1978] Fam 196 (CA).

⁶⁵ See chapter 16 of this report.

legitimate his or her child by adopting it – one of the effects of adoption is that the child is deemed to be the child of the parent as if born in “lawful wedlock”.⁶⁶ In more recent times, a child born in performance of a surrogacy agreement is not the legal child of the parents who intend to raise the child; therefore adoption is used to regularise the child’s status.⁶⁷

⁶⁶ Sections 3(3) and 16(2)(a). These provisions are still in force, although the Status of Children Act 1969 and changing societal attitudes towards illegitimacy mean that it is no longer used for this purpose.

⁶⁷ See chapter 18 for a discussion of surrogacy.

3

A snapshot of adoption law

ADOPTION

- 31 **A**DOPTION IS A PROCESS by which a child’s legal relationship with birth parents is replaced by one with adoptive parents. Original birth records are sealed, and a new birth certificate is issued as if the child had been born to the adoptive parents.
- 32 This chapter describes the legal processes and consequences of the Adoption Act and related legislation.

Jurisdiction

- 33 Section 3 of the Adoption Act gives courts the power to make adoption orders on the application of any person, whether resident in New Zealand or not.⁶⁸

Who may adopt a child

- 34 Single persons⁶⁹ and two spouses jointly⁷⁰ are permitted to adopt. Birth parents may adopt their own children.⁷¹ Applicants for adoption must be over 25 years of age and at least 20 years older than the child they are adopting, unless they are a relative of the

⁶⁸ Section 3(1) Adoption Act.

⁶⁹ Section 3(1) Adoption Act.

⁷⁰ Section 3(2) Adoption Act. There is judicial conflict over whether “spouses” can be read to include de facto as well as de jure couples. See paragraphs 344–349 for a discussion.

⁷¹ Section 3(3) Adoption Act.

child in which case they can adopt if they are over the age of 20 years.⁷² No age limits apply to the adoption of a child by a birth parent.⁷³ A male applicant is not able to adopt a female child unless he is the father of the child or there are special circumstances which justify the adoption.⁷⁴

Adopting a child

35 Any person under the age of 20 years may be adopted, including a married person.⁷⁵ A child⁷⁶ cannot be placed or kept in a home for the purposes of adoption unless a social worker has given prior approval, there is an interim adoption order in force, the child is in the home pursuant to other legislation,⁷⁷ or the child is in the home of a relative.⁷⁸ It is an offence under the Adoption Act to publish an advertisement indicating that a child is available for adoption, that a person wishes to adopt a child, or that a person or organisation is willing to make arrangements for the adoption of any child.⁷⁹ Similarly, payments or any other form of reward may not be made in consideration of an adoption or a proposed adoption without the consent of the court.⁸⁰

⁷² Section 4(1)(a) and (b) Adoption Act.

⁷³ Section 4(1)(c) Adoption Act.

⁷⁴ Section 4(2) Adoption Act.

⁷⁵ See definition of “child” section 2 Adoption Act; see also *Re E* (1991) 7 FRNZ 530 (FC).

⁷⁶ For this purpose a child is a person under the age of 15.

⁷⁷ Such as the Guardianship Act or CYP&F Act.

⁷⁸ Section 6 Adoption Act. The other legislation is the CYP&F Act and the Guardianship Act. The term “relative” does not include a person who is prohibited by reason of age or sex from adopting the child.

⁷⁹ Section 26(1) Adoption Act. The Director-General has the discretion to approve in particular cases advertisements published by a group or society caring for the welfare of children.

⁸⁰ Section 25 Adoption Act.

Consent

- 36 Consent to the adoption of the child is required from the birth mother and any other guardians.⁸¹ A birth mother is not legally able to give consent until at least 10 days after the birth of the child.⁸² Where a sole applicant applies to adopt a child, that applicant's spouse (if there is one) must also consent.⁸³
- 37 Where the Chief Executive of CYFS is the guardian of the child, the parents or guardians cannot withdraw their consent once an interim order or an adoption order has been made.⁸⁴ Where the child has been placed with prospective adopters, consent cannot be withdrawn until the prospective adopters have had a reasonable opportunity to apply to adopt the child or an application to adopt the child is pending.⁸⁵
- 38 The court may dispense with the consent of the parents or guardians if the court is satisfied that:
- the parent or guardian has abandoned, neglected, failed to maintain, or persistently ill-treated the child, or has failed to exercise the normal duty and care of parenthood, and that reasonable notice has been given to the parent or guardian where they can be found;⁸⁶ or
 - the parent is unfit to care for the child because of physical or mental incapacity and that incapacity is likely to continue indefinitely, and that reasonable notice has been given to the parent or guardian where they can be found;⁸⁷ or a licence has been granted in respect of the child under the now repealed Adoption Act 1950 (UK).⁸⁸

⁸¹ Section 7(2)(a) Adoption Act.

⁸² Section 7(4) and (7) Adoption Act.

⁸³ Section 7(2)(b) Adoption Act.

⁸⁴ Section 9(2) Adoption Act.

⁸⁵ Section 9(1) Adoption Act.

⁸⁶ Section 8(1)(a) Adoption Act.

⁸⁷ Section 8(1)(b) Adoption Act.

⁸⁸ Section 8(1)(c) Adoption Act. There is no corresponding provision in the Adoption Act 1976 (UK).

39 Where consent has been dispensed with, the parent or guardian may apply to the High Court within one month for revocation of that order⁸⁹ and the discharge of a resulting adoption order (if the adoption order is made within one month of the dispensation of consent).⁹⁰ The provisions of section 20, which govern the variance or discharge of adoption orders, apply to such a discharge.⁹¹

Making an adoption order

40 Before the court can make an interim adoption order, a social worker must provide a report to the court about the application.⁹² This is not required where one of the applicants is a natural or existing adoptive parent of the child.⁹³

41 When making an interim or final adoption order, the court must be satisfied that:

- the applicants are fit and proper persons to have custody and are of sufficient ability to bring up, maintain and educate the child;⁹⁴
- the welfare and interests of the child will be promoted by the adoption, with consideration being given to the wishes of the child having regard to the child's age and understanding;⁹⁵ and
- any religious condition imposed by the parent or guardian is being complied with.⁹⁶

42 Where an application to adopt a child has been made, the court will usually first make an interim order.⁹⁷ An interim order has the effect of transferring custody to the adoptive parents, but does not cause

⁸⁹ Section 8(6) Adoption Act.

⁹⁰ Section 8(7) Adoption Act.

⁹¹ See paragraphs 431–439 for a discussion of discharging an adoption order.

⁹² See section 10 Adoption Act. Where a Māori applicant seeks to adopt a Māori child, a community officer appointed under the Māori Community Development Act 1962 acts in the place of the social worker.

⁹³ Section 10 Adoption Act. An existing parent or adoptive parent would currently adopt the child in the context of a step-parent adoption. See discussion of step-parent adoptions in chapter 13.

⁹⁴ Section 11(a) Adoption Act.

⁹⁵ Section 11(b) Adoption Act.

⁹⁶ Section 11(c) Adoption Act.

⁹⁷ Section 5 Adoption Act.

the child's name to be changed.⁹⁸ A social worker may visit the adoptive parents and child at any reasonable time, and the ability of the adoptive parents to change residence or leave the country is restricted.⁹⁹ On the application of any person the court may, in its discretion, revoke an interim order in respect of any child.¹⁰⁰ The interim order remains in force for 12 months unless it is sooner revoked or an adoption order is made.¹⁰¹

- 43 Where the court considers that there are special circumstances that render it desirable to make a final adoption order in the first instance and all the conditions for an interim order have been complied with, the court may make an adoption order without first making an interim order.¹⁰²
- 44 Six months after an interim order is made, or after a shorter period if specified by the court, the applicants may apply for a final adoption order.¹⁰³ This will be automatically granted unless certain defined events have occurred.¹⁰⁴

Effect of the adoption order

- 45 Once an adoption order has been made, the adopted child is deemed to be the child of the adoptive parent, and the adoptive parent is deemed to be the parent of the child, as if the child was born to that parent in lawful wedlock.¹⁰⁵ The adopted child is deemed to cease to be the child of the existing parents and vice versa, except for the purposes of any enactment relating to forbidden marriages or to the crime of incest where the existing parents are the natural parents.¹⁰⁶ The adoption order must give the child a surname and a given name(s).¹⁰⁷ All family relationships are then determined in

⁹⁸ Section 15(2)(a) and 15(1)(b) Adoption Act.

⁹⁹ Section 15(b), (c) and (d) Adoption Act.

¹⁰⁰ Section 12(1) Adoption Act.

¹⁰¹ Section 15(1)(c) Adoption Act.

¹⁰² Section 5 Adoption Act.

¹⁰³ Section 13(1) and (2) Adoption Act.

¹⁰⁴ Section 13(3) Adoption Act.

¹⁰⁵ Section 16(2)(a) Adoption Act.

¹⁰⁶ Section 16(2)(b) Adoption Act.

¹⁰⁷ Section 16(1), (1A) and (1B) Adoption Act.

accordance with these provisions.¹⁰⁸ The adopted child acquires the domicile of the adoptive parents,¹⁰⁹ and any existing appointment as guardian of the child ceases to have effect.¹¹⁰

- 46 Any affiliation or maintenance order made prior to the adoption order ceases to have effect when the adoption order is made,¹¹¹ unless the adopted child is adopted by his or her mother either alone or jointly with her husband.¹¹²
- 47 Subject to the Citizenship Act 1977, the race, nationality and citizenship of the adopted child shall not be affected by the adoption order.¹¹³ Section 3(2) of the Citizenship Act provides that where a New Zealand citizen adopts a child, that child is deemed to be a child of a New Zealand citizen and as such is considered to be a New Zealand citizen by descent.¹¹⁴ An adoption order does not necessarily deprive an adopted child of citizenship rights obtained before the adoption occurred.¹¹⁵
- 48 Where a testator¹¹⁶ or an intestate¹¹⁷ dies prior to the making of the adoption order, the changed relationships that will be brought about by the adoption order have no impact on the adopted child's right to succeed.¹¹⁸ Where the death occurs after an adoption order is made, for the purposes of succession the child is considered to be a member of the adoptive family.¹¹⁹

¹⁰⁸ Section 16(2)(c) Adoption Act.

¹⁰⁹ Section 16(2)(f) Adoption Act.

¹¹⁰ Section 16(2)(h) Adoption Act.

¹¹¹ Section 16(2)(i) Adoption Act.

¹¹² Section 16(2)(a) and (i) Adoption Act.

¹¹³ Section 16(2)(e) Adoption Act.

¹¹⁴ Section 7 Citizenship Act.

¹¹⁵ This may depend on the laws of the country of which the child was a citizen before the adoption.

¹¹⁶ A testator is a person who dies leaving a valid will directing who should inherit the testator's estate.

¹¹⁷ An intestate is a person who has died without leaving a valid will.

¹¹⁸ Subject to express provision otherwise, section 16(2)(d) Adoption Act.

¹¹⁹ Unless the testator in the birth family makes express provision for the child who has been adopted.

Discharging an adoption order

- 49 The court in its discretion may vary or discharge an adoption order.¹²⁰ An application to discharge an adoption order can be made only with the prior approval of the Attorney-General,¹²¹ and a discharge cannot be granted unless the adoption order was made by mistake as to a material fact or in consequence of a material misrepresentation to the court or any person concerned,¹²² or the discharge is expressly authorised by any other section of the Adoption Act.¹²³

Recognition of Māori customary adoption

- 50 Prior to 1909, Māori customary adoption practices were recognised by the legal system in their own right.¹²⁴ After the introduction of the Native Land Act 1909, Māori customary adoptions ceased to have legal effect, unless they had already been registered in the Native Land Court.¹²⁵ After 1909, Māori who wished to adopt had to do so in accordance with the provisions of the Native Land Act 1909.¹²⁶ Statutorily defined legal consequences of adoption flowed from the making of the order.¹²⁷ Customary adoption in the traditional sense no longer had legal effect. Section 19(1) of the Adoption Act 1955 reiterates that no customary adoption made after the introduction of the Native Land Act 1909 will have any legal effect.¹²⁸

¹²⁰ Section 20(1) Adoption Act.

¹²¹ Section 20(3) Adoption Act.

¹²² Section 20(3)(a) Adoption Act.

¹²³ Section 20(3)(b) Adoption Act. Section 8(7), relating to dispensation of consent, is the only other section of the Adoption Act that authorises the court to discharge an adoption order.

¹²⁴ Section 50 Native Land Claims Adjustment and Laws Amendment Act 1901 provided an optional means of registration of customary adoption, but this did not supplant customary adoption.

¹²⁵ Section 161 Native Land Act 1909. Section 19(2) of the Adoption Act provides that these adoptions will be recognised during their subsistence.

¹²⁶ Sections 162–170 Native Land Act. The Native Land Amendment and Native Land Claims Adjustment Act 1927 afforded a window of opportunity for legal recognition of some customary adoptions; however, this was reversed with retrospective effect by the Native Lands Amendment Act 1931.

¹²⁷ Section 168 Native Land Act.

¹²⁸ See chapter 9 for a more detailed explanation of historical legal recognition of Māori customary adoption practices.

Birth certificates and access to information

- 51 After an adoption order has been made, a new birth certificate is issued with the adoptive parents entered in the place of birth parents.¹²⁹ There is no indication on the face of the birth certificate that the child is adopted.¹³⁰ The original birth registration of an adopted person is sealed until that child turns 20 and requests access under the Adult Adoption Information Act.¹³¹ Access to identifying details on the birth certificate will be restricted if the adoption occurred prior to the commencement of the Adult Adoption Information Act and the birth parent has placed a veto upon the disclosure of information.¹³²
- 52 Once an adopted person reaches the age of 19, that person can request the Registrar-General to have the original birth certificate endorsed to the effect that the person does not desire any contact with either a particular birth parent or both birth parents.¹³³ This means that the Director-General is not empowered to release information that would identify the adopted person to the birth parent.¹³⁴
- 53 In the case of adoptions for which no section 7 endorsement has been requested by the adopted person, and adoptions before the commencement of the Adult Adoption Information Act for which no veto has been placed, information that identifies an adult adopted person or a birth parent can be requested by either party.¹³⁵
- 54 Whenever a person places a restriction upon the other party's access to identifying information, or attempts to access identifying information, the Adult Adoption Information Act provides that counselling services be offered.¹³⁶

¹²⁹ Section 63 Births, Deaths, and Marriages Registration Act.

¹³⁰ Unless an adoptive parent requests that the words "adoptive parent" appear on the face of the birth certificate – section 23(d) Births, Deaths, and Marriages Registration Act. The Legal Adviser to the Births, Deaths and Marriages Office advises that this option is very rarely exercised.

¹³¹ Section 4 Adult Adoption Information Act.

¹³² Sections 4(1)(c) and 5 Adult Adoption Information Act.

¹³³ Section 7(1) Adult Adoption Information Act.

¹³⁴ Section 8(2)(d) Adult Adoption Information Act.

¹³⁵ Sections 8 and 9 Adult Adoption Information Act.

¹³⁶ Sections 3(2), 5(2), 6 and 7(2) Adult Adoption Information Act.

- 55 An alternative means of obtaining adoption information is provided by section 23(3)(b) of the Adoption Act. A person can apply to the Family Court or High Court on “any special ground” to have adoption records opened. This provision is interpreted very narrowly by the courts.¹³⁷

Overseas adoption

- 56 Where a person has been adopted in any place outside New Zealand according to the law of that place and the Adoption (Intercountry) Act does not apply, New Zealand will recognise the adoption if it has certain legal consequences.¹³⁸
- 57 A different regime is applied to intercountry adoptions between countries that are signatories to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.¹³⁹ The Adoption (Intercountry) Act purports to implement the Hague Convention.¹⁴⁰ The Act provides a framework for the approval of organisations as accredited bodies to arrange intercountry adoption, in accordance with the provisions of the Hague Convention. The overall aim of the Convention is to establish safeguards so that intercountry adoptions accord with the best interests of the child, such adoptions only proceed when the birth parents give free and informed consent, and information about the child is collected for the child’s benefit.

The role of social workers

- 58 While it is the role of the court to make an adoption order, and to judge whether the applicants are suitable persons to adopt and that the welfare and interests of the child will be promoted by the adoption, social workers control the early stages of the process.
- 59 Social workers assess persons who wish to adopt a child, and decide whether they should be placed on a register of people who are considered eligible to adopt. They then select persons to present to birth parents as prospective adopters of their child, and the birth

¹³⁷ *D v Hall* [1984] 1 NZLR 727 (HC).

¹³⁸ Section 17 Adoption Act.

¹³⁹ Section 17(5) Adoption Act. See chapter 11 for a discussion of the Hague Convention.

¹⁴⁰ For further discussion of the Adoption (Intercountry) Act see chapter 11.

parents choose whom they prefer; sometimes birth parents and prospective adopters will meet before making the final choice. This process is facilitated by section 6 of the Adoption Act, which gives social workers the authority to grant approval to an adoption placement.

- 60 A social worker must furnish a report on most¹⁴¹ adoption applications before the court can make an interim¹⁴² adoption order. This will often be the only information upon which the court can assess the merits of the application, as there is no provision in the legislation for the court to appoint counsel for the child or to order psychological reports. By the time an adoption application reaches the court, the child will have been in the home of the applicants for a month or more. In most cases, the court will not wish to disrupt the arrangements that have been made.

RELATED LEGAL CONCEPTS

Guardianship Act 1968

What is guardianship

- 61 Guardianship is a legal term used to describe the rights and responsibilities associated with the bringing up of children. A guardian has the right to custody of the child (subject to any custody order made by the court) and the right of control over the way the child is brought up.¹⁴³ In the case of parents, guardianship rights reside alongside the usual responsibilities of parenthood,¹⁴⁴ for example, the responsibility to maintain and educate.
- 62 “Testamentary” guardians may be appointed by the parents of the child in a will.¹⁴⁵ If the parent appointing the testamentary guardian is a guardian of the child at the time of death, the testamentary

¹⁴¹ This does not apply where the applicant or one of the applicants is an existing parent of the child (section 10 Adoption Act). In practical terms this means the legislation does not require a social worker’s report for step-parent adoptions.

¹⁴² Or an adoption order without first making an interim adoption order (section 5 Adoption Act).

¹⁴³ Section 3 Guardianship Act.

¹⁴⁴ Section 3 Guardianship Act.

¹⁴⁵ Section 7 Guardianship Act.

guardian will become the sole or additional guardian of the child.¹⁴⁶ If the parent appointing the testamentary guardian is not a guardian of the child at the time of death, the testamentary guardian will not have automatic rights to custody of the child.¹⁴⁷ However, they may, at the court's discretion, be given the responsibilities of a guardian upon the death of the child's parent(s).

- 63 Any person may apply to the court to be appointed as a sole or additional guardian, either generally¹⁴⁸ or for a specific purpose.¹⁴⁹ An example of an appointment for a specific purpose might be where medical treatment is required and the parents cannot or will not consent to such treatment. Alternatively, the Family or High Court may appoint itself a guardian, if that is necessary to protect the best interests of the child.¹⁵⁰

How is guardianship different from adoption?

- 64 Guardianship differs from adoption in three main respects. Adoption creates the "status" of legal parenthood, ensures permanency, and creates new rights of succession.
- 65 Adoption is a legal means by which people can permanently acquire the status of parenthood. Guardianship confers certain rights and responsibilities in respect of a child, but it does not have the legal effect of deeming a person to be a parent. Guardianship is a less permanent legal status than adoption. For the court to remove a parent as guardian, the court must be satisfied that the parent is for some grave reason unfit to be a guardian of the child or is unwilling to exercise the responsibilities of a guardian.¹⁵¹ These qualifications do not apply to the removal of a guardian who is not a parent. This

¹⁴⁶ Section 7(2) Guardianship Act.

¹⁴⁷ Section 3 Guardianship Act.

¹⁴⁸ A child can be placed in the care of a foster parent. This can be achieved by the court granting either or both a custody order or a guardianship order under the CYP&F Act or Guardianship Act in favour of the foster carer. Long-term foster parents who wish to regularise their relationship with a foster child may seek to be appointed as a guardian so as to have more control over decision-making in respect of the child.

¹⁴⁹ Section 8 Guardianship Act.

¹⁵⁰ Section 10A extends the wardship jurisdiction of the High Court to the Family Court. For a discussion of wardship, see below paragraph 72.

¹⁵¹ Section 10(2) Guardianship Act.

means that the court has a broader discretion to remove a guardian than to discharge an adoption order.¹⁵² Guardianship terminates when the child attains the age of 20 years or marries under that age.¹⁵³ There is no comparable provision in the Adoption Act; adoption creates permanent family relationships.

- 66 Guardianship does not carry with it automatic rights of succession as between the guardian and the child in the same manner as adoption.
- 67 Most birth parents are automatically guardians of their children. This responsibility can be removed from them by the court, on the application of a guardian or near relative or with leave of the court, where the court is satisfied that the parent is “for some grave reason unfit to be a guardian of the child or is unwilling to exercise the responsibilities of a guardian”.¹⁵⁴ This has the effect of removing parental rights and responsibilities from a parent, but does not deprive a birth parent the right, in law, to be recognised as that child’s parent, nor does it alter the child’s legal identity.

Children, Young Persons, and Their Families Act 1989

- 68 The CYP&F Act creates a legal regime to deal with children in need of temporary or continuing care and protection or who have committed criminal offences. The Act expresses the principle that families play an important role in the life of the child and that they should be involved in decision-making when that child is in need of care and protection.¹⁵⁵ The welfare and interests of the child are the first and paramount consideration when a care and protection decision has to be made.¹⁵⁶
- 69 Where a social worker reasonably believes that a child is in need of care and protection, a family group conference is convened to provide a forum in which the extended family can discuss means of caring for the child and make decisions, recommendations and plans.¹⁵⁷ This is quite different from adoption which allows, at the

¹⁵² Compare section 10 Guardianship Act to section 20 Adoption Act.

¹⁵³ Section 21 Guardianship Act.

¹⁵⁴ Section 10 Guardianship Act.

¹⁵⁵ Title CYP&F Act.

¹⁵⁶ Section 6 CYP&F Act.

¹⁵⁷ Sections 20–38 CYP&F Act.

most, both birth parents, but often just the birth mother,¹⁵⁸ to make decisions in relation to the adoption and/or placement of the child.

- 70 Once a care and protection issue reaches the Family Court or Youth Court, the judge may call for a social worker's report, medical, psychiatric and psychological reports and cultural and community reports to provide assistance.¹⁵⁹ A barrister or solicitor can be appointed to represent the child,¹⁶⁰ and the child or young person can give evidence.¹⁶¹
- 71 Where the court determines that a child is in need of care and protection, the child may be placed in the custody of another person,¹⁶² or the court may make a guardianship order appointing another person as the guardian of the child.¹⁶³ Where such a guardianship order is made by the court, existing guardianship rights are suspended.¹⁶⁴ Where a child is in need of care and protection, either guardianship (including foster care) or adoption, whether by family members or other persons, may be suitable options for the child.

Wardship

- 72 Wardship is a form of guardianship that allows the High Court or Family Court to become a guardian of the child, replacing existing guardians. Such a replacement may be all-encompassing or for a specific purpose (for example, to give consent for the child to have a blood transfusion). The wardship jurisdiction is not often exercised by the court, and when it is exercised it is usually for a specific purpose. McGechan J has stated that:¹⁶⁵

the guardianship or so-called wardship jurisdiction is a matter of last resort, to be used with care, and only where the interests of the child

¹⁵⁸ If she is the only guardian of the child.

¹⁵⁹ Sections 178, 179, 186 and 187 CYP&F Act.

¹⁶⁰ Sections 159–162 CYP&F Act.

¹⁶¹ Section 167 CYP&F Act.

¹⁶² Sections 101–109 CYP&F Act.

¹⁶³ Section 110 CYP&F Act.

¹⁶⁴ Section 114 CYP&F Act.

¹⁶⁵ *Berghan v Lambourn* (25 February 1991) unreported, High Court, Wellington Registry, M 67/91.

and in that sense any aspects of wider public interest so require. As examples only, it may be invoked where a child is about to be removed from the jurisdiction, or is to be hidden, or a matter of considerable physical or mental health significance is involved.

Part II
Proposals for Reform

4

The need for change

BACKGROUND

73 **T**HE ADOPTION ACT 1955 provides that when an adoption order is made:

the adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock.

74 This provision, together with section 23 of the Adoption Act,¹⁶⁶ the Adoption Regulations 1959,¹⁶⁷ and section 21 of the Births and Deaths Registration Act 1951,¹⁶⁸ established the principle of secrecy in adoption. As a result, for many years adoptions were conducted in secret. The previous identity of the adopted child was inaccessible, and the birth parents were not given access to the new identity of their child.

75 The interests of the child were not central to the institution or practice of adoption. Adoption legislation and practice were based upon an assumption that the past should be concealed, that the birth mother would forget her ordeal and get on with her life, and that the new adoptive family unit would develop like any other.¹⁶⁹

¹⁶⁶ Which restricts access to adoption records.

¹⁶⁷ Which provides for adoption consent forms that do not reveal the names of the adoptive parents.

¹⁶⁸ Which provides for the re-registration of birth when a child is adopted and restricts access to the original birth certificate. This provision was re-enacted as sections 23, 24 and 63 of the Births, Deaths, and Marriages Registration Act.

¹⁶⁹ Law Commission, above n 2, paragraph 13.

76 Unfortunately this assumption was flawed.¹⁷⁰ Some adoptees have reported problems in establishing a sense of identity; fundamental matters such as similarity in common interests, thinking patterns, behaviour, personality characteristics and physical attributes may be missing in an adoptive family.¹⁷¹ Longitudinal research indicates that birth mothers do not just forget about their child; rather they go through a complex grieving process.¹⁷² Surrounding adoption in secrecy served to repress that grieving process for many women, causing emotional difficulties later on in life.¹⁷³

77 Robert Ludbrook,¹⁷⁴ a leading authority in adoption law and practice, has identified a number of social benefits and disadvantages associated with adoption as it is currently constituted.¹⁷⁵ On the positive side:

- adoption creates a new legal family which includes the child as a full family member;
- adoption can provide an inducement for people to assume the care of children who would otherwise be without a permanent family;
- adoption gives substitute parents a greater sense of security (which is passed on to the child); and
- adoption is a cost-effective means by which the State can relieve itself of financial responsibility for children for whom it has (or might otherwise have) financial responsibility.

¹⁷⁰ Law Commission, above n 2, paragraphs 15–16.

¹⁷¹ *Open Adoption*, above n 62.

¹⁷² See G Palmer “Birth Mothers: Adoption in New Zealand and the Social Control of Women 1881–1885” (MA Hons thesis, University of Canterbury, 1991); L Langridge “Adoption: The Birth Mother’s Experience” (MA thesis, University of Auckland, 1984); R Winkler and M van Keppel *Relinquishing Mothers in Adoption: Their Long-term Adjustment* (Institute of Family Studies Monograph No 3, Melbourne, 1984).

¹⁷³ For example, another pregnancy might trigger repressed grief relating to the adoption, as might a reunion with the adopted child.

¹⁷⁴ Solicitor, Children’s Legal Centre, London, 1980s; established Youth Law Project, Auckland, 1987; Inaugural Director of the Australian National Children’s and Youth Law Centre 1993–1996; Legal Adviser to Laurie O’Reilly, Commissioner for Children, 1996–1997; Legal Adviser to Commission for Children and Young People, New South Wales, 2000; Principal author of *Ludbrook’s Family Law Practice*; author of update of the section on adoption in Trapski’s *Family Law* vol v (Brooker’s, Wellington, 1991–); author of *Adoption: Guide to Law and Practice* (1990).

¹⁷⁵ Submission, Robert Ludbrook.

To Robert Ludbrook's comments, one might add that adoption has the benefit of being internationally recognised.

The disadvantages of adoption include:

- the effect of adoption on adoptees – the secrecy and deception promoted by the Adoption Act have caused serious psychological trauma to some adoptees, as well as feelings of rejection, confusion, or of being unwanted;
- the effect on the relinquishing parents – adoption is a traumatic event likely to have serious repercussions for the birth family;
- current New Zealand adoption legislation focuses on the needs and rights of adults rather than those of children;
- adoption legislation dilutes the principle that the best interests of the child must be the paramount consideration¹⁷⁶ – this formulation does not fulfil New Zealand's international obligations;¹⁷⁷
- adoption legislation is notable for a lack of participation rights for children;¹⁷⁸
- past adoption practices had a devastating impact on many birth parents and adopted persons;
- adoption legislation reflects property and contract law principles rather than family law principles;
- adoption creates a legal fiction that many adopted people find unacceptable; and
- adoption is inconsistent with deeply held Māori cultural values.

¹⁷⁶ Section 11(b) states that when making an adoption order the court shall be satisfied that the welfare and interests of the child will be promoted by the adoption. As well as being a diluted form of the welfare principle, it only applies when the court makes the adoption order – the principle is not given a role throughout the adoption process.

¹⁷⁷ Article 12, UNCROC.

¹⁷⁸ Either personal participation in the case of an older child or a right to representation by counsel.

OPEN ADOPTION

- 78 In the late 1970s and early 1980s people began to question the need for secrecy. Bethany¹⁷⁹ was instrumental in initiating the practice of “open adoption”. Open adoption involves varying degrees of contact between the child, members of the child’s adoptive family, and members of the child’s birth family. Contact may range from the birth parents and adoptive family meeting prior to the adoption, to regular meetings between the birth parents and adoptive family, to intermittent ongoing contact. The degree and regularity of contact is decided by the parties involved. As initial reports indicated that this practice had real benefits for all parties involved, social workers also began to promote the practice of open adoption and have facilitated its growth over the last 20 years – to the extent that New Zealand has been described as “leading Western adoption practice with respect to openness”.¹⁸⁰
- 79 Today the AISU arranges for the birth parents themselves to select the adoptive parents from a selection of profiles of couples waiting in the approved pool of prospective parents. Birth parents are encouraged to meet the adoptive parents, and many make independent arrangements for continuing contact (letters, etc) or access (meetings) with the child. A number of community support groups have formed to assist families to maintain open adoption arrangements.
- 80 At the centre of open adoption is the best interests of the child. Empirical studies carried out in the United States support the belief that open adoption is in the adopted child’s best interests.¹⁸¹ While an open adoptive arrangement may also assist the birth mother in coming to terms with her loss,¹⁸² and help the adoptive parents¹⁸³ to understand their child, open adoption ultimately benefits the child

¹⁷⁹ Salvation Army home for unmarried mothers.

¹⁸⁰ *Open Adoption*, above n 62, 16.

¹⁸¹ HD Grotevant and RG McRoy *Openness in Adoption: Exploring Family Connections* (Sage Publications, California, 1998) [*Openness in Adoption*].

¹⁸² United States studies indicate that birth mothers in closed adoptions experience significantly worse grief resolution and have poorer role adjustment than birth mothers who place a child in open adoption arrangements (*Openness in Adoption* above n 181, 169).

¹⁸³ Furthermore, the research referred to by Grotevant and McRoy indicates that adoptive parents in open adoptions feel more secure in their roles as parents, are not overtly fearful that the mother will try to reclaim the child and are not worried about the permanence of the relationship with their child (*Openness in Adoption*, above n 181, 129).

and helps alleviate the disadvantages associated with closed stranger adoption. Barnardos commented in its submission that:

An “open” adoption relationship is where the child maintains ongoing contact with his/her birth parent. The goal of an open adoption process is to ensure that the child feels as psychologically secure as possible. There is no secrecy about where the child comes from or who their birth family is. Open adoptions are not shared parenting arrangements as both the birth and adoptive parent/s have their own separate and distinctive roles.

Mary Iwanek, National Manager of AISU, has written of the benefits conferred by open adoptions:¹⁸⁴

For children, *open adoption* enables them to stay in touch with important birth family members in their lives, not having to lose out on knowledge about their original (birth) families. The general feeling of birth families has been that current knowledge about the well being of their biological child has helped them cope with their grief. They feel that by being able to grieve, things become easier over time. Adoptive parents have reported that they [are] secure in their role as a parent, and they feel that having been chosen by the birthparents to raise the child, they feel more secure in that role. Contact with birth families has given adoptive parents the opportunity to secure access to health and behavioural information at times when it has been needed. Both adoptive parent and birth families believe that they have benefited from *open adoptions* – particularly those who previously had closed adoptions. They feel more secure and less fearful of the birthmother turning-up on their doorstep unexpectedly wanting to claim back the child, or fantasies of guilt and shame on behalf of birthparents who wonder if their child will ever think about them, or feel bad towards them for having been adopted.

- 81 Secrecy in adoption is now the exception, rather than the rule. Many families involved in the adoption process see the deeming provision¹⁸⁵ in the Adoption Act and the re-registration of birth as unjustifiable legal fictions, and consider that pretending the adoptive parents were responsible for the child’s birth is ludicrous.

TYPES OF ADOPTION

- 82 In the 1955, 67.6 per cent of adoptions were by strangers and 32.4 per cent were by non-strangers. Of the non-stranger adoptions, the

¹⁸⁴ M Iwanek “Open adoption: an evolving practice” in *Has Adoption A Future: Proceedings of the Fifth Australian Adoption Conference* (1994) 284.

¹⁸⁵ Section 16 Adoption Act.

majority were adoptions by birth parents and step-parents, and the rest were by other relatives or other non-strangers. In 1996, only 21.1 per cent of adoptions were to strangers whilst 78.9 per cent were to non-strangers. Today, most adoption orders are made within a family or step-family. The deeming provisions of the adoption legislation create genealogical distortion and more often than not the legal emphasis upon secrecy is unrealistic.

SUBMISSIONS

- 83 The discussion paper asked whether adoption as an institution should be retained, whether a new system could be adopted, and whether a flexible “care of children” system that encompasses options from temporary guardianship to permanent legal care of children could be adopted.
- 84 Thirty-eight of eighty submitters stated that adoption as an institution should be abolished. Of the forty-two who supported retaining adoption as an option, the majority were concerned that a substitute for adoption would not provide sufficient permanency of status for the child.
- 85 Sixty-three submitters agreed and one disagreed with the proposal that the needs of contemporary society require amendment of the law. Of the submitters who described their ideal system, sixteen suggested that a system of open adoption should be adopted, seventeen supported the use of guardianship in a modified form,¹⁸⁶ and nine supported the concept of legal parenthood proposed in the discussion paper.¹⁸⁷
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¹⁸⁶ Modified to enable permanent legal status to be given to relationships.

¹⁸⁷ See below paragraph 96 for an explanation of the proposal.

5

A Care of Children Act

THE CONTINUUM OF CARE ARRANGEMENTS

- 86 **T**HE DISCUSSION PAPER suggested that a Care of Children Act could replace adoption and other legislation governing the guardianship and care of children. Such an Act would encompass at one end of its spectrum the temporary care of children (temporary custody and/or guardianship)¹⁸⁸ and at the other a reformulated concept of adoption.
- 87 The advantage of such a Care of Children Act is that it enables child placement issues to be dealt with coherently. Each care option on the spectrum, from temporary care to permanent placement, would be canvassed as an option for that particular child. Such an approach, with an emphasis upon the best interests of the child, would be consistent with the principles espoused in UNCROC.¹⁸⁹
- 88 We observed in the introduction to this report that there are disjunctions between the legislation dealing with placement of children in the context of adoption, guardianship, and care and protection proceedings.¹⁹⁰ Reformulating adoption and placing it at one end of a spectrum emphasises the availability of all the options and provides for an ease of movement between the options. It brings together a number of disparate pieces of legislation, and it subordinates them to an overarching emphasis upon the best interests of the child. Thirty-six submitters agreed that a flexible system for the care of children could be created, while five objected to the proposal.

¹⁸⁸ Which includes fostering. See also above n 148.

¹⁸⁹ Particularly articles 3, 7, 20 and 21.

¹⁹⁰ Some social workers dealing with care and protection issues may be philosophically opposed to adoption by strangers because such adoptions are perceived to be in conflict with the CYP&F Act and international conventions which emphasise family care – therefore in many cases adoption is not seen as an option. A recent consultation paper on adoption contains echoes of our proposal for a Care of Children Act. The paper, issued by the UK Prime Minister recommends that the UK Adoption Act be aligned with the Children Act to ensure that children are provided with a full range of legal options for permanent placements, whether adoptive or otherwise. See *Prime Minister's Review of Adoption – Issues for Consultation* (Cabinet Office Performance and Innovation Unit, London, July 2000, <http://www.cabinet-office.gov.uk/innovation/2000/adoption/adindex.htm>)

89 We offer for consideration an outline of what such a statute might contain. We have not gone into all categories in great detail, as the focus of this review has been on reviewing aspects of adoption law. We acknowledge that the Care of Children Act proposal is not fully developed, but we would prefer to gauge whether there is support for such a proposal before conducting more detailed work on aspects of guardianship¹⁹¹ and matters relating to parental status.

We recommend that the Adoption Act and the provisions of the Guardianship Act and the CYP&F Act relating to the placement of children be incorporated in a Care of Children Act.

Defining parenthood

90 The Status of Children Act, the Status of Children Amendment Act and the Family Proceedings Act all establish legal principles or methods that, in addition to the Guardianship Act, determine who should or should not be deemed to be a parent of a particular child. The Commission considers that the legislation that deems persons to be parents would be more appropriately located in a single piece of legislation, such as the proposed Care of Children Act.

We recommend that a Care of Children Act contain a section describing the persons who are, in law, considered to be the parents of a child.

ORDERS AVAILABLE UNDER A CARE OF CHILDREN ACT

Adoption

A reformulated concept

91 The majority of submitters agreed that adoption should not continue in its current form. The present legislation deems an adopted child to be born to the adoptive parents.¹⁹² It is now clear that many people affected by adoption find this provision a repugnant and an

¹⁹¹ The Ministry of Justice is conducting a review of the Guardianship Act. The primary focus of the review is on custody and access disputes between guardians, rather than the more general aspects of the law pertaining to guardianship. See *Responsibilities for Children: Especially When Parents Part* (Ministry of Justice, Wellington, 2000).

¹⁹² Section 16 Adoption Act.

unnecessary distortion of reality. A submission from an adoption support group stated that a fundamental principle of adoption is that:¹⁹³

An adopted person's well-being and the adoptive parents' security in parenting are not dependent upon a pretence that adopted children are the adoptive parents' biological children created by a legal fiction severing the adopted child's blood ties with the birth family or having details of the child's birth family cloaked in secrecy.

92 Forty-eight submitters supported reformulating the legal effect of an adoption, so that adoption no longer creates a "legal fiction". Three submitters objected to this proposal. We agree that the way forward for adoption as a legal concept and institution is to reformulate the legal effect of adoption.

93 The discussion paper proposed that an adoption order should have the effect of permanently transferring full parental responsibility from the birth parents to the adoptive parents, making the adoptive parents the legal parents of the child. This proposal received widespread support.¹⁹⁴ We set out below at paragraph 99 our proposal for a definition of parental responsibility.¹⁹⁵

94 This formulation recognises that parental responsibility is being transferred both in law and in fact from the birth parents to the adoptive parents, that a new legal family is being created, and that a birth family still exists and may have a role in the child's life.

95 Ludbrook agrees that reformulating adoption in this way, and placing it at one end of the spectrum of options, would:¹⁹⁶

meet the social goal of giving substitute carers a recognised status in relation to the child – a status which carries with it the right to care for the child and make decisions about the child's upbringing. . . . It would remove the elements of secrecy and legal fiction which are inappropriate in regulating family relationships.

96 We considered renaming adoption "legal parenthood" to give our proposals the opportunity of starting with a clean slate. We were concerned that because the current formulation of adoption is so well understood, a reformulation would encounter resistance and be

¹⁹³ Submission 1/16, 17.

¹⁹⁴ Forty-eight submitters supported the proposal, three objected to it.

¹⁹⁵ This proposed definition could be considered in the context of any future review of guardianship legislation.

¹⁹⁶ Submission, Robert Ludbrook.

seen as something “less” than adoption. Emphasising the legal nature of the new relationship might address these concerns and avoid the negative connotations that the word adoption has for many people.

- 97 Adoption, however, has existed for almost five thousand years and has been adapted to suit the social circumstances of a variety of cultures.¹⁹⁷ Adoption need not continue to have the negative connotations that have arisen as a result of New Zealand’s short history of closed stranger adoption. As we observed earlier, for many families currently raising adoptive children, secrecy is no longer an aspect of modern adoption – “adoption” to them means something quite different from “adoption” as it was perceived in the 1950s, 1960s and 1970s. For many Māori, “adoption” is a term that has positive connotations.¹⁹⁸
- 98 Furthermore, we experienced difficulties when we attempted to put the new term to use. It proved almost impossible to avoid using the word “adopted”. It is our belief that the term is so universal that any attempt to rename it, while academically appealing, would be ignored by the general public. It is clear that what the public understands by the term adoption will alter as adoption practices change.

We recommend that the legal effect of adoption should be the transfer of permanent parental responsibility from birth parents to the adoptive parents.

Parental responsibility

- 99 We consider the proposed Care of Children Act an appropriate place to state categorically what a parent’s responsibility to a child actually is and to define the rights that a parent has in relation to his or her child. We are attracted by the Scottish approach.¹⁹⁹ We consider that these provisions should be adapted, suitably amended for the New Zealand context, and included in a Care of Children Act. Amendments would also need to be made to the current

¹⁹⁷ See chapter 3 for a brief history of adoption.

¹⁹⁸ Metge, above n 27, 211–213.

¹⁹⁹ See appendix I for the Scottish legislation. Our attention was drawn to this legislation by a recent article RM Henaghan “Custody Decisions – Discretion Gone too Far?” (2000) 9 Otago Law Review 731.

definition of “guardianship” found in the Guardianship Act. We envisage that the provisions could be enacted to the following effect:

GUARDIANSHIP ACT

4 Definition of custody and guardianship

For the purposes of this Act –

“Custody” means the right to possession and care of a child and the responsibility for the care of the child.

“Guardianship” means that the parent has the power to exercise all parental responsibilities and parental rights in relation to the child, including the right to custody of the child (except in the case of testamentary guardian and subject to any custody order made by the Court); and “guardian” has a corresponding meaning.

PARENTAL RESPONSIBILITIES AND RIGHTS

Parental responsibilities

- (1) A parent has in relation to his or her child the responsibility –
 - (a) to safeguard and promote the child’s health, development and welfare;
 - (b) to provide, in a manner appropriate to the stage of development of the child –
 - (i) direction; and
 - (ii) guidanceto the child;
 - (c) if the parent does not have custody of the child, to maintain personal relations and direct contact with the child on a regular basis
but only in so far as compliance with this section is practicable and in the interests of the child.
- (2) “Child” means for the purposes of –
 - (a) paragraphs (a), (b)(i) and (c) of subsection (1) above, a person under the age of 16 years;
 - (b) paragraph (b)(ii) of that subsection, a person under the age of 20 years.
- [(2A) A definition of parent to be included once overall policy is settled. See paragraph 90 above and footnote 588 below.]
- (3) The responsibilities mentioned in paragraphs (a) to (c) of subsection (1) above are in this Act referred to as “parental responsibilities”.²⁰⁰

²⁰⁰ The Commission has deleted the latter part of this clause, which can be seen in appendix I. It is unnecessary in the New Zealand context to empower a child to sue or defend in any proceedings in relation to those responsibilities.

- (4) The parental responsibilities are in addition to any duties imposed on a parent at common law; and this section is without prejudice to any other duty so imposed on any parent or to any duty imposed on the parent by, under or by virtue of any other provision of this Act or of any other enactment.

Parental rights

- (1) A parent, in order to enable him or her to fulfil his or her parental responsibilities in relation to a child, has the right –
 - (a) to have custody of the child or otherwise to regulate the child’s residence;
 - (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child’s upbringing;
 - (c) if the parent does not have custody of the child, to maintain personal relations and direct contact with the child on a regular basis.
- (2) Subject to subsection (3) below, where two or more persons have a parental right as respects a child, each of them may exercise that right without the consent of the other or, as the case may be, of any of the others, unless any court order conferring the right, or regulating its exercise, otherwise provides.
- (3) Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in New Zealand from, or to retain any such child outside, New Zealand without the consent of a person described in subsection (6) below.
- (4) The rights mentioned in paragraphs (a) to (c) of subsection (1) above are in this Act referred to as “parental rights”.²⁰¹
- (5) The parental rights are in addition to any rights enjoyed by a parent at common law; and this section is without prejudice to any other right so enjoyed by a parent or to any right enjoyed by the parent by, under or by virtue of any other provision of this Act or any other enactment.
- (6) The description of a person referred to in subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right mentioned in paragraph (a) or (c) of subsection (1) above; except that, where both the child’s parents are persons so described, the consent required for his removal or retention shall be that of them both.

²⁰¹ The Commission has deleted the latter part of this clause, which can be seen in appendix I. It is unnecessary in the New Zealand context to empower a parent to sue or defend in any proceedings in relation to those rights.

(7) In this section, “child” means a person under the age of sixteen years.

100 This definition of guardianship is open-ended and section 4 is designed to preserve any common law or statutory rights of parents (adoptive or natural) and guardians.

101 Adoption confers upon adoptive parents the rights and responsibilities of parents outlined above.

We recommend that parental responsibilities and rights be specifically defined in the Care of Children Act.

Mandatory effects of an adoption order

102 We propose that the legal effect of adoption be reformulated. Rather than relying on deeming provisions to create a legal fiction that the child was born to the adoptive parents, adoption should be a transparent process for the permanent transfer of parental rights and responsibilities. The adoptive parents will obtain the legal right and obligation to care for and control the child and make decisions regarding the education, medical care and upbringing of the child. The child’s natural parents will cede their parental rights and responsibilities in respect of the child.

103 The child’s original birth certificate will be annotated to show the identities of the adoptive parents and the date of the adoption order. At the same time, a new certificate will be issued showing only the child’s current (that is, new) name and date and place of birth, and the identity of current parents. Only the second certificate would be a matter of public record. We discuss our proposals for these birth certificates in more detail in chapter 16.

104 The adoption order will specify that any former child support or maintenance obligations on the part of the natural parents cease to exist and that the adoptive parents assume those obligations.

105 The adoption order will specify the child’s rights of succession and the child’s domicile.

Parenting plan

106 Parties will be required to create a parenting plan that would document the parties’ intentions regarding the adoption of the child and would cover the matters listed below. Our intention here is that parties address at the outset all issues regarding open adoption and

the potential consequences of open adoption, and determine what best suits the child's needs.

(a) *Contact*

- 107 The parties will specify in the plan the name by which the child shall be known and what, if any, type of contact there will be between the adopting parents, birth parents and child. Parties may decide that there will be no contact, or that the contact may take the form of an exchange of written information, photographs, telephone calls or actual physical contact.²⁰² Parties should not attempt to specify in too much detail the amount of contact that they will have. This will inevitably change as the child grows and as the circumstances of the adults alter. Attempts to quantify contact may lead to unrealistic expectations. As Grotevant and McRoy have stated:²⁰³

Developmental differences contribute to the dynamic nature of openness relationships. What may be “best” for one party in the adoption triad at one point may not be “best” for other parties. Furthermore, parties’ needs for more or less openness may change over time and may not always occur in synchrony among triad members.
...

Over time, adoptive kinship networks will develop different relationship solutions as they engage in the process of arriving at a workable comfort zone of contact.

- 108 If the parties agree, the interests of other birth relatives might also be canvassed at this stage, and arrangements for some degree of contact between the adopted child and other birth relatives might be negotiated.

(b) *Succession*

- 109 Current legislation mandates that succession rights flow from the making of an adoption order.²⁰⁴ Under the new scheme the child will continue automatically to obtain succession rights in respect of the adoptive parents and the adoptive parents will be able to inherit from the child in the event of intestacy.

²⁰² At this point we might note, as Grotevant and McRoy do (above n 181, 199), that in adoptive relationships the power to make decisions and control the level of mutually acceptable contact is not always equally distributed between the adoptive parents, birth parents and child.

²⁰³ Above n 181, 198–199.

²⁰⁴ Section 16(2)(a) Adoption Act.

110 We favour retaining the presumption that the child's rights of inheritance (and right to inherit in the event of intestacy) from the natural family be extinguished when that child is adopted. Where, however, a natural parent wishes the child to be able to succeed, this should be recorded in an adoption plan.²⁰⁵ Such right would flow only one way; the birth parents and other birth relatives would not have any right to inherit from the child.

(c) *Other conditions*

111 In addition, the parties or the court may express other intentions in the adoption plan, such as providing the child with the opportunity to learn about cultural and linguistic heritage. In the case of a Māori child, it would be desirable for the child's tribal affiliations (whakapapa) to be recorded in the plan.

(d) *Enforceability of a parenting plan*

112 A challenging issue is the status that the law should confer upon open adoption arrangements. Many submitters commented positively about their experiences of open adoption. Where there have been difficulties with open adoption, many of the problems can be attributed to a lack of understanding about the dynamics of such arrangements and the parties involved having differing (and often unarticulated) expectations of the arrangement. A number of submitters commented that the success of open adoption arrangements can be attributed to the informality of the arrangements, and they expressed concern that if such arrangements were made justiciable (able to be enforced by the court) it would undermine their success.

113 If compliance with the terms of the open adoption arrangement were the dominant consideration, there must be an ultimate sanction. But the potential effect of such sanctions carries a high cost. In custody and access disputes, the sanctions for non-compliance include stripping access rights, warrants to enforce access, and ultimately, removal as a guardian. If the terms of an order for open adoption were to be legally enforceable, the ultimate sanction for breaching an open adoption agreement must logically be the discharge of the adoption order. The Commission does not consider that refusal to comply with an open adoption arrangement, in the absence of any fundamental parental deficiencies on the part

²⁰⁵ Although such an intention will not be legally enforceable if a later will does not express this intent. See below paragraphs 112–116 for a general discussion of the enforceability of the parenting plan.

of the adopters, should ultimately lead to such sanction. The resulting upheaval would be contrary to the child's best interests.

- 114 It must be recognised that there is a risk that open adoption might be used to induce birth parents to agree to an adoption (“You will still be able to see him whenever you want – nothing will really change”). It must be made very clear to birth parents that by consenting to an adoption, the birth parent has permanently given up parental responsibility for that child. If a birth parent has any doubts about that consequence, a measure short of adoption should be considered.
- 115 The Law Commission's views, formed on balance, are that, in the interests of certainty and the stability of the new adoptive parent–child relationship, there should be no opportunity for resort to the courts. Therefore, the Commission proposes that in the event of a dispute between the birth family and the adoptive family, a parenting plan will not be legally enforceable. It is appropriate that Parliament resolve this point.
- 116 We propose, however, that when tensions or disputes arise between adoptive and birth families regarding implementation of the adoption plan, those families have recourse to mediation services. We consider that this is the best way to attempt to re-establish fractured relationships in order to promote the welfare and interests of the adopted child. If mediation fails to resolve an intractable dispute, the adoptive parents, having assumed full parental responsibility for the child, must ultimately be trusted to act in the child's best interests. We discuss recourse to mediation and other support services in more detail in chapter 10. We considered, but rejected, the option of compelling parties to attend mediation. Mediation is most likely to be effective where both parties are committed to, or at least amenable to, reaching a mutually acceptable outcome. We consider that compelling attendance would be counterproductive and inconsistent with the philosophy underlying the concept of the parenting plan.

We recommend that adoption have defined mandatory consequences and that a parenting plan accompany the order.

Enduring guardianship

- 117 The next point on the spectrum would provide for the role of “enduring guardian”. We envisage that this form of guardianship might appropriately be used instead of adoption in situations where

responsibility for a child has been partially or totally assumed by a step-parent or family member. Rather than having the effect of removing a parent from a child's life, enduring guardianship could be used to confer a status with some characteristics of parenthood on persons other than the child's natural (or pre-existing) parents. In this way a child would retain links to existing parents as well as having recognised the child's relationship to any other person(s) acting in a capacity akin to that of a parent in terms of adding to the child's sense of security.

- 118 Enduring guardianship is not the same as adoption. As outlined in the foregoing paragraph, it provides a means of legally adding a further adult relationship to a child's life rather than substituting parents, as in the case of adoption. Thus, enduring guardianship would not qualify as a form of adoption for the purposes of international instruments.
- 119 Enduring guardianship is an enhanced version of the current form of guardianship, encompassing guardianship but with the added social (and limited legal) consequences of a lifetime parent-child relationship. Unlike guardianship, which expires when the child reaches 20, the nominal status of enduring guardian would not expire but would endure.²⁰⁶
- 120 Enduring guardianship may only be created by court appointment. Where there is a dispute between existing parents and the proposed guardian regarding the appointment of an enduring guardian, the court should take into account the views and interests of the child and the existing parents, but should not be constrained by such views. As in any other guardianship case, the paramount consideration is the welfare and interests of the child. Disputes between an enduring guardian and any other guardians and/or parents should be determined in the same manner as any other dispute between guardians.
- 121 The New South Wales Adoption Bill²⁰⁷ requires step-parents who seek to adopt a child to have lived with the child for a period of not less than three years preceding the application for adoption. Similarly relatives seeking to adopt a related child must have had a relationship with the child for at least five years preceding the application. It may be appropriate to enact a similar requirement in

²⁰⁶ Although the practical powers that accompany guardianship, such as the right to exercise control over the child, would tail off as the young person matures and would expire when the child reaches 20 – as they do for any guardian.

²⁰⁷ Clauses 20 and 30 Adoption Bill (NSW).

New Zealand in respect of an application by a step-parent and relative to become an enduring guardian.

122 Enduring guardianship would have the following implications for succession:

- When the court appoints an enduring guardian, the guardian should give thought to whether he or she intends the ward to inherit from the guardian, and a will should be created or altered accordingly.
- Where a testamentary disposition has been made in favour of the ward, the ward will inherit in accordance with that disposition and may defend a Family Protection Act²⁰⁸ claim against the estate.
- Where the enduring guardian has made a will but elects not to make provision for the ward, the ward may not bring a Family Protection Act claim for provision out of the estate on the basis that they are on the same footing as a child of the testator. However, any existing rights as regards stepchildren and step-parents under the Family Protection Act²⁰⁹ would be preserved, and cases falling within the Law Reform (Testamentary Promises) Act 1949 would be unaffected by such restriction.
- Where the guardian dies intestate, the ward will be entitled to inherit as a child of the guardian in accordance with sections 77–78 of the Administration Act 1969.
- Because the parents may not have ceded all rights and responsibilities of parenthood, it is equitable that the ward retain succession rights in respect of any other parents.

123 Appointment as an enduring guardian could result in the enduring guardian being treated as a step-parent (and therefore a liable parent) for the purposes of the Child Support Act 1991.²¹⁰

124 Like adoption and guardianship, enduring guardianship would be terminable by court order. Because enduring guardianship is

²⁰⁸ Family Protection Act 1955.

²⁰⁹ Section 3(1)(d) Family Protection Act.

²¹⁰ Section 99 of the Child Support Act 1991 allows the court to treat a person as a step-parent for the purposes of the Act. A step-parent may then be considered a liable parent and have to pay child support. Note that this scenario also applies to persons appointed as additional guardians – *A v R* [1999] NZFLR 249 (HC). It is arguable that in some cases there ought to be scope for both the natural parent and enduring guardian to be liable parents in terms of the Act. It would be feasible for there to be an apportionment of liability in respect of the child. This is a matter that the legislature might wish to consider.

designed to place the enduring guardian in the same position as the child's parents, we propose that the test for removal of guardianship from a parent, also be applied to enduring guardians. Section 10 of the Guardianship Act provides:

- (1) The Court may at any time in application by the other parent or by a guardian or near relative or, with the leave of the Court, by any other person deprive a parent of the guardianship of his child or remove from his office any testamentary guardian or any guardian appointed by the Court.
- (2) No parent shall be deprived of the guardianship of his child pursuant to subsection (1) unless the Court is satisfied that the parent is for some grave reason unfit to be guardian or is unwilling to exercise the responsibilities of a guardian.

125 Apart from its enduring nature and the altered succession rights, the role of enduring guardian carries the same legal consequences as the role of guardian. The importance of enduring guardianship lies less in its legal significance than in the moral and social benefit of providing explicit recognition of the social importance of the extra parent in the child's life. Enduring guardianship provides a means by which a child's security and sense of familial belonging can be incrementally strengthened.

We recommend that the role of "enduring guardian" be created to recognise the social status of a guardian who acts as a parent.

Guardianship

126 We propose that those elements of the Guardianship Act that set out who is a guardian, or determine who can be made a guardian or have guardianship removed from them, should be transferred to the Care of Children Act. Guardianship as a legal concept will remain as it is currently constituted,²¹¹ and include natural guardians,²¹² additional guardians,²¹³ testamentary guardians and the guardianship provisions of the CYP&F Act.²¹⁴

²¹¹ Subject to the amendments in relation to parental responsibility, discussed above at paragraphs 99–101.

²¹² Sections 6, 6A, 7 and 8 Guardianship Act.

²¹³ Section 8 Guardianship Act.

²¹⁴ Sections 110–120 CYP&F Act.

127 As noted in chapter 3, the duration and legal consequences of a guardianship order may vary from full responsibility for and control over the way a child is brought up, whether until the age of 20 or for a more limited period (for example where a child is placed in foster care), to a more temporary or limited scenario where a child needs particular medical treatment and a guardian is appointed only for the purpose of consenting to that treatment.

We recommend that the provisions governing who is, who can apply to be, and who may be removed as a guardian be transferred from the Guardianship Act and the CYP&F Act to the Care of Children Act.

6

A snapshot of our proposals

CARE OF CHILDREN ACT

128 **W**E SET OUT BELOW what we envisage as the framework of the proposed Care of Children Act:

CARE OF CHILDREN ACT

Part 1 – Guiding principles

Part 2 – Care of children orders

Part 3 – Adoption

Part 4 – Enduring guardianship

Part 5 – Guardianship, temporary guardianship and testamentary guardianship

129 The rest of this chapter will introduce the concepts to be incorporated in each part.

PART 1 – GUIDING PRINCIPLES

130 New Zealand is a signatory to a number of international conventions regarding the welfare of children. These conventions establish many fundamental principles that should provide the basis for decisions affecting the welfare of children. The CYP&F Act provides an example of a piece of family legislation that establishes such guiding principles as a cornerstone of the legislation.²¹⁵ Part 1 of the Care of Children Act will establish the principles that must guide all decisions made and actions taken in accordance with the Act.

²¹⁵ See sections 4, 5 and 6 CYP&F Act.

- 131 More specifically, these fundamental principles will reflect:
- New Zealand’s international obligations, including those expressed in the United Nations Convention on the Rights of the Child and the Hague Convention on Intercountry Adoption;
 - our expectations of the responsibilities and an elucidation of the rights that flow from parenthood – natural or otherwise; and
 - an understanding that a child’s culture should be taken into account when decisions regarding that child are made.
- 132 In addition, there are certain principles that are specifically related to adoption and the adoption process. We do not propose that these be incorporated within the general guiding principles in Part 1 of the Act. They will be set out at the beginning of Part 3 of the Act, which deals with the adoption process. These principles are discussed in more detail in chapters 8 and 9 of this report.

PART 2 – CARE OF CHILDREN ORDERS

- 133 Part 2 of the Care of Children Act will set out the orders that are available under the Act. These will be:
- *adoption orders* – as described above at paragraphs 102–116. Note that we are also proposing reform of the entire adoption process. We also expect that successful surrogacy arrangements will ultimately require an adoption order for the commissioning parents to become the legal parents of the commissioned child;
 - *enduring guardianship orders* – as described above at paragraphs 117–125; and
 - *guardianship orders* – as described above at paragraphs 126–127.
- 134 The effects of each type of order will be described in this section of the Act. These effects were discussed in the previous chapter of this report.

PART 3 – ADOPTION

- 135 The bulk of this report focuses specifically on adoption law reform. Our terms of reference directed us to undertake this task; our proposals for a Care of Children Act arose out of our recognition that the legislative framework for caring for and placing children who cannot live with their own parents was unnecessarily fragmented. Part 3 of the Care of Children Act will set out the underlying principles and purpose of adoption, provide for the

process by which an adoption order can be made, and provide for issues that arise as a consequence of an adoption order.

Guiding principles

136 The guiding principles that will be stated in Part 1 of the Care of Children Act are discussed in chapters 8 and 9 of this report, primarily in the context of adoption. Those principles that relate only to adoption will be set out at the beginning of this part of the Act. These principles include:

- the purpose of adoption; and
- the factors to be taken into account when determining the best interests of a child.

Support services

137 The provision of support, in the form of both counselling and being given the necessary information upon which to base decisions, is vital if a decision to adopt a child, or to give up a child for adoption, is to be the correct decision for the child, the birth family and the adoptive family. To emphasise the importance of support services, and because their availability will permeate every step of the adoption process, we envisage that the support services available will be set out early on in Part 3 of the Care of Children Act.

138 Our proposals for reform of support services include:

- mandatory pre-adoptive counselling for birth parents;
- mandatory pre-adoptive counselling for adoptive parents;
- availability of family or whānau meetings and mediation services throughout the adoption process;
- access to post-adoption counselling by adopted persons, birth parents and adoptive parents;
- provision of adoption counselling services by private as well as State providers;
- an accreditation framework for private providers of adoption counselling services;
- retention of State control over assessment of prospective adoptive parents; and
- State control over placement of children for adoption.

These issues are discussed in more detail in chapter 10 of this report.

Jurisdiction, citizenship and intercountry adoption

- 139 The court currently has jurisdiction to entertain an application for adoption regarding any child, by any person, regardless of whether any of the parties are permanently resident in New Zealand. This, and other provisions relating to adoptions made overseas, will be amended in the new Act. Jurisdictional issues will be dealt with early on in the legislation, and there will be a specific section of Part 3 of the Act governing recognition of adoptions made overseas by persons not resident in New Zealand and governing the intercountry adoption procedures for persons habitually resident in New Zealand. The specific problems and our proposals for reform are discussed in chapter 11.

Who may be adopted?

- 140 This section of the Act will define who is eligible to be adopted. We are proposing that children aged up to 16 years old will be eligible to be adopted, with young persons aged between 17 and 20 eligible only where the court is satisfied that the needs of the child require an order to be made. This issue is discussed in more detail in chapter 12 of this report.

Who may adopt?

- 141 This section of the Act will set out who is eligible to adopt a child. As noted in chapter 3, adoption legislation has traditionally focussed first upon a person's status in determining eligibility to adopt a child and then secondly turned to a person's suitability. Status will no longer be an eligibility issue – single persons (whether male or female) and couples (whether married, de facto or same-sex) will all be eligible to adopt a child. The suitability of a specific person or couple to adopt a particular child is a factual question to be determined on a case-by-case basis.
- 142 This section of the Act will also establish presumptions regarding when adoption is suitable and when enduring guardianship or guardianship might be more appropriate. These issues are discussed in more detail at chapter 13.

Consent

- 143 This section of the legislation will set out the procedural requirements for consent. Chapter 14 of this report proposes that the birth mother's consent not be valid until 28 days after the birth,

that the consent of a non-guardian birth father be required in most cases, and that certain procedural requirements be met before a consent is valid. It also recommends that the grounds for dispensing with consent undergo minor modifications and that the effect of a valid consent be clearly established.

Access to adoption information

- 144 A fundamental part of our proposals is an emphasis upon honesty and openness in adoption. To this end, we are proposing that adopted persons, birth parents and adoptive parents have unrestricted access to their adoption information. Access by other persons will be dependent upon their obtaining the permission of the adopted person or demonstrating to the Family Court that they have a genuine and proper interest in the information they are seeking. Existing vetoes on access to information will remain in force.
- 145 To accompany this emphasis upon openness, we also propose the availability of a new form of birth certificate for adopted persons, which would list birth parents, birth name, date and place of birth, adoptive parents, new name, and date and place of the adoption order. The same conditions will apply to access to this certificate as to access to adoption information.
- 146 These issues are fully discussed in chapter 16.

Incest and prohibited marriage

- 147 There is currently some confusion regarding how the laws of incest and prohibited marriage apply to an adopted person. Chapter 17 discusses a proposal that would set out special provisions relating to incest and prohibited marriage regarding adopted relatives.

Surrogacy

- 148 We envisage that the Care of Children Act is capable of encompassing regulation of surrogacy arrangements. We tentatively suggest in chapter 18 that this might occur through a mixture of regulation and by utilising adoption as the mechanism to formalise the child's proposed status. At this stage we do not consider that there has been sufficiently wide public consultation for these tentative proposals to be put forward as firm recommendations. The Commission has suggested to the Associate Minister of Justice that this topic be considered as a discrete reference.

PART FOUR – ENDURING GUARDIANSHIP

- 149 As discussed at paragraphs 122–125, we propose that for all purposes except succession and expiry of the order, enduring guardianship be dealt with in the same manner as guardianship. The legal consequences will be set out in this part of the Act.

GUARDIANSHIP, TEMPORARY GUARDIANSHIP AND TESTAMENTARY GUARDIANSHIP

- 150 The rules regarding natural guardians, additional guardians (who may become a guardian) and testamentary guardians will be transferred from the Guardianship Act 1968 to this part of the Care of Children Act. This encompasses the wardship jurisdiction of the High Court and Family Court and the Care and Protection jurisdiction under the CYP&F Act. Provisions regarding the appointment and termination of additional guardians²¹⁶ will also apply to enduring guardians.
- 151 There has been some criticism in recent years that the Guardianship Act 1968 is out of date. This criticism relates primarily to those aspects of the Guardianship Act that govern disputes between guardians, rather than the appointment and termination of guardians. The Minister of Justice has recently initiated a review of the Guardianship Act. The Commission has been informed by the Ministry of Justice that this review will focus on custody and access disputes between guardians, rather than on the status of guardianship itself. We therefore do not expect that our tentative proposals will have any impact upon the review.

THE SPECTRUM OF OPTIONS

- 152 Table 1 presents the spectrum of categories available under the proposed Care of Children Act.

²¹⁶ In the general sense, as opposed to guardians appointed for a specific and limited purpose.

TABLE 1: CATEGORIES OF CARE UNDER A CARE OF CHILDREN ACT

Adoption	Enduring guardianship	Guardianship	Temporary guardianship*
Full transfer of parental rights	Additional long-term “for life” guardianship	Guardianship until age of majority	Guardianship until further order†
Essentially status quo but with increased openness			
Intimation as to future arrangements. Could be used for surrogacy parenting plan	Recognition of place in family for older/teenage children	Current model	Current model
<i>Options for:</i> increased openness by means of info-sharing contact succession from both families if desired post-adoption mediation available	Valuable for use in step-parent situation or intra-family adoption Preserves existence of natural family connections		
	Default position regarding succession, but formal dispositions could not be challenged		

* CYP&F Act and Guardianship Act.

† As is often used to enable a child to be placed in foster care.

Part III
Adoption Reform

7

Background to reform

153 **WE** STATED in the discussion paper that:²¹⁷

It is perhaps ambitious to expect “social” legislation to have a life of more than 15–20 years in view of the way societal needs, expectations and values can change so rapidly from one generation to the next.

That the current adoption legislation has lasted as long as it has is not a testament to its success – rather, it is a reflection of the fact that adoption forces people to question basic social principles, and that obtaining agreement as to what those basic principles should be, is an extremely difficult task. We consider that the present review has reconciled a number of views²¹⁸ by emphasising that the interests of the child should be at the centre of the adoption process.

154 The last 45 years have seen the abolition of the status of illegitimacy, the introduction of State financial support for single parents, the growing acceptance of familial institutions other than the nuclear family,²¹⁹ and the increasing use of assisted reproductive technologies to assist infertile couples in their quest to have a child. Alongside these wider social changes, New Zealand society has led the world in practising, and succeeding at, open adoption arrangements.

155 What the Commission has learnt from its examination of the social changes that have occurred over the last 45 years is that legislation cannot, and should not, prescribe in fine detail what an adoption will be. For example, changing concepts of family within society

²¹⁷ Law Commission, above n 2, paragraph 3.

²¹⁸ Although we recognise that it will not be possible to reconcile all views.

²¹⁹ For example, de facto and single families now account for a significant proportion of families in New Zealand. The 1996 Census revealed that 62.75 per cent of families with children are headed by a married couple, 28.29 per cent are headed by a single parent, 8.17 per cent are headed by a de facto opposite-sex couple and 0.06 per cent are headed by a same-sex couple. See appendix J, Table 3.

have led us to recommend that the status of prospective adoptive parents (an eligibility issue)²²⁰ should be less important than their suitability to parent a particular child.

- 156 Certain legal effects will be inevitable, but the social reality of an adoption will vary from family to family. It is for this reason that we propose an increased emphasis upon preparation for adoption, and consultation between birth families and the adoptive families prior to adoption, with support services available to provide assistance while these families attempt to build new relationships.
- 157 Avoidance of over-prescription does, however, need to be balanced by legal safeguards, so that the interests of the child are paramount throughout the entire adoption process. It is for this reason that we recommend more protection for the child during the adoption placement process,²²¹ better procedural protection for birth parents when consenting to an adoption,²²² and removal of all impediments to access to adoption information by the adopted person, the birth parents and the adoptive parents, whilst maintaining privacy by limiting complete access to that information by the general public.²²³
- 158 During the course of this review we have received a number of submissions stating that reform of current adoption law must be accompanied by a review of past practices. Our terms of reference directed us not to consider past or current social worker practice. In devising our recommendations, however, we have been unable to avoid taking into account the experiences of those affected by adoption over the last 50 years, if only to ensure that our proposals resolve inadequacies in the legal framework that have allowed the occurrence of now discredited practices. While our review was not the right forum for a consideration of past adoption practices, the pending Select Committee review²²⁴ may allow those who feel aggrieved by the impact that adoption has had on their lives to express their grievances, in order to ensure that their experiences are taken into account when any reform is eventually enacted.

²²⁰ For example, their gender or marital status.

²²¹ See chapter 10 for a discussion of support services.

²²² See chapter 14 for a discussion of consent to adoption.

²²³ See chapter 16 for a discussion of access to adoption information.

²²⁴ The Government and Administration Select Committee has been charged with considering recommendations arising from this report and other issues relating to adoption, including past adoption practices, to the extent that they inform new law-making.

159 We hope that our proposed amendments to adoption law, by keeping at the centre of the process the best interests of the child, by recognising different types of families in modern society, and by recognising and providing for the beliefs and value systems of other cultures, will provide an approach to adoption law that will better serve the New Zealand public. We note, however, that the ultimate success of any adoption reform is dependent upon the maintenance and funding of a well trained specialist adoption unit within CYFS.

8

Guiding principles

INTERNATIONAL CONVENTIONS

- 160 **N**EW ZEALAND HAS RATIFIED a number of international conventions relating to children that have a bearing on this report. Ratification entails a commitment to implement the principles of a convention in domestic law.
- 161 UNCROC affirms that when making decisions regarding the adoption of a child, the rights of the child are paramount. States must ensure that the adoption is authorised by competent authorities and that every person who is consenting to an adoption has given informed consent, with the assistance of as much counselling as may be necessary.²²⁵
- 162 The UN Declaration on Child Placement²²⁶ states that the purpose of adoption is to provide a permanent family for a child whose birth parents cannot care for the child. It also lists the following principles which should apply to the permanent placement of children:
- The welfare of the child is the paramount consideration.
 - Where possible a child should be cared for within its extended family.
 - The child's need for knowledge of family background should be recognised, unless such knowledge is contrary to the child's best interests.

²²⁵ Article 21(a) UNCROC.

²²⁶ Above n 7. This declaration has less formal status than UNCROC. Declarations are not legally binding instruments; however, they do have moral force, particularly so where, as in the case of the Declaration on Child Placement, New Zealand participated in the drafting process.

Emphasis on extended family

- 163 UNCROC, the UN Declaration on Child Placement, and the CYP&F Act, all place considerable emphasis on maintaining the child within the birth family group, wherever possible. Only where this is not possible, should placement or care outside that family group be considered. We favour an approach that requires an investigation of the possibility of the child being cared for within the extended family group, before permanent placement elsewhere is considered, and recommend that this be reflected in the principles of the legislation.
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We recommend that the Care of Children Act state as a guiding principle that a placement within the extended family, where practicable, is preferable to a placement with strangers.

- 164 The Hague Convention on Intercountry Adoption establishes a series of safeguards to ensure that free and informed consent is sought from and given by natural parents and the child, that consent to an adoption is not induced by bribery, that the views of the child have been sought, that the adoptive parents have received such counselling as necessary and are suitable persons to adopt, and that the child's heritage will be preserved.
- 165 By entering into these Conventions, and participating in the drafting of the UN Declaration on Child Placement, New Zealand has signalled its stance to the global community. The principles enunciated in these international documents should be incorporated into all family law legislation.

THE PURPOSE OF ADOPTION

- 166 The 1955 Adoption Act does not define adoption, nor does it attempt to describe the circumstances where adoption should be used. As outlined earlier,²²⁷ adoption has been used at different times for many different purposes. The precise purpose and effect of "adoption" varies depending on the context, society and era in respect of which it is discussed. An early purpose of adoption was to create legal heirs; in more recent times adoption has been used to secure the permanent placement of a child in a family. There are regional and cultural variances in adoption law and practice. Common reasons for adoption include:

²²⁷ Above paragraphs 13–17.

- to ensure that care can be provided for a child whose parent(s) cannot or will not care for the child;
- to provide an infertile couple with a child;
- to ensure gender balance within a family;
- to cement family or tribal relationships; and
- to save children from lives of poverty in lesser developed nations.

167 Although some of these purposes may have been appropriate in a former time or in a particular cultural context, they might not necessarily be so relevant, appropriate or desirable in contemporary New Zealand.

168 We considered it desirable that a clause state the purpose of adoption. Forty-three out of the forty-five submitters who commented on this issue thought that new legislation should state the purpose of adoption. We endorse the description of adoption contained in the UN Declaration on Child Placement which describes the aim of adoption as to provide the child who cannot be cared for by his or her own parents with a permanent family. There are a myriad of reasons why people adopt or give up a child for adoption. However, we offer as a starting point the premise that the purpose of adoption should be focussed on children's needs rather than adult desires.

We recommend that the fundamental purpose of adoption should be to provide a child who cannot or will not be cared for by his or her own parents with a permanent family life.

The paramountcy principle

169 UNCROC, the UN Declaration on Child Placement, and section 6 of the CYP&F Act, all assert the principle that the welfare and interests of the child must be the paramount consideration. This formulation is also used in the Guardianship Act.

170 The discussion paper asked whether another expression should be used to make clear that other principles are also protected. We believe that is unnecessary – an Australian judge remarked a number of years ago that: ²²⁸

²²⁸ *Priest v Priest* [1966] ALR 40, 47 per Chief Justice Herring.

The fact that the interests of the child are to be the paramount consideration does not mean that his welfare is to be the only consideration. The very use of the word “paramount” shows that other considerations are not to be excluded. They are only subordinated.

The paramountcy principle has the advantage of being well established in case law and accords with our international obligations. We do not believe that a strong case can be made for a shift away from the paramountcy principle.

171 It would, however, be helpful for legislation to contain some guidelines regarding the factors that should be taken into account when assessing the welfare and interests of the child. Such guidelines would not be all-inclusive, but would provide a starting point for consideration of the welfare of the child. Many submitters commented that the phrase “the best interests of the child” was at best, ambiguous, and at worst, subject to the personal values of individual judges. Setting out a list of non-exhaustive factors to consider will make consideration of the best interests of the child more transparent.

172 The following factors should be included in a non-exhaustive list of factors that decision-makers should consider when assessing the welfare and interests of the child:²²⁹

- the child’s physical, emotional and educational needs, including the child’s sense of personal, family and cultural identity;
- the wishes expressed by the child;
- the importance to the child of having a secure place as a member of a family;
- the alternatives to the making of the adoption order and the likely effect on the child in both the short and longer term of changes in the child’s circumstances caused by an adoption, so that adoption is determined among all alternative forms of care to best meet the needs of the child;
- the quality of the child’s relationship with birth parents or other members of the child’s birth family and the effect of maintaining or severing that relationship;

²²⁹ These factors have been loosely modelled on UN Declaration of Child Placement Principles and the Children Act 1989 (UK). The discussion paper proposed these principles at paragraph 130 and asked for public comment. They have been amended slightly in response to such comment.

- the character and attitudes of the birth parents and whether they have failed to or are unable to discharge their parental responsibilities;
- any wishes expressed by the birth parents;
- the suitability and capacity of each proposed adoptive parent, or any other person, to provide for the needs of the child;
- the character and attitudes of the proposed adoptive parents to the child and the responsibilities of parenthood;
- the quality of the potential relationship of the child with each proposed adoptive parent; and
- the preservation of the cultural, linguistic and religious heritage of the child.

We recommend that the welfare and interests of the child be the paramount consideration when considering any issue under the Care of Children Act.

We recommend that the Care of Children Act provide a list of factors that should be considered when determining the best interests of the child in the context of an application for adoption.

PRINCIPLES GOVERNING THE ADOPTION OF CHILDREN

173 The New South Wales Adoption Bill 2000 sets out the principles that should be applied by persons making decisions about the adoption of a child. These provisions neatly articulate the philosophy underlying the proposals discussed in this report. Clause 8 provides:

- (1) In making a decision about the adoption of a child, a decision-maker is to have regard (as far as is practicable or appropriate) to the following principles:
 - (a) the best interests of the child, both in childhood and in later life, must be the paramount consideration,
 - (b) adoption is to be regarded as a service for the child, not for adults wishing to acquire the care of the child,
 - (c) no adult has the right to adopt a child,
 - (d) if the child is able to form his or her views on a matter concerning his or her adoption, he or she must be given an opportunity to express those views freely and those views are

- to be given due weight in accordance with the developmental capacity of the child and the circumstances,
- (e) the child's given name or names, identity, language and cultural and religious ties should, as far as possible, be identified and preserved.

Objects clause

174 The following formulation expresses the objects that in the Commission's view should underlie any new adoption legislation:

What are the objects of this Part?

The objects of this Part are as follows:

- (a) to make clear that adoption is to be regarded as a service for the child, and that the purpose of adoption is to provide a child, who cannot or will not be cared for by his or her own parents, with a permanent family life;
- (b) to emphasise that the best interests of the child, both in childhood and later life, must be the paramount consideration in adoption law and practice;
- (c) to ensure that adoption law and practice complies with New Zealand's obligations under treaties and other international agreements;
- (d) to ensure that equivalent safeguards and standards to those that apply to children from New Zealand apply to children adopted from overseas;
- (e) to recognise the changing nature of practices of adoption;
- (f) to ensure that adoption law and practice encourages openness in adoption;
- (g) to assist a child to know and have access to his or her cultural heritage;
- (h) to allow the adopted person and their birth and adoptive families access to information relating to adoptions; and
- (i) to provide for the giving in certain circumstances of post-adoption assistance to adopted children and their birth and adoptive parents.

We recommend that the Care of Children Act set out the purpose of adoption in an objects clause.

9

Cultural adoption practices

175 **T**HE TERMS OF REFERENCE require us to consider whether recognition might be given to “Māori customary adoption” and other culturally different adoption practices.²³⁰ In this chapter we have focussed mainly on Māori views of adoption. We do not disregard or devalue the concerns of other cultural groups, but have focussed on Māori views because of the unique status that Māori occupy as tangata whenua and as partners to the Treaty of Waitangi.²³¹

MĀORI CUSTOMARY ADOPTION

Whāngai or “customary adoption”

176 In the paragraphs below we describe how whāngai placements differ from adoption and provide a brief history of the way in which the New Zealand legal system has chosen to recognise, or refuse to recognise, the legal validity of such placements. Apart from the statutory provisions of Te Ture Whenua Māori Act 1993, Māori customary adoptions are no longer recognised in law.²³²

²³⁰ The terms of reference are set out in appendix D.

²³¹ Section 5(2) of the Law Commission Act 1985 requires the Commission to take into account te ao Māori (the Māori dimension) and to give consideration to the multicultural character of New Zealand society.

²³² See section 19 Adoption Act. Section 3 Te Ture Whenua Māori Act 1993 defines “whāngai” as “a person adopted in accordance with tikanga Māori”. Appendix G contains the 1895 Native Land Court guidelines for determining whether a person is a whāngai or not. The Māori Land Court may make a factual determination of whether a person is whāngai or not. In doing so, the judge will call for expert evidence from respected members of the iwi involved. For a recent example of a determination of whāngai status see *In re Tukua and Maketu C2B Block* (10 March 2000, 116 Otorohanga MB 81) Carter J.

177 Whāngai cannot be equated with adoption under the Adoption Act, as it does not carry the same incidents (features) or consequences as adoption.²³³ Dame Joan Metge’s studies indicate that the current use of the term whāngai generally makes no reference to the legal status of the child involved.²³⁴ If a Pākehā analogy needs to be sought, the concept of guardianship more closely equates to customary placements.²³⁵ Dame Joan Metge commented that Māori have a longstanding tradition of using adoption to translate the terms whāngai, atawhai and taurima. Any reference to “Māori customary adoption” in this report must be understood in the context of the above comments.

Whāngai – history

178 For centuries Māori have had a practice known as whāngai or atawhai,²³⁶ a recognised practice whereby a child is given to family members to raise.²³⁷ Although for the purposes of adoption law, whāngai placements are not legally recognised,²³⁸ an informal system of “customary adoption” which corresponds with the traditional concept of whāngai placements²³⁹ is still practised by Māori.²⁴⁰

179 The Ministry of Women’s Affairs described whāngai in the following way:²⁴¹

At the heart of Māori customary adoption or whāngai is the practice of allowing for the care of a child to be shared across a broad social group.

²³³ See D Durie-Hall and Dame J Metge “Kua Tutu Te Puehu, Kia Mau Māori Aspirations and Family Law” in M Henaghan and W Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Oxford, 1992) 54–82.

²³⁴ Metge, above n 27.

²³⁵ Department of Social Welfare *Review of Adoption Law: Adoption by Maori: A Consultation Paper* (Social Policy Agency, Department of Social Welfare, Wellington, 1993) 7, 10.

²³⁶ See HM Mead “Tamaiti Whāngai: The Adopted Child: Māori Customary Practices” (Paper delivered at the Adoption Conference, Victoria University of Wellington, 1990); F Acheson “Adoption Amongst the Maoris of New Zealand” (1922) 4 *Journal of Comparative Legislation and International Law* (3rd series) 60; Metge, above n 27, 228–257.

²³⁷ Submission, Ministry of Women’s Affairs, 3 March 2000.

²³⁸ Section 19 Adoption Act.

²³⁹ For a discussion of whāngai placements see Law Commission, above n 2, paragraphs 309–313.

²⁴⁰ Metge, above n 27, 252.

²⁴¹ Submission, Ministry of Women’s Affairs, 3 March 2000.

The effect of the variety of whāngai options was that a child had a more complete experience of its place in the world, at the same time as busy parents were assisted and cultural information was transmitted either by grandparents or some other whānau, hapū or iwi member.

The principles that underpin whāngai are:

- openness;
- placement within the family; and
- whakapapa²⁴² and whanaungatanga.²⁴³

There are no particular formalities for whāngai, but whāngai placements are a matter of public knowledge and are made with the express or tacit approval of the whānau or hapū.²⁴⁴

- 180 Māori customary adoption does not involve the secrecy that has surrounded Pākehā adoption practices. The child has two sets of parents and recognises his or her relationship to them both. The child is aware of its birth parents and other family members and usually maintains contact with them. Once the child is accepted in this way, the adopter and child will frequently regard each other as parent and child for all significant purposes, as will the other members of the whānau. Expressed in the words of one Māori woman, “an atawhai, though not born of my womb is born of my heart”.²⁴⁵ Whāngai placements are not necessarily permanent and it is not uncommon for such a child to later return to the birth parents.
- 181 Whāngai placements have been used for a variety of reasons²⁴⁶ and with a number of results. The tikanga²⁴⁷ relating to whāngai varies among iwi.²⁴⁸ Generally, whāngai placement was a means of strengthening relations within a hapū or iwi and had the advantage of ensuring that land rights were consolidated within the tribe,

²⁴² Genealogy.

²⁴³ The centrality of relationships to the Māori way of life.

²⁴⁴ See *Arani v Public Trustee* above n 32, 201.

²⁴⁵ As quoted in Metge above n 27, 213.

²⁴⁶ As with Pākehā adoption, infertility was often a reason why a child was offered as a whāngai to a relative.

²⁴⁷ Tikanga can incorporate law, custom, values, traditional behaviour, and philosophy.

²⁴⁸ Father Henare Tate gave us this advice when we met with the Ministry of Justice Māori Focus Group. For this reason we have not attempted here to articulate the tikanga.

rather than diluted. For this reason, whāngai placements were traditionally arranged between members of the same hapū or iwi, although relatives by marriage would sometimes be deemed acceptable candidates.

- 182 Adoption of children from outside the whānau, hapū and iwi was uncommon. A child who was adopted by a stranger was considered to be vulnerable and to have little protection.²⁴⁹ Whāngai placements contrast markedly with Western closed adoption practices whereby children have been usually adopted by strangers.

Legal recognition of whāngai placements

- 183 The legal system has afforded varying degrees of recognition to Māori customary placements. Initially, customary placements were made without State intervention or regulation. The Adoption of Children Act 1895 provided a regulatory scheme which gave all citizens the capacity to adopt children by court order. Māori could avail themselves of the statutory adoption procedure if they wished to do so, but it was not obligatory.²⁵⁰
- 184 The Native Land Claims Adjustment and Laws Amendment Act 1901 provided that claims to adoption could not be recognised unless the adoption was registered in the Native Land Court.²⁵¹ Between 1901 and 1904 customary placements became increasingly regulated, largely because of the potential for whāngai to dispute land entitlement.²⁵² If a person wanted to claim against an estate on the basis of whāngai, the customary placement had to be registered with the Native Land Court.²⁵³ Māori began registering customary placements as a means of clarifying rights to Māori land. When a person sought to register a customary adoption, the Native Land Court would inquire into the nature and circumstances of the placement and seek an opinion on the relevant Māori customary law from Māori assessors. Incrementally, the Native Appellate Land Court created guidelines (based on the Land Court assessors' version of Māori customary law) to help judges assess the validity of

²⁴⁹ Mead, above n 236, 7. See also Law Commission, above n 2, paragraph 49, which discusses the Māori Committee's view of adoption.

²⁵⁰ *Arani v Public Trustee* above n 32.

²⁵¹ Section 50 Native Land Claims Adjustment and Laws Amendment Act 1901.

²⁵² LG Anderson, above n 42, 6.

²⁵³ Section 50 Native Land Claims Adjustment and Law Amendment Act 1901.

customary placements and determine succession rights.²⁵⁴ To a certain extent, customary law principles informed the substance of the mainstream law relating to adoption.

- 185 Section 161 of the Native Land Act 1909 provided that no adoption in accordance with Native custom, even if it was made before the Act was passed, should have any force or effect, particularly as regards intestate succession to Māori land.²⁵⁵ An adoption would only have legal effect if it had been registered before 31 March 1910.²⁵⁶ This was the express intention of the legislature, as indicated by Sir John Salmond's notes on the Bill which was to become the Native Land Act 1909:²⁵⁷

[B]y this Bill, adoption by Native custom is abolished, and adoption by order of the Native Land Court is substituted. Any such order of adoption has the same effect as adoption by a European under the Infants Act 1908. The jurisdiction of Magistrates over Native adoptions is taken away, and the adoption of a European child by a Native is prohibited.

- 186 The Native Land Court retained jurisdiction over such adoptions. An adoption order made by the Native Land Court carried the same legal consequences as other adoption orders under the Infants Act 1908; the Māori child assumed the name of the adoptive parents and the law deemed that the legal ties to the birth parents ceased to exist.
- 187 In 1927 the legislative policy was reversed. Section 7 of the Native Land Amendment and Native Claims Adjustment Act 1927 reinstated customary adoptions made before 31 March 1902, if they were subsisting at the date of commencement of the Native Land Act 1909. This provision only applied "in the case of a Māori who dies or who has died subsequently to the commencement of the principal Act".
- 188 Section 202 of the Native Land Amendment Act 1931 reinstated the original section 161, providing that "no adoption in accordance

²⁵⁴ See appendix G.

²⁵⁵ Sections 161–164 Native Land Act 1909. It also provided that adoption in this form had the same effect as adoption under the Infants Act 1908, but "subject to the rules of Native custom as to intestate succession to Native land" (section 168).

²⁵⁶ Section 161(2) Native Land Act 1909; *Piripi v Dix* [1918] NZLR 691 (SC).

²⁵⁷ Law Commission "Law of Succession: Notes of Points Made at Law Commission Hui Held in December 1995 and May–June 1996" (Unpublished, Wellington, 1997) 11. ["Law of Succession"]

with Native custom, whether made before or after the commencement of this Act, shall be of any force or effect”.²⁵⁸ Clearly this provision was intended to have retrospective effect, as had its 1927 predecessor.

- 189 The proscription of customary placements continued in much the same form until 1955. An abridged version was then inserted in the Adoption Act 1955.²⁵⁹ That law is still in force.
- 190 In summary, the law recognised whāngai placements between 1899 and 1902. Whāngai placements were not recognised between 1902 and 1909, although such placements could be recorded as an adoption in the Native Land Court. Between 1909 and 1927, the law refused to recognise customary placements. Between 1927 and 1931, the law once again recognised whāngai and equated such practice with adoption. From 1 January 1932 onwards, a whāngai child was no longer treated as an adopted child in the eyes of the law. The present Adoption Act confirms that Māori customary adoptions made after the introduction of the Native Land Act 1909 have no legal effect beyond the recognition accorded to such placements by Te Ture Whenua Māori Act 1993.²⁶⁰

Court jurisdiction

- 191 Despite the legal changes, adoption practices in the Magistrates’ Court²⁶¹ and the Māori Land Court remained markedly different. Adoption hearings in the Māori Land Court took place in open court and the proceedings were published. Magistrates’ Court adoption proceedings were heard in closed chambers and the proceedings were not published. From 1962 all adoptions had to be processed by the Magistrates’ Court.

Succession

- 192 Māori customary law varies as to whether whāngai children may inherit from their “adoptive” family. Some iwi allow a whāngai child

²⁵⁸ Section 202 Native Land Amendment Act 1931.

²⁵⁹ Section 19 Adoption Act.

²⁶⁰ Section 19(1) Adoption Act. For a discussion of the effect of this legislation, see paragraphs 192–193 below.

²⁶¹ Now the District Court or the Family Court.

to inherit only if the child is a blood relative. Ngāi Tahu, for example, oppose such succession by adopted or whāngai children, whether Māori or not.²⁶²

- 193 Children who have been formally adopted can take the property just as if they were born to their adoptive parents. Whāngai children²⁶³ who are not formally adopted (in accordance with the Adoption Act) can only succeed under the will of the whāngai parent²⁶⁴ or by order of the court on the intestacy of the whāngai parent.²⁶⁵ The Māori Land Court is able to make provision for whāngai when distributing an estate under Te Ture Whenua Māori Act 1993.²⁶⁶ The Māori Land Court may determine whether a person is to be recognised for the purposes of the Act as having been whāngai of the deceased owner of land.²⁶⁷ In deciding whether a person is whāngai or not, the Court will hear evidence from expert advisers as to the tikanga of that particular hapū.²⁶⁸ Where the Court determines that a person is to be recognised as whāngai, it may then order that the whāngai is entitled to succeed to any beneficial interest in any Māori freehold land belonging to the estate, to the same extent as if the person was the child of the deceased owner.²⁶⁹ Alternatively, the Court may order that the whāngai is not entitled to succeed, or is entitled to succeed to a lesser extent than that person would otherwise be entitled to, on the death of that person's parents.²⁷⁰ These provisions have effect notwithstanding section 19 of the Adoption Act.²⁷¹

²⁶² “Law of Succession”, above n 257, 44.

²⁶³ It was originally assumed that Māori custom would not allow European children to succeed to Māori land. The Native Land Court interpreted tikanga to allow an adopted Pākehā child to succeed.

²⁶⁴ Section 108(2)(e) Te Ture Whenua Māori Act 1993.

²⁶⁵ Section 115 Te Ture Whenua Māori Act 1993.

²⁶⁶ Section 115 Te Ture Whenua Māori Act 1993.

²⁶⁷ Section 115(1) Te Ture Whenua Māori Act 1993.

²⁶⁸ See for example, *In re Tukua and Maketu C2B Block* (10 March 2000 116 Otorohanga MB 81) per Carter J.

²⁶⁹ Section 115(2)(a) Te Ture Whenua Māori Act 1993.

²⁷⁰ Section 115(2)(b) Te Ture Whenua Māori Act 1993.

²⁷¹ Section 115(3) Te Ture Whenua Māori Act 1993.

Māori concerns about legal adoption

194 Dame Joan Metge has stated that:²⁷²

The Adoption Act 1955 was designed less to meet the needs and wishes of New Zealand than to reinforce the official view of the family. It was part of the more general policy to force Māori and other minorities to assimilate to a single national pattern.

195 In December of 1995 and between May and June 1996 the Law Commission held a number of hui around New Zealand. Hui participants pointed out that many concepts that underpin the Adoption Act are alien and constitute an affront to Māori culture.²⁷³ There was general concern about the uncertain status of whāngai²⁷⁴ and the way in which adoption impacts on Māori family structures.

196 The effect of section 16 of the Adoption Act was considered excessive by many Māori attending the hui.²⁷⁵ Adopted children are treated as the children of the adopters for all legal purposes and cease to be the children of the birth parents once the adoption order is made.²⁷⁶ In this way, the Adoption Act was seen by some to be an imposition on customary law rules relating to lines of descent.²⁷⁷ In spite of these criticisms, some participants at the hui argued that no law can break the links of blood in Māori tradition, so although the Adoption Act alters familial relationships in law, it does not necessarily do so in fact, as Māori children adopted within Māori families know their family connections and relationships.²⁷⁸ Furthermore, some saw adoption as a better means of ensuring that a child is provided for upon the parents' death.²⁷⁹

²⁷² Submission, Dame Joan Metge, 28 January 2000.

²⁷³ Law Commission "Draft Preliminary Paper on Māori Succession Laws" (Unpublished, Wellington, 1997) ["Draft Preliminary Paper on Māori Succession Laws"].

²⁷⁴ "Law of Succession", above n 257, 39–44.

²⁷⁵ See also the discussion of this point in Law Commission *Justice: The Experiences of Māori Women Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei*: NZLC R53 (Wellington, 1999) 23–24.

²⁷⁶ "Draft Preliminary Paper on Māori Succession Law", above n 273, 144. See also "Law of Succession", above n 257, 43.

²⁷⁷ "Law of Succession", above n 257, 42.

²⁷⁸ Above n 273, 144.

²⁷⁹ Above n 273, 144.

- 197 Many of the participants were highly critical of the secrecy surrounding Pākehā adoption practices.²⁸⁰ The risk that the child will lose a sense of identity was a matter of great concern.²⁸¹
- 198 The Adoption Act was also criticised for being inconsistent with customary law because of the lack of provision for whānau consultation during the adoption process.²⁸²

The impact of secrecy upon whakapapa

- 199 Unlike Pākehā adoption, secrecy was never a feature of Māori customary placements. Although the Adoption Act did not mandate secrecy, procedures implemented pursuant to the legislation had this effect.²⁸³ Furthermore, the transfer of jurisdiction over Māori adoptions from the Māori Land Court to the Magistrates' Court was viewed by some Māori as representing a change in policy regarding adoption by extended family members. It had the effect of imposing Pākehā values upon Māori. From a Māori viewpoint this had a negative effect in a variety of ways.
- 200 An issue of prime importance in the adoption debate is the negative impact of the law upon whakapapa.²⁸⁴ One submitter described whakapapa as:²⁸⁵

identity, sense of belonging, history, taonga, knowing who you are and where you come from and your tipuna before you. Your place in the world.

The submitter went on to say that:

Whakapapa is critical to developing one's cultural identity, health and well being, and connection with one's whenua, whanau and tupuna. I

²⁸⁰ "Law of Succession", above n 257, 42

²⁸¹ "Law of Succession", above n 257, 42–43.

²⁸² "Draft Preliminary Paper on Māori Succession Law", above n 273, 145.

²⁸³ Regulation 9 and Form 3 of the Adoption Regulations 1959 allow the birth mother to consent to adoption by unnamed applicants, and sections 23, 24 and 63 of the Births, Deaths, and Marriages Registration Act 1995 restrict access to the original birth certificate until the adopted person is eligible to use the procedures set out in the Adult Adoption Information Act 1985. Such procedures, however, did not exist prior to 1985, and access to the original birth certificate by adopted persons was denied.

²⁸⁴ Whakapapa is about knowing where you come from, both your tūrangawaewae and your connections with forebears.

²⁸⁵ Submission 1/56.

have heard it said that people who do not know their whakapapa are like pieces of driftwood lost at sea. . . . It is about a connection with the land, your extended family and ancestors.

- 201 A Māori submitter adopted by a Pākehā family described her nascent realisation of the importance of whakapapa and tūrangawaewae after meeting her birth father:²⁸⁶

Meeting my father led me to learning of my Maori heritage and our tribal land. This is where my “pull” and my ancestors were. It all felt familiar . . . I was part of my father’s land and many spiritual experiences followed. My connection to the land has only become stronger over the years. This link to the land was a significant part of me that was missing for so long.

. . . I have settled down a lot in my life and have been able to integrate who I am inside and the way I look. The search was very important despite all the hard work and the pain. I would do it all again because you cannot live without the knowledge of where you belong ie Maori heritage/land.

. . . There is a mystical connection to the land, culture and heritage among Maoridom. This is deeply embedded within Maori descendants whether we are aware of it or not My connection to my tribal land is very strong and I feel that it’s my duty to preserve the magnificence of it all for my wairua to be at peace.

The Ministry of Women’s Affairs has commented that whakapapa is a fundamental value in Māori society and it is vital that whakapapa be preserved.²⁸⁷

Whānau

- 202 Māori regard children as an integral part of the whānau, rather than as individuals divisible from the whānau.²⁸⁸ When the child is adopted outside of the whānau, the child may lose cultural identity and a sense of connection with forebears and relatives.²⁸⁹ This concern is magnified when a child is adopted by non-Māori. Several Māori submitters wrote about the effect of being adopted by a Pākehā family. One stated:²⁹⁰

²⁸⁶ Submission 2/60.

²⁸⁷ The Ministry reported concern on the part of many Māori women that a lack of identity and whānau support contributes to youth suicide rates.

²⁸⁸ *In re T* (1998) 16 FRNZ 599.

²⁸⁹ Mead, above n 236, 13.

²⁹⁰ Submission 1/56.

Recognition has been difficult to achieve in both Maori and Anglo-Saxon cultures because I do not have the typical physical appearance of either. I believed I was never white enough within Anglo-Saxon communities and amongst Maori communities they would see me with my white family therefore they would perceive me as being white. I got stuck in the cracks between the cultures. . . .

It is terrifying being brought up in one culture, when you really belong in another. You never seem to fit anywhere, never feel like you truly belong.

For some Māori adoptees, reunion with the family of origin has served to highlight the impact of cross-cultural adoption:²⁹¹

Several adoptees I know have gone back to their turangawaewae and felt ignored, out of place or too whakama to participate. Some of us who have been cross culturally adopted don't know the reo, tikanga or kawa we need to participate in our culture and marae.

Loss of entitlement

- 203 Certainty as to one's identity is crucial to facilitating access to a range of opportunities and entitlements. Māori who are not aware that they are Māori cannot exercise the right to enrol on the Māori electoral roll. Similarly, young persons who have no knowledge of their whakapapa find it difficult to access scholarships available for descendants of a particular iwi. Entitlement to Māori land and other resources is dependent on the ability to establish whakapapa links or a whāngai placement. The secrecy surrounding adoption and the restrictions on access to information makes it difficult for a Māori person to trace whakapapa and access entitlements.

Lack of whānau consultation

- 204 Pākehā society is often criticised by Māori for valuing individual rights above communal rights. Many Māori are critical of the lack of consultation and whānau participation in the adoption process. The process does not facilitate wider family consultation or involvement, either in relation to the decision to have a child adopted or in relation to the placement of that child. Traditionally, parents alone did not have the right to decide whether and with whom a child should be placed; rather whānau, hapū and iwi played a role in the decision-making.²⁹²

²⁹¹ Submission 1/56.

²⁹² Durie-Hall and Metge, above n 233, at 69.

Reconciling values

- 205 Two claims before the Waitangi Tribunal argue that the Adoption Act and Guardianship Act constitute a breach of the Crown's obligations to Māori in terms of Article 2 of the Treaty of Waitangi.²⁹³ The claims state that the Treaty guarantees Māori full and exclusive control over their taonga (which is interpreted as including children). They claim that the paramountcy principle in family legislation is Eurocentric, and fails to take into account the Māori child's place in the whānau and does not recognise that issues relating to the care of Māori children should be resolved at a whānau level. This is not a view held by all Māori and may not reflect the reality of many urban Māori. Dame Joan Metge points out that many urban Māori are alienated from their cultural heritage and may be more comfortable with Pākehā views and practices.
- 206 In addressing the weight to be accorded to various claims to rights, Professor Hirini Moko Mead has indicated that Māori values and children's rights can be harmonised:²⁹⁴

Finally, the bottom line position is that the person, the child is the most important taonga to be considered. The question is asked – *He aha te mea nui? Maku e ki atu, he tangata, he tangata, he tangata*. What is the most important thing? I answer it is the child, the child, the person.

This philosophy was echoed by the Ministry of Women's Affairs which commented that although there should be wider whānau consultation than takes place at present, this should only occur with the consent of the birth mother.²⁹⁵ Dame Joan Metge agreed that:²⁹⁶

While on the one hand the Maori value system accords the whanau and relatives other than parents rights and interests in a child which the existing adoption law does not, it also stresses the concomitant responsibilities and the status of children as taonga, valued for both their own sakes and as the hope of continuance for the descent group and its culture. Using the shared valuation of children as a starting point, it should be possible to negotiate reconciliation of areas of conflict and devise strategies to safeguard the rights and interests of children within a model which stresses flexibility, respect for cultural preferences, and the provision of options.

We wholeheartedly endorse these sentiments.

²⁹³ Wai 160, Wai 286.

²⁹⁴ Mead, above n 236, 228–257.

²⁹⁵ Submission, Ministry of Women's Affairs, 4.

²⁹⁶ Submission, Metge.

LEGAL RECOGNITION OF MĀORI CUSTOMARY ADOPTION

Other jurisdictions

- 207 Other jurisdictions provide a separate process or additional requirements for adoptions of children from indigenous groups.²⁹⁷ Most stop short of granting tribes complete jurisdiction over children.²⁹⁸ A number of States require that when an aboriginal child is placed for adoption there must be consultation with that child's tribe or band in order to determine the most appropriate placement.²⁹⁹ Others apply a child placement principle: placement within the tribe or band is the first option to be considered, placement within the same culture is the next alternative, and placement with persons of another culture is a last resort.³⁰⁰
- 208 Māori customary adoption has been expressly extinguished³⁰¹ and no longer forms part of the legal system. As noted above, however, Māori have continued to use whāngai placement as a means of caring for children. In the discussion paper we asked the following questions:
- Should revival of legal recognition of Māori customary adoption be considered? If so, what would the legal effect of customary adoption be?
 - Should customary adoption be defined in accordance with former customary rules, or has it evolved since then?
 - Who would act as an arbiter to determine the existence of a customary adoption?
 - Who would determine, and by what criteria, whether a child should be dealt with according to customary law or the general law of the State?
 - How would jurisdictional debates be resolved where the parents of the child were from different cultural groups?

²⁹⁷ See appendix H for a discussion of procedures in other jurisdictions.

²⁹⁸ The United States grants limited jurisdiction over Native American children to Native American tribal authorities. See appendix H.

²⁹⁹ United States, Nova Scotia, Alberta.

³⁰⁰ British Columbia, Victoria, South Australia, Northern Territory.

³⁰¹ See discussion of the Native Land Act 1909 and the Native Land Amendment Act 1931, above at paragraphs 183–190.

- Which bodies would have overall responsibility for administering customary adoptions or resolving disputes?

209 We observed that if a parallel system of adoption for Māori were created, there would need to be a determination of the legal consequences of recognition of that status – there must be legal certainty. The Ministry of Women’s Affairs expressed doubt as to whether it would be necessary to incorporate whāngai into legislation at all. The Ministry referred to a hui concerning whāngai that was held with Māori women in 1994, where:³⁰²

the predominant view was that whāngai is a customary Māori practice and, as such, was not suitable for regulation by statute. Māori women consulted with considered that changes in whāngai should happen as a result of cultural forces, rather than legislative ones.

However, the Ministry went on to suggest that the principles of the Act could expressly preserve the practice of whāngai and acknowledge it as an option for child care placement. We consider, however, that this would inevitably invite questions as to the definition of customary adoption. On the whole, we consider the better approach would be to repeal sections 18 and 19 and leave Māori to practise whāngai as Māori always have done.³⁰³

210 It is questionable whether there is any cogent impetus for specific legal recognition of whāngai status. Some submitters expressed concern about any attempt to codify and freeze the meaning of whāngai. They argued this would potentially distort whāngai and limit the ability of customary practices to evolve. Dame Joan Metge expressed reservations about the feasibility or desirability of reviving legal recognition for Māori customary adoption as a legal entity. She pointed out the difficulty of distilling a pan-Māori view of what whāngai was and is, but went on to say that if Māori did want to develop a parallel system of adoption she would support this.

211 At present there appears to be limited support for specific legal recognition of whāngai. In light of this, we favour a more general approach which specifically incorporates Māori values in legislation to be applied according to the tikanga supporting each circumstance.³⁰⁴ We set out these recommendations below at paragraphs 217–228. They should not, however, be taken as the final

³⁰² Submission, Ministry of Women’s Affairs, 3.

³⁰³ See above at paragraphs 178–182.

³⁰⁴ See the comments in the discussion of guiding principles at chapter 8.

word on Māori customary adoption. Should Māori desire to create a separate system for Māori customary adoption, such system should be given careful consideration.

OTHER CULTURAL ADOPTION PRACTICES

- 212 We received some submissions outlining other cultural adoption practices (most notably Tongan and other Pacific Island practices). Generally speaking, the nature of such arrangements bore great resemblance to whāngai placements practised by Māori. One submitter described Tongan adoption practices in the following way:³⁰⁵

Traditionally, children are adopted within the extended family and open adoption is practised. Adoption within the family acknowledges the role of the extended family in the life of the child. The identity of the child is linked to its extended family. Although there is a break in the relationship between the child and the natural parents, there is no complete severance of those ties as the child is still with its family. There is less distortion of family relationships (for example, when a child is adopted by a grandparent) because the family relationships are still maintained. The child adopted by a grandparent can be considered a “child” and “grandchild” of the grandparents at the same time.

Children are normally adopted when they are babies, but older children may be adopted, depending on the circumstances, such as the death of a parent or the break-up of a marriage. Normally, the child is a younger child of the family.

The adoptive parents have the main responsibility for the care of the child. In general, the child is primarily considered as being part of the adoptive family. However, the child is still considered part of his/her natural family.

The child may still actively interact with his/her natural family. For example, it is not uncommon for a child to stay with the natural parents during most of the year when attending school in another island while the adoptive parents remain in their home.

- 213 Such practices share many features with Māori whāngai placements and the concerns expressed were similar.

³⁰⁵ Submission 2/45.

AN ADOPTION REGIME RESPONSIVE TO CULTURAL VALUES

- 214 Much of the criticism levelled by Māori and other cultural groups at the Adoption Act relates to lack of input into decision-making and the restrictions placed upon access to information. Our consultation process has shown us that Māori values have gained widespread support and are regarded as providing the basis upon which to move forward. The principles that we discuss in this report, such as openness and honesty, access to information about one’s self and one’s origins, family placement or placement within the same cultural group before adoption elsewhere is considered may relieve some of the concerns that Māori have expressed in relation to the monocultural nature of the present Adoption Act.
- 215 General provisions have the advantage that they can respond to a range of cultural adoption practices and tikanga, rather than attempting to prescribe a particular approach to adoptions for each culture. As Dame Joan Metge submitted:
- I endorse the proposition that it is better to develop general provisions which accommodate a range of cultural adoption practices rather than attempting to prescribe a particular approach for each culture.
- 216 Any system must be flexible enough to accommodate and respect cultural differences. The new statute should specifically recognise the existence of other kinship structures – family groups, whānau, hapū, and iwi and should not attempt to prescribe homogeneity in family structures.

Redefining the “best interests” principle

- 217 Overseas legislation illustrates various ways to accommodate customary adoption practices. Some achieve this by stating that a consideration of the “best interests” of the child involves, where practicable, placing children within their extended family or at least with members of their own cultural and/or ethnic group.³⁰⁶ We endorse this approach.

³⁰⁶ See appendix G.

We recommend that where practicable³⁰⁷ a child should be placed within a family of the same culture as the child.³⁰⁸ If that is not possible, the court should be satisfied that the prospective adopter(s) will help foster the child's cultural, social, economic and linguistic heritage, and facilitate contact with that child's family.³⁰⁹

Counselling and family group conferencing

- 218 We recommend below at chapter 10 that counselling should be provided throughout the adoption process. We also encourage the use of family group meetings to help families find solutions that best meet the needs of the child and the family's needs. This consultative process might help resolve some of the issues Māori have raised about lack of consultation during the adoption decision-making process.³¹⁰
- 219 We do not, however, favour making family group meetings compulsory. In 1990, the Adoption Practices Review Committee reported concerns expressed by a hospital social worker that some Pacific Island women are unprotected and are at risk of being coerced by family members to give up their child.³¹¹ The Committee commented:³¹²

We were told that birth mothers sometimes need protection from their families if violence is part of the family interaction.

The Committee further reported that a Pacific Island social worker consulted as part of the review did not think that the procedures of the CYP&F Act should apply; that for a number of reasons Pacific Island women should make their own decisions about the baby's future, preferably after discussion with a Pacific Island social worker.

³⁰⁷ This guideline needs to be given a common sense interpretation. A child should not languish in care because there are no suitable adopters available from that child's cultural group. As with all other provisions in the proposed legislation, this provision would be exercised in accordance with the overriding principle that the welfare and interests of the child are paramount.

³⁰⁸ And in a Māori context preferably with a whānau member or member of the same hapū or iwi.

³⁰⁹ This was supported by the Ministry of Women's Affairs in their submission, 2.

³¹⁰ See paragraphs 204, 242–243 of this report.

³¹¹ Adoption Practices Review Committee Report to the Minister of Social Welfare (August 1990, Wellington) 17.

³¹² Above n 311, 17.

- 220 Many submitters were opposed to mandatory conferencing. The Ministry of Women's Affairs felt that if whānau consultation were legislatively mandated, it should only be with the consent of the birth mother. The Office of the Race Relations Conciliator voiced similar concerns and felt that family group meetings should be optional rather than mandatory.³¹³
- 221 Sensitivity to cultural differences is essential. We recognise that in some cases a family group conference might be inappropriate. We would encourage birth parents to involve wider family members in decision-making, but recognise that this may not always be desired or desirable.

Māori social workers

- 222 The Adoption Act requires that a Māori social worker (or a person nominated by the Māori community) deal with applications by a Māori person or couple to adopt a Māori child.³¹⁴ It does not, however, apply in cases where Pākehā parents seek to adopt a Māori child. It would be desirable to involve such persons in *all* cases involving a Māori child, and we suggest that this provision should be strengthened to apply in all cases where a Māori child is being considered for adoption.³¹⁵
- 223 However, the Māori community is not uniform and Dame Joan Metge has pointed out that problems can arise where social workers and clients come from different iwi because there can be differences in tribal tikanga and histories of conflict. Where possible, the Māori social worker should have iwi affiliations in common with the child.

We recommend that a Māori social worker provide the social worker's report in applications to adopt a Māori child.

We recommend that, where practicable, the Māori social worker have iwi affiliations with the child.

³¹³ Submission, Office of the Race Relations Conciliator, 29 February 2000.

³¹⁴ Section 2 Adoption Act.

³¹⁵ This may not be so important when the child is being adopted by a member of its own cultural group, hapū, iwi. See paragraph 452 for a discussion of the court's general ability to call for reports.

Cultural reports

- 224 The Commission is of the view that there is scope for Māori agencies³¹⁶ and other cultural agencies to play a greater role in adoption preparation and counselling services. Such agencies could also advise the AISU and the Family Court on the suitability of placements by providing cultural reports.
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When considering cross-cultural adoption applications, the court should call for a report on cultural matters to ascertain the suitability of the placement and how the prospective adopters intend to foster the child's cultural heritage.

Parenting plans

- 225 Earlier in this report we recommended that an adoption plan be attached to the adoption order to encourage contact between the child and the child's birth family. This concept was supported by a large number of submitters. Continuing contact between the child, the child's family of origin, and the new parents, helps the child to retain its whakapapa (genealogical history) and ensures that the child is aware of its cultural heritage.³¹⁷ We have renamed this concept a "parenting plan".
- 226 A parenting plan is also a good way of encouraging parties to discuss and document the way in which they intend to foster the child's links with his or her language and culture of origin. This is particularly important in the case of cross-cultural adoptions.

Access to information

- 227 In chapter 16 of this report we recommend unrestricted access to information by those in the adoption triangle.³¹⁸ This should alleviate the concerns of Māori and other cultural groups regarding access to whakapapa/genealogical information.

Iwi databases

- 228 In the discussion paper we suggested that iwi authorities could maintain a register of adoptions of Māori children of their iwi. The

³¹⁶ Especially iwi social services.

³¹⁷ See paragraphs 103, 107, 111, 162, and 172–173.

³¹⁸ Adopted person, birth parents and adoptive parents. For the details of this recommendation, see chapter 16.

database could include such information as the iwi thinks necessary to enable the child to establish its whakapapa and tūrangawaewae.³¹⁹ Iwi specific guidelines would determine the basis upon which a person would have access to the information contained in the database.³²⁰ This suggestion received favourable comment³²¹ and we encourage hapū and iwi to build on existing databases to provide a link for those Māori who feel that they have been lost to adoption.

We recommend that the guiding principles of the Care of Children Act require decision-makers to take into account the cultural heritage of the child in such a way as to ensure that the child has full access to his or her cultural, social and economic heritage.

³¹⁹ One submitter commented that the secrecy inherent in the current regime slows down the process of one's journey to find out "Ko wai ahau?" and favoured open access to information and iwi databases.

³²⁰ Kua Marshall, Ngāi Tahu Māori Trust Board, submission to Manager Social Services Policy, Department of Social Welfare, 30 September 1993.

³²¹ Submission 2/53, submission 1/56.

10

Support services

INFORMED DECISION-MAKING

229 **W**E SUGGESTED in the discussion paper that a key element in a successful adoption was adequate preparation and counselling of birth parents and adoptive parents. Without such preparation and counselling, there can be no basis for informed decision-making. This suggestion has been overwhelmingly confirmed by submissions.³²²

Mandatory pre-adoptive counselling for birth parents

230 The decision to give up a child for adoption has lifelong implications for the parents as well as the child.³²³ In order that the negative consequences of the decision to adopt be minimised,³²⁴ it is important that new legislation places an emphasis upon informed decision-making. Current adoption legislation allows a parent to give up a child for adoption having only had a perfunctory explanation about the effects of an adoption order, given at the time of the signing of consent.³²⁵ This may be the only contact the parent has had with professionals regarding the adoption.

³²² Forty-two submitters supported mandatory counselling, twenty-nine submitters favoured optional counselling but argued counselling should be available, and one submitter objected to the provision of any counselling.

³²³ Law Commission, above n 2, paragraph 79.

³²⁴ It is likely that most birth mothers will experience some negative consequences as a result of their decision – it is well documented that even in happy open adoption arrangements, a birth mother is likely to experience a period of grief for the loss of her child.

³²⁵ Contrast this with section 3 of the Adult Adoption Information Act which requires that birth parents and adopted persons be informed about the availability of counselling when they make a request for adoption information. A request under the Act will only proceed if the applicant either attends counselling or informs the Registrar-General of Births, Deaths, and Marriages that he or she does not want counselling.

- 231 The legislation does not require a parent to undergo counselling or be informed of community or government support that might be available to help the parent care for the child, so as to learn of other options available for the care of the child or the social and legal implications of an adoption. All these factors play an important role in shaping the parent's decision.
- 232 Many grievances relating to the adoption practices of the 1950s, 1960s and 1970s stem from the birth parents' lasting impression that alternatives were never put to them; that the choice to adopt out their child was not really a "choice" but the only option presented to them.³²⁶ Although adoption practices have changed considerably since that era, there is currently no legislative recognition of the importance of counselling in relation to making decisions regarding the care or adoption of one's child.
- 233 The Adoption Act requires prescribed information about the effect of an adoption order to be given to a birth parent at the time a consent is signed.³²⁷ This information is not expressed in plain English and is often presented to the parent in a highly emotionally charged environment. Anderson and Potter JJ recently observed:³²⁸
- The decisions a mother is called upon to make in an adopting situation are critical for her future and for the whole of the life of her child. She must be placed in a position rationally to exercise freedom of choice, and in most cases she may be able to do that only with the benefit of objective counselling and clear advice on the concepts and issues involved.
- 234 There is a perception that counselling is simply a means of dissuading women from deciding to place their child for adoption. Counselling is not designed to achieve a particular outcome. The goal is for the participants to reach the decision that is right for them.
- 235 Submissions demonstrated overwhelming support for pre-adoption counselling and information sessions, the majority suggesting that they should be mandatory. It is our view that counselling must be mandatory. If counselling has not occurred, the solicitor should not proceed with obtaining the birth parent's consent to the adoption. To facilitate this, a counsellor would certify that counselling has occurred and the required information been given. A consent

³²⁶ Else, above n 35, 37–47.

³²⁷ Section 7(9) Adoption Act.

³²⁸ *H and R v C* [1999] NZFLR 721, 731.

cannot be taken from the birth parents until that certificate has been received by the solicitor.

We recommend that there should be mandatory pre-adoptive counselling for parents contemplating giving a child up for adoption. An adoption consent taken without counselling first being provided should be invalid.

- 236 AISU suggest that as many as two-thirds of women that approach their service contemplating giving a child up for adoption change their minds after the birth of their child.³²⁹ This suggests that decisions made prior to birth should be revisited in counselling after the birth.
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We recommend that there be a distinction between counselling given before and after the birth of the child, and that at least one counselling session be given to the birth parents after the birth of the child.

- 237 The discussion paper sought advice regarding the information that should be provided about the effects of adoption. Thirty-six submitters favoured the idea of a standard form explanation of the effects of adoption (social and legal), expressed in plain English. They observed that this should be available in a number of languages, should be given some time prior to the taking of consent, and should be set out in regulations rather than legislation, to enable changes where necessary. One submitter commented that this should also be provided in child-appropriate language, for the benefit of children that are to be adopted or that have been adopted.
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We recommend that regulations set out an explanation of the legal and social effect of adoption expressed in plain English and translated into several languages.

We recommend that a children's version of this explanation be created and issued to the child (or the adoptive parents where the child is an infant) for future use by the child.

³²⁹ Mary Iwanek, National Manager, AISU, at Adoption Symposium with Family Court judges, 17–18 February 2000.

Mandatory pre-adoptive counselling for prospective adoptive parents

238 It is an offence to place or receive a child in a home for the purpose of adoption without the prior approval of a social worker or an interim adoption order. For this reason, the majority of “stranger” adoption placements are made through the Adoption Information Services Unit of the Department of Child, Youth and Family. Prospective adoptive parents undertake a programme which covers topics relating to adoption, such as:

- the role of the social worker;
- the service’s adoption processes;
- the adoption pool and profiles;
- the legal process;
- adoptions today – open adoption;
- the current adoption situation nationally and internationally;
- cross-cultural placements;
- guardianship/custody in relation to family/whānau placements and step-parent adoptions;
- myths about adoption;
- hearing from birth parents, adopted persons and adoptive families;
- issues arising from infertility;
- open adoption;
- how adoptive parenthood differs from raising your own child; and
- the impact of adoption on children.

After completing the education programme and screening process, those who are approved as prospective adoptive parents prepare a “family profile” and are placed on the waiting list.

239 A number of prospective adoptive parents, however, choose to make private adoption arrangements. As a result they might not receive such counselling and education. This stems in part from inadequate enforcement of the laws relating to private adoption placements without social worker approval. Although it is an offence to receive a child for the purpose of adoption without social worker approval, the commission of such an offence does not preclude the making of an adoption order. In most cases, the child will have begun to bond

with the adoptive parents and the court is placed in the invidious position of having to endorse a *fait accompli*.³³⁰ To date, there has never been a prosecution for this offence. By breaking the law, some adoptive parents avoid the counselling, education and initial screening requirements of AISU.

- 240 This situation is facilitated by the provision in the Adoption Act that allows prospective adoptive parents to apply directly to the court for an interim adoption order, without social worker approval of the proposed placement (although until this order is made they are not legally permitted to have custody of the child).³³¹
- 241 There are important reasons for requiring prospective adoptive parents to undergo counselling and education sessions prior to an adoption placement. It can help them better focus on the difference between parenting an adopted child and one's biological child and can help to dispel some of the myths about adoption, which may help them to cope with these issues and better parent the adopted child. It also gives them the opportunity to speak with a professional, independent and non-judgmental person about their concerns or fears regarding adoption. Some people realise after attending such sessions that adoption is "not for them". A number of submitters observed how important this preparation process is.³³²

In the adoption process adoptive parents are sometimes seen as self-serving and needy – at times we felt the lowest of the low but if you want to adopt it is important that you confront all the issues that adoption raises. Parenting an adopted child is *not* the same as parenting a biological child – it comes with additional responsibilities that you need to be prepared for.

Another submitter commented:³³³

Adoption is not the same as having a biological child, and it would benefit adoptive parents to receive counselling to come to terms with the difference between raising an adopted child and a biological child.

Compulsory counselling and education for all prospective adoptive parents prior to an adoption will increase the chances of a successful adoption.

³³⁰ In *Re P* [1990] NZFLR 385 (FC) a final adoption order was not sought until three years after the child had been placed with the adopting parents. By this time bonding was well established.

³³¹ Section 6(1)(b) Adoption Act.

³³² Submission 1/52.

³³³ Submission 2/51.

We recommend that it be mandatory for prospective adoptive parents to receive counselling and education about adoption before receiving a child for adoption.

We recommend that before witnessing a consent to an adoption application the lawyer must certify having received a certificate from counsellors³³⁴ that the birth parents and prospective adoptive parents have received adoption counselling.

FAMILY OR WHĀNAU MEETINGS AND MEDIATION SERVICES

- 242 A key component of the CYP&F Act is the emphasis upon family and whānau consultation about the future of a child in need of care and protection.³³⁵ International conventions state that the best place for children is within their own extended family.³³⁶ To this end, it is necessary to create a forum in which decisions relating to the permanent placement of a child can be discussed amongst extended family members if this is considered appropriate by the social worker, after consultation with birth parents.
- 243 The discussion paper asked whether a procedure akin to a Family Group Conference of members of the birth parents' families should be available during the adoption process. While there was a significant amount of support for this proposal,³³⁷ it was clear that a number of submitters confused our proposal (a forum to facilitate discussion and decision-making, but with final decisions remaining in the hands of birth parents unless their consent is dispensed with) with Family Group Conferences as they operate under the CYP&F Act (where the conference has decision-making powers).³³⁸ For this reason we recommend maintaining the concept reflected in our original proposal, but renaming it as "family or whānau meeting". The family or whānau meeting would be entirely optional and should not be convened where the birth mother opposes such meeting.

³³⁴ See paragraphs 254–257 below for a discussion of accreditation for counsellors.

³³⁵ Section 5 CYP&F Act.

³³⁶ Article 3, UN Declaration on Child Placement. See also Article 7(1) UNCROC.

³³⁷ Thirty-nine submitters expressed support for this proposal while six opposed it.

³³⁸ Section 20 CYP&F Act.

We recommend that a “family or whānau meeting” be available to discuss issues relating to adoption.

ACCESS TO POST-ADOPTION COUNSELLING

- 244 The Adoption Act does little more than provide a process for transferring the legal rights to and responsibility for a child from one family to another. As a result, many people feel that as soon as the adoption order is made, they are cast adrift to manage as best they can.
- 245 There was general criticism of the lack of State-funded post-adoption services, especially for those who feel that they have been harmed by past adoption practices. Birth mothers in particular have special needs that may require counselling after the adoption has proceeded. For example, it is now well established that adoption can have long-term emotional and psychological implications for women who give a child up for adoption. During the period when closed adoption was practised, birth mothers experienced depression, addiction, grief, relationship difficulties and subsequent parenting problems that they believed could be linked back to their experience of adoption.³³⁹ A recent New Zealand study indicates that birth mothers who relinquished children during this era are more likely to be clients of mental health, relationship, and addiction services.³⁴⁰
- 246 Many organisations and individuals commented that it is better to spend money at the front-end of the process by providing specialised counselling and encouraging people to deal with the consequences of their decisions, than for the State pick up an increased cost at a later stage when repressed emotions and grief lead to much larger problems. We discuss funding issues below at paragraphs 280–286.
- 247 We received comments from birth and adoptive families participating in open adoption arrangements that there are often times when it is difficult to maintain communication, particularly

³³⁹ Langridge, above n 172, 102–106; Palmer, above n 172; Winkler and van Keppel, above n 172.

³⁴⁰ A Weaver “Addressing the Psycho-Social Implications in Social Policy: The Case of Adoption and Early Intervention Strategies” (MPP Research Paper, Victoria University of Wellington, 1999).

when a birth parent is working through his or her grief about the adoption. One submitter observed that:³⁴¹

Open adoption is in many ways a strange situation in that you are instantly thrown into a profound relationship with almost complete strangers. In my experience, it usually takes about one year before the intense emotions surrounding the adoption calm down to a point that clear communication can proceed. This first year however is a critical period for laying the foundation of an open and honest relationship. Assistance by way of mediation would be extremely useful during this period. Mediation may help to build an open, honest and respectful relationship between all parties involved in the parenting of this child. And it is in the best interests of the child that they get along!

Most submitters commented that the ability to invoke a mediation session, or to have access to counselling to talk through the issues with an understanding and informed person, would go a long way to helping an open adoption succeed. The family or whānau meeting/mediation model proposed above would be a suitable forum.

We recommend that a post-adoption family or whānau meeting or mediation be available to adoptive parents, birth parents, and adopted persons.

We recommend that post-adoption counselling be available to adoptive parents, birth parents, and adopted persons.

PROVISION OF ADOPTION SERVICES

Separation of education and counselling services from assessment and placement services

- 248 We observed above that it is in the interests of birth and adoptive parents to have access to counselling and advice so that they can make an informed decision. The issue of who provides that counselling and advice is also important.
- 249 The AISU provides a range of adoption services. The Unit counsels women who are relinquishing their child for adoption. They also provide information and preparation sessions for adoptive parents, and assess their suitability to adopt. Prospective adopters who have been approved are encouraged to prepare a profile of themselves,

³⁴¹ Submission 2/5.

which the birth mother will rely upon when choosing the person(s) she wishes to raise her child. The AISU will often facilitate a meeting between the birth mother and prospective adopters to discuss the adoption of the child.

250 A number of other agencies also provide adoption services, including pre- and post-adoption counselling for birth parents and advice for prospective adopters. Some of the agencies which responded to the discussion paper indicated that they would like to play a more formal role in the counselling and preparation of parties for adoption. We might consider whether the State needs to provide all adoption services, or whether some might successfully be devolved to private providers. Related issues are how the provision of such services might be controlled to ensure that certain basic criteria are met, and whether the State should fund these services.

251 A number of submitters, representing the State, private providers of adoption services, and users of adoption services, recognised that when prospective adopters know that their suitability to adopt will be assessed by the persons counselling them, they are less likely to be candid or forthcoming about reservations or problems. They are also less likely to approach that agency for post-adoption assistance, for fear that their parenting may be judged as inadequate or that it will have an impact upon their ability or suitability to adopt another child. One submitter commented that for birth mothers and adopted people to be obliged to approach CYFS for post-adoption counselling would be painful because of the association of the agency with the trauma that they have suffered.³⁴² This is a strong argument for the separation of counselling and assessment services.

We recommend that counselling services be provided separately from adoption assessment services.

Accessibility

252 We have discussed above in paragraphs 227–238 and 241–244 the importance of adequate counselling for the participants in the adoption process. By making better use of those community-based organisations that provide adoption counselling services, access to adoption counselling services throughout New Zealand will be improved.

³⁴² Submission 1/69, 33.

Specialisation

- 253 Some of the private organisations indicated that they would like to focus their work on a particular group, for example, birth mothers rather than prospective adopters, as they felt that this would lower the risk of conflict of interest. Intercountry Adoption New Zealand (ICANZ) operates a service aimed at facilitating intercountry adoption and plays a role in the preparation of prospective intercountry adopters.

Accreditation

- 254 Thirty eight out of forty submissions on the issue of private providers of adoption services commented that agencies providing such services should be accredited. If counselling and advice services are devolved to private providers, accreditation is needed to ensure standardisation of services, and in particular, to avoid the failure or refusal by groups with a particular philosophy or agenda to present the full range of available options.
- 255 One way of achieving this might be for CYFS to prepare a framework for the provision of such counselling services.³⁴³ Those agencies who wish to become accredited would be required to employ suitably trained staff and to develop a programme conforming with the minimum standards and content required by the framework. CYFS would then monitor the providers of these services for quality. This approach is similar to that developed for the “Stopping Violence” programmes, which the Family Court can direct a respondent to attend.³⁴⁴

We recommend that CYFS prepare an accreditation framework for the provision of private adoption counselling services.

Profit motivation inappropriate

- 256 The existing Adoption Act makes it an offence to make or receive payments³⁴⁵ in consideration of an adoption or proposed adoption, or in consideration of making arrangements for an adoption.³⁴⁶ At paragraph 113 of the discussion paper we stated:³⁴⁷

³⁴³ The costs of establishing an accreditation framework could be partially offset by levying a fee upon applicants seeking accreditation.

³⁴⁴ Section 32 Domestic Violence Act 1995.

³⁴⁵ Without the prior consent of the court.

³⁴⁶ Section 25 Adoption Act.

³⁴⁷ Law Commission, above n 2.

The introduction of a profit motive may compromise the ability of these agencies to offer a service that provides, and is seen to provide, independent screening of applicants for adoption and independent counselling of birth mothers.

Twenty seven out of thirty submitters felt that only not-for-profit organisations should be able to provide adoption services. For the reasons enunciated in the discussion paper, we strongly recommend that only not-for-profit organisations be permitted to provide adoption education and counselling services.

- 257 This is consistent with the Adoption (Intercountry) Act which allows only organisations pursuing non-profit objectives to be accredited to provide intercountry adoption services.³⁴⁸

We recommend that only not-for-profit organisations be entitled to receive accreditation.

Accreditation of private agencies to provide adoption placement services

- 258 Article 21 of UNCROC states:

States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

- 259 This is a stringent obligation which New Zealand has undertaken. The adoption unit of CYFS, AISU, is staffed by competent professionals who have considerable experience in assessing the merits of applicants. The AISU operates as a division within CYFS, which has overall responsibility for the welfare and protection of children in New Zealand. The current assessment and placement

³⁴⁸ Section 15 Adoption (Intercountry) Act. Section 6 provides that the Central Authority (the Director-General of CYFS) may delegate functions under Article 9 of the Hague Convention on Intercountry Adoption to accredited organisations. See chapter 11 for a discussion of intercountry adoption.

services are run with the welfare of the child as the key consideration. In these respects the AISU meets the requirements of Article 21 of UNCROC.

- 260 A further factor to consider is that the assessment of applicants to adopt involves considerable incursion into the privacy of the applicants (for example, police checks and medical assessments). We consider that a State agency is more appropriately placed to discharge such a duty than a private organisation.
- 261 It is unclear what benefits would be obtained by contracting out assessment and placement services, particularly given the size of New Zealand and the numbers of domestic adoptions carried out each year. To contract out such services could create several undesirable results such as the following:
- It is likely that there would be a skill shortage of appropriately trained adoption case workers. This creates a risk that untrained or inexperienced persons might be entrusted with the responsibility of assessing the suitability of applicants and placements.
 - It would expand the numbers of persons who may seek access to highly personal information.
 - There is a risk that such agencies would be more attuned to the desires of prospective applicants (who would be their main clients) than the needs of the child, particularly if the agency received a subsidy from the applicants.
 - There is a risk that privatisation of such services could result in the introduction of a profit motive in adoption.
- 262 A clear majority of individuals and groups who responded to our discussion paper agreed that the responsibility for assessing the suitability of prospective adopters and approving adoption placements should remain with CYFS.³⁴⁹
- 263 Assessment and placement services are too important to run the risk of fragmentation or the introduction of a profit motive, which could subordinate the welfare and interests of children available for adoption.

We recommend that the AISU remain the sole assessor of the suitability of prospective adoptive parents.

³⁴⁹ Thirty-three for, six against.

PLACEMENT ISSUES

Private versus State-controlled placement

Background

- 264 The Adoption Act provides for consent to be given by the birth parents to the adoption of their child by specified persons. The applicants are named on the consent, or referred to by reference number.³⁵⁰
- 265 It is an offence for any person to place, receive or keep any child in the home of any person for the purposes of adoption, unless prior approval has been given by a social worker and the approval is in force, or an interim order in respect of the proposed adoption is in force.³⁵¹ The penalty for such an offence is imprisonment for a term not exceeding three months, or a fine not exceeding \$15 000 or both. Parties facilitating these arrangements are not covered by this offence, therefore no prosecution can be brought against them.
- 266 Although it is clear that a number of unlawful placements occur, nobody has ever been prosecuted for this offence. The Family Court does not have jurisdiction to impose this penalty in adoption proceedings where it transpires that such unlawful placement has occurred. In such cases the adoption order will usually still occur as the child has bonded to the prospective adoptive parents – the court is presented with a *fait accompli*. CYFS has observed that:³⁵²

[Section 6] is currently being flouted by both birthparents, adoptive parents, midwives and lawyers because even if these parties are charged and fined it is unlikely to alter the placement for the child.

Loophole in current law

- 267 There is currently a loophole in the law that allows prospective adopters to avoid the risk of committing an offence under the Adoption Act:³⁵³

Children are being placed immediately in the homes of future adoptive parents, privately, on the premise that the birthmother is unsure at that point, so that the purpose of the placement is ostensibly not for the purposes of adoption, but perhaps a fostering arrangement.

³⁵⁰ Section 7(6) Adoption Act, reg 9 Adoption Regulations 1959.

³⁵¹ Sections 6(1) and 27 (1)(a) Adoption Act.

³⁵² Submission, CYFS, 3 March 2000, 15.

³⁵³ Submission, CYFS, 3 March 2000.

Such an arrangement no longer requires the Department's approval. This requirement (s 73) was removed when the Children and Young Persons Act 1974 was replaced by the CYP&F Act. After a period of time, a direct application is made to the Court and the Department is requested to make a report. After the passage of time the question of established emotional bonds with the new family, such that any separation and new placement are likely to create stress, virtually guarantee a "fait accompli" adoption.

Another example of avoiding the provisions of section 6 is when a lawyer suggests that prospective adoptive parents apply for guardianship and custody as an interim measure, as they are aware having the child in the home would breach section 6. This avenue also allows the prospective caregivers to avoid an assessment of their suitability.

Problems with private adoption arrangements

268 CYFS has stated that it does not support privately arranged adoptions:³⁵⁴

The primary rationale for this stance is the lack of formal assessments and matching of child needs to caregiver abilities prior to change of custody for the child.

269 Other issues of concern also arise in private adoption arrangements:

- Some placements are facilitated by organisations that have their own "agenda", for example, opposition to abortion. It is difficult to know what pressure the birth parent might have been placed under, or misinformation received, to encourage adoption.
- In most cases the adoption is arranged prior to birth, and the prospective adoptive parents may be present at the birth and take the baby home from the hospital – this places a lot of pressure on the birth parent not to change her mind.
- Two-thirds of women change their minds about adoption after the child is born – this may not be an option the birth mother feels she can exercise if a private adoption has been arranged for some time.

270 CYFS has provided three examples of current activity relating to private arrangements that it considers to be undesirable:³⁵⁵

- a criminal defence lawyer acting for a birth mother contacting personal friends to be adoptive parents of the client's toddler;

³⁵⁴ Submission, CYFS, 3 March 2000, 14.

³⁵⁵ Submission, CYFS, 3 March 2000, 14.

- a solicitor who keeps a set of “profiles” so that he or she may broker adoptions with clients who may be wishing to place their child; and
- a midwife who organises a “whāngai” placement for a child where there is no hapū or iwi consultation or connection to the child.

271 It is clear that a number of contested adoption applications, or applications to revoke interim adoption orders, involve adoption placements that were arranged privately.³⁵⁶

Recommendation

272 We do not consider that the ability to sign an adoption consent in relation to specified persons should be removed. However, we believe that private placements should be prohibited because of the risk factors involved. All precautions should be taken to reduce the possibility that the birth parents will regret their decision and attempt to withdraw consent, or challenge the making of the order.

273 A number of overseas countries, including Australia and the United Kingdom do not allow private placements. In these countries the birth parents release a child to the State for adoption and the State agency liaises with the birth parents in selecting appropriate parents for the child. This ensures that correct procedures are followed and provides better protection for the child and birth parents, and is a better guarantee for security for the adoptive parents.

274 The New South Wales Law Reform Commission recently reviewed the procedures regarding the giving of a general, rather than a specific, consent to adoption. In considering the possibility of allowing specific consents to be given, the Commission expressed concern that:³⁵⁷

It might be felt that if birth parents were able to limit their consent to particular individuals, they would be able in effect to by-pass the process by which agencies prepare and select suitable adopters.

³⁵⁶ See for example *In the matter of A* [1998] NZFLR 964 (FC); *Re SDJ* (1999) 18 FRNZ 658 (HC); *H and R v C*, above n 328; *B v H* [1996] NZFLR 390; *Wackrow v Irvine* (1988) 4 NZFLR 666 (HC). Reported cases of revocation of consent and opposition to the adoption order were examined. However, not all cases provide the background necessary to discern such factors.

³⁵⁷ New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965 (NSW) DP34* (NSWLRC, Sydney, 1994) paragraph 7.61.

Their final recommendation was that the existing system of giving a general consent, together with giving the birth parent the opportunity to be involved in the process of selecting adoptive parents, was adequate.³⁵⁸

- 275 Because New Zealand has a long history of private adoption, we suggest a modified form of the United Kingdom and Australian system, which would mean that all prospective adopters would have to present themselves to the AISU for assessment and approval before they could make an application to the court to adopt a child. We consider that this approval process should also apply to persons wishing to adopt a child from overseas.³⁵⁹
- 276 Birth parents would retain their current role whereby they can select the parents that they wish to adopt their child. AISU should provide birth parents with a range of prospective adopters, and assess the match³⁶⁰ between the child and the prospective parents. We consider that requiring a birth parent to be presented with several prospective adoptive parents is unnecessary in the context of a step-family or intra-family adoption.
- 277 We consider it desirable to re-enact section 73 of the Children and Young Persons Act 1974 requiring CYFS approval for the placement of any child in the home of an unrelated person, whether ostensibly for the purpose of guardianship or for adoption.
- 278 The legislation should provide that the court does not have jurisdiction to entertain an adoption application unless these procedures have been complied with. This would mean that prospective adopters would be unable to become legal parents if they did not follow this process. This approach is stringent, but necessary if proper protection and certainty for the child is to be achieved. It is unlikely that prospective adopters will take the risk of not being able to secure an adoption order.

³⁵⁸ New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965 (NSW) R81* (NSWLRC, Sydney, 1997) paragraph 5.18.

³⁵⁹ See discussion below paragraph 311 and the following recommendations for our proposed definition of intercountry adoption.

³⁶⁰ The matching process should also take into account the parties' views regarding contact. The AISU should attempt to place children in families whose desired level of contact with the birth mother is as similar as possible to the birth parents' desire for contact.

STATUTORY RIGHT OF REVIEW

- 279 The requirement for all prospective adoptive parents to be approved by AISU should be accompanied by a statutory right of review. The majority of submissions agreed that an internal review was appropriate, followed by an appeal to the Family Court if necessary. We consider that this is necessary if CYFS approval is a prerequisite to an application for adoption.
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We recommend that:

- All prospective adopters (including intercountry adopters) must be approved by CYFS;
- CYFS must assess the particular “match” between the child and the prospective adopters;
- The birth parents retain their current role whereby they can select the parents whom they wish to adopt their child; and
- CYFS must provide the birth parents with a range of prospective adopters.

(Proposed step-parent and intra-family adoptions should be exempt from the last requirement.)

- It should be an offence to place, receive or keep a child, or to facilitate the placement or receipt of a child, for the purpose of guardianship or adoption without a social worker’s prior approval. CYFS should be specifically empowered to prosecute persons who fail to comply with this requirement.
 - Compliance with these procedures should be a condition that precedes the making of an adoption application.
 - Persons whom CYFS has rejected as prospective adoptive parents may have that decision reviewed by CYFS and, if necessary, may appeal that decision to the Family Court.
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FUNDING

- 280 In the case of domestic adoptions there is a strong argument for the State bearing the cost and reaping the benefit of providing adoption services. Adoption provides a family for New Zealand children whose parents cannot or will not provide proper care. In this way it serves society.
- 281 The State will need to determine whether counselling services should be funded by the State on an open-ended basis or whether a cap (of perhaps 10 sessions) should be imposed, and it will need to

consider whether all parties to the adoption (child, birth and adoptive parents) should be entitled to the same services. We have emphasised earlier the importance of adequate education and counselling prior to the adoption. We believe that education and counselling up until the adoption order is made should be unlimited.

282 We consider that there is a compelling argument that a birth mother should receive extensive counselling to assist her in dealing with resolving any issues of grief. Whether the birth father is entitled to the same level of counselling may depend upon facts of each case. Adopted persons have different issues, for example issues surrounding abandonment and identity, and may also benefit from post-adoption counselling. Adoptive parents, the third party in the adoption triangle, may also benefit from post-adoption support in learning how to raise an unrelated child or to deal with the vicissitudes of an open adoption arrangement.

283 However, some submitters expressed concern that access to unlimited counselling could lead to an unhealthy dependency on such services by some clients. For this reason, we are inclined towards the view that there should be a cap on the number of State-funded post-adoption counselling sessions.³⁶¹

We recommend that pre- and post-adoption services for adopted persons, birth parents and adoptive parents be State funded.

We suggest that a cap might be imposed on the number of State-funded post-adoption counselling sessions for adopted persons, birth parents and adoptive parents.

Intercountry adopters

284 It is unclear whether the State should bear the same level of financial responsibility for persons seeking to enter into an intercountry adoption. Certainly there needs to be extensive

³⁶¹ The Accident Compensation Corporation-funded counselling for victims of sexual offences provides a model for capped State-funded counselling. The ACC Sensitive Claims Unit provides approved claimants with an automatic entitlement to 10 hours of counselling. After that, the counsellor must prepare a report justifying any further counselling, entitlement to which is assessed on a case-by-case basis. The amount that ACC contributes towards the counsellor's fees is set by regulation.

preparation of prospective intercountry adopters.³⁶² However, intercountry adoptions do not ameliorate a pressing New Zealand social problem, except insofar as they may benefit childless couples. One can appreciate the factors that might motivate couples to seek intercountry adoption; however, whatever personal gains intercountry adoption might provide to adopters is a separate issue. In some cases, such adoptions impose a burden upon the New Zealand taxpayer, particularly in the form of significant medical expenses.³⁶³

- 285 Legislation should require prospective intercountry adopters to undergo counselling and education sessions before leaving New Zealand to adopt a child from overseas. It might be appropriate to require intercountry adoptive parents to contribute to the cost of the counselling and education sessions. However, CYFS expressed concern that this might, in the minds of some adoptive parents, create an expectation that an adoption will result. At a minimum, CYFS should be able to charge intercountry adoptive parents for the full cost of disbursements incurred in relation to the adoption.³⁶⁴
- 286 Once an intercountry adoption has occurred and the child is brought back to New Zealand, the child will be a New Zealand citizen or resident and is entitled to adequate care in his or her own right. There is a social interest in supporting the adoptive parents and the child to ensure that the adoption works. Post-adoption counselling for those involved in an intercountry adoption should be provided in the same way as for domestic adoptions.

³⁶² The Russian delegate highlighted Russian concerns about poorly prepared prospective intercountry adopters at a recent conference on intercountry adoption held in Frankfurt in November 1999.

³⁶³ The AISU has expressed concern at the increasing number of intercountry adopted children who are featuring in care and protection proceedings after suffering abuse from, or neglect by, their adoptive parents who may be experiencing difficulty in coping with the challenges of raising intercountry adopted children.

³⁶⁴ For example, translation costs, fees relating to the adoption, and international toll calls.

We recommend that consideration be given to charging intercountry adoptive parents at least a portion of the cost of the counselling, education and preparation sessions.

We recommend that CYFS be able to charge intercountry adoptive parents the full cost of disbursements payable in relation to the adoption.

11

Jurisdiction, intercountry adoption and citizenship

DOMICILE OR HABITUAL RESIDENCE

287 SECTION 3 OF THE ADOPTION ACT allows a New Zealand court to entertain an adoption application by any person, anywhere, to adopt a child, whether or not that child is in New Zealand. We observed in the discussion paper that such an unfettered jurisdiction could allow New Zealand to be used as a “clearing house” for adoptions, but that there was no evidence to suggest that this provision had been misused.³⁶⁵ Since then we have discovered that section 3 does create practical difficulties. People have attempted to use section 3 in the following instances:³⁶⁶

- A Middle Eastern woman living in a Middle Eastern country (but who has New Zealand permanent residency status) sought to adopt her nephew from the Middle East using New Zealand adoption law. They did not plan to reside in New Zealand.
- A New Zealand women resident in India sought to adopt an Indian child.
- An Australian citizen resident in Australia wanted to use New Zealand’s Adoption Act to adopt a Russian child because the Australian State in which she resides does not accept unmarried applicants.
- A New Zealand citizen living in Australia adopted a child from Brazil using New Zealand law. Once the adoption was made the adoption was recognised in New Zealand and the child became a New Zealand citizen by descent and was free to enter Australia. Such an adoption would not have been permitted by Australian legislation.

³⁶⁵ Law Commission, above n 2, paragraphs 133–136.

³⁶⁶ Examples provided by the AISU.

- 288 In some cases, section 3 allows New Zealand adoption law to be used to circumvent more restrictive adoption practices in the child's or adoptive parents' country of origin.
- 289 Section 3 allows New Zealanders to adopt children from overseas using New Zealand adoption legislation, and in combination with section 17 could arguably allow New Zealand adopters to circumvent the provisions of the Hague Convention, as expressed in the Adoption (Intercountry) Act.
- 290 It also creates practical difficulties. Where the parties are not resident in New Zealand, they cannot be assessed appropriately, and post-placement services and monitoring cannot be provided. Such scenarios do not allow social workers to discharge their statutory obligation to report on the suitability of the applicant to adopt or the advisability of the adoption generally.³⁶⁷

Common law rules relating to adoption

- 291 Having discussed the potential for misuse of section 3 we should emphasise that adoptions so made may not be recognised overseas. The general rule³⁶⁸ expressed in *Re Valentine's Settlement*³⁶⁹ is that recognition of an adoption made overseas will depend upon whether the adopting parents were domiciled³⁷⁰ in the country where the adoption order was made. Lord Denning MR went further and added the requirement that the child should also be resident in the country in which the adoption order is made.
- 292 This rule has implications for adoptions under section 3 made by persons habitually resident overseas to adopt a child who may or may not be resident in New Zealand. Although an order made using section 3 would be valid in New Zealand, it may not be considered valid overseas.

³⁶⁷ As required by section 10 of the Adoption Act.

³⁶⁸ See PM North and JJ Fawcett *Cheshire and North's Private International Law* (12 ed, Butterworths, London, 1992) and L Collins (ed) *Dicey & Morris The Conflict of Laws* (12 ed, Stevens and Sons Ltd, London, 1992).

³⁶⁹ [1965] 1 Ch 831.

³⁷⁰ In more recent times, as a result of international conventions, States have begun to refer to habitual residence as being the connecting factor for determination of matters of status and the validity of an adoption order.

We recommend that jurisdiction be limited to cases where:

- the child is habitually resident in New Zealand or coming to reside in New Zealand; and
 - the applicants are New Zealand citizens or permanent residents who are resident, and have for three years been habitually resident, in New Zealand prior to the filing of the application to adopt.
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INTERCOUNTRY ADOPTION

Recognition of intercountry adoption and overseas adoption

293 According to the Hague Convention on Intercountry Adoption, an intercountry adoption occurs where:

a child habitually resident in one Contracting State (“the State of origin”) has been, is being, or is to be moved to another Contracting State (“the receiving State”) either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

294 There are currently three ways in which intercountry adoptions are carried out:

- adoption of a child from a Hague Convention State in accordance with the provisions of the Adoption (Intercountry) Act;
- adoption of a child in a country with “compatible” legislation. Section 17 of the Adoption Act provides for compatibility to be assessed and recognition of an overseas adoption to be afforded in New Zealand; and
- adoption of a child from a non-Hague Convention State using the New Zealand Family Court. In such cases, a child is brought into New Zealand on an entry permit and is adopted in accordance with New Zealand law.

Hague Convention on intercountry adoption

295 New Zealand has ratified the Hague Convention and has incorporated it into domestic law in the Adoption (Intercountry) Act. This statute sets out the rules that must be complied with when

the adoption of a child from another Convention State is contemplated by persons habitually resident in New Zealand.

296 The Hague Convention on Intercountry Adoption establishes safeguards to ensure that the child³⁷¹ and birth parents have been counselled, that the child is adoptable, and that the child's wishes and opinions have been considered. Competent authorities in the receiving State must ensure that:

- the adoptive parents are eligible and suitable to adopt;
- the adoptive parents have been given any necessary counselling; and
- the child is authorised to enter and reside permanently in the receiving State.

The authorities in the sending State must ensure that:

- the child is adoptable;
- the possibility of adoption within the State of origin has been given due consideration;
- the persons, institutions and authorities whose consent is necessary for adoption have been:
 - counselled;
 - informed of the effect of consent, in particular whether the adoption will result in the termination of the legal relationship between the child and his family of origin;
 - the birth mother has not given consent until after the birth of the child;
 - parents, guardians, children, institutions and authorities have given their consent freely, in the required legal form and expressed or evidenced in writing;
 - the consents have not been induced by payment of compensation;
 - the consents have not been withdrawn; and
- information about the child's origins and medical history is preserved.

³⁷¹ Having regard to the age and maturity of the child.

297 Such safeguards are eminently sensible and ensure that all parties to the adoption are as informed and protected as they can possibly be. The Adoption (Intercountry) Act implements these principles and procedures in New Zealand domestic law and sets out a framework to allow the accreditation of agencies who wish to facilitate intercountry adoption. Hague Convention intercountry adoptions may be made by a New Zealand court or by a court of the sending State.

Intercountry adoption finalised in New Zealand

298 An intercountry adoption may be finalised in New Zealand where a child is brought into New Zealand by the prospective adoptive parents on an entry permit, and an application to adopt is made to the New Zealand Family Court.

299 In these cases, a social worker is required by section 10 of the Adoption Act to furnish a report to the court. The social worker offers counselling and assesses the suitability of the prospective adopters. CYFS attempts to ascertain that the prospective adopters intend and have the capacity to foster the child's links with its country of origin, race and culture. They will check the overseas documentation to ensure that the child is free for adoption and that the adoption would be in the child's best interests. When these procedures have been completed, the social worker reports to the court and the Family Court may make an adoption order.

300 There are, however, a number of practical difficulties that emerge during this procedure. While the social worker is preparing the report, the child has been uprooted from the country of origin, is adapting to life in New Zealand, and is forming bonds with the prospective adoptive parents. Such placements breach section 6 of the Adoption Act unless social worker approval has been obtained in advance. Furthermore, there is no guarantee that CYFS will be able to obtain the information it needs to make a professional assessment of the placement. This places the child in an unacceptable position. The child may be uprooted for a second time if the adoption application is rejected because the applicants are unsuitable or the adoption is not considered appropriate. Alternatively, the child may be left in the care of unsuitable adoptive parents when adequate precautions have not been taken, simply because the court has felt compelled to endorse a fait accompli.

301 In contrast to this approach, Sweden allows intercountry adoption only where the Hague Convention procedures are followed and

where the child is transferred to Sweden and an adoption order is made by the Swedish Child Welfare authorities.

302 A child adopted in such a manner is deemed to be a New Zealand citizen by descent, unless the child is adopted by persons who are not New Zealand citizens, in which case the child will not automatically be granted New Zealand citizenship.³⁷²

Overseas adoptions

303 Section 17 of the Adoption Act was intended to be a conflict of laws provision to ensure that immigrants to New Zealand who had adopted children in their State of origin would have the adoption recognised in New Zealand. These are not “intercountry adoptions” and would better be described as domestic adoptions in overseas states. Section 17 simply applies a formal test of the legal consequences of the adoption under the laws of the State where the adoption took place.

304 Section 17 accords recognition to an overseas adoption where:

- the adoption is legally valid in the State where it took place;
- the adoptive parents acquire, under the law of the State where the adoption took place, a right of custody of the child superior to that of the natural parents;³⁷³ and
- either the adoption took place in a certain named State³⁷⁴ or the adoptive parents acquire specified rights in respect of property of the adopted child.

³⁷² Sections 3(2) and 6 Citizenship Act 1977.

³⁷³ The adoption legislation of the following countries was (when last assessed) found to be compatible with New Zealand adoption legislation: Australia, Belgium, Brazil, Bolivia, Canada, China, the Cook Islands, Denmark, England, Fiji, France, Ghana, Hong Kong, India, Japan, Kenya, West Malaysia, Malaysia, Malta, Mexico, Nauru, North Mariana Island, Papua New Guinea, Peru, Rhodesia, Romania, Russia, Republic of Georgia, Spain, Samoa, Scotland, Saint Lucia, Sierra Leone, Singapore, South Africa, Sri Lanka, Tahiti, Tonga, Trinidad and Tobago, Tuvalu, Ukraine, 13 States of the United States of America, Vanuatu, Venezuela, Zimbabwe and Zambia

³⁷⁴ Countries which satisfy section 17(2)(c)(i) include Antigua and Barbuda, Australia, The Bahamas, Bangladesh, Barbados, Belize, Botswana, Canada, Cyprus, Dominica, Fiji, The Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Namibia, Nauru, New Zealand, Nigeria, Papua New Guinea, Samoa, St Lucia, St Vincent and the Grenadines, Seychelles, Sierra Leone, Singapore, Solomon

305 Section 17 is now being used for purposes far removed from the original intentions of the 1955 legislators.³⁷⁵ It is primarily used by persons habitually resident in New Zealand to adopt children habitually resident in countries that have not ratified or implemented the Hague Convention.³⁷⁶ Once recognition is granted, such children are deemed New Zealand citizens by descent.³⁷⁷

306 This provision creates the following difficulties:

- It does not require any assessment of how well that country's legal system protects the welfare and interests of the child.
 - Adoptions made in Brazil are recognised under section 17 because the adoption order grants the adoptive parents rights superior to the birth parents and establishes succession rights. However, CYFS has expressed concern about Brazilian adoption practices. There is no statutory adoption service operating in Brazil, nor is there a reliable system of ensuring that the child is in fact available for adoption and that free and informed consent has been given. Such adoptions are usually facilitated by United States third party agencies.³⁷⁸
 - Similarly, Russian adoptions do not conform with the principles of the Hague Convention as there is no clear process for matching the child's needs and the abilities of the adoptive parents.

Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom, Vanuatu, Zambia and Zimbabwe. The Governor-General by Order in Council has directed Austria, Denmark, Finland, The Netherlands, Norway and Sweden to be referred to under section 17(2)(c)(i) – Overseas Adoptions Order 1967 (SR 1967/68).

³⁷⁵ See paragraphs 287 and 306, which illustrate some of the scenarios for which section 17 is now being used.

³⁷⁶ In 1980, 42 children entered New Zealand using section 17. By 1991, the number had reached 769 per annum. New Zealand has a high rate of intercountry adoption. In 1998 there were 116 intercountry adoptions per million population compared to 52 per million for the Netherlands, 26 per million for Sweden and 117 per million for Norway (which describes itself as having an extremely high rate of intercountry adoption).

³⁷⁷ Out of 531 intercountry adoptions in 1996, 460 involved New Zealand citizens using section 17 and the citizenship by descent provisions (sections 3 and 7 of the Citizenship Act).

³⁷⁸ At a recent conference on intercountry adoption held at Frankfurt in October 1999, participants expressed deep concern about the activities of such third party agencies.

– Adoptions in Samoa do not require the court to inquire into the suitability of the applicants (who do not even have to appear before the court). There is no enquiry into the child’s circumstances or the appropriateness of the proposed adoption. Seventy-eight per cent of adoptions recognised using section 17 in the first six months of the 1999 fiscal year were from Western Samoa.³⁷⁹

- It does not give New Zealand any discretion to refuse to recognise an adoption made overseas.
- It does not pay heed to competent social work practice.
- It does not conform with New Zealand’s international obligations.³⁸⁰

307 CYFS has used some recent cases as examples to highlight the inadequate protections.³⁸¹

This concern is given weight by the recent media case of 8 children living in a Wellington home with a couple who have been recently . . . charged with “slavery” and “cruelty to children” (*The Dominion* 22/01/2000). It is the Department’s understanding that some of the [children and young people] were resident with neither legal status nor biological link to the adults and others had been adopted by the couple in the Pacific Islands.

The importance of this issue was again highlighted in December 1999 when a man was sentenced to fourteen years imprisonment, and his wife for eight years, for multiple rape charges against their daughter, adopted from relatives in Samoa at age thirteen (*Otago Daily Times* 24/12/99).

Although it is unknown whether an assessment of these couples would have revealed any risk indicators in this instance, it is likely that such unfortunate outcomes may have been avoided had a full assessment been made.

³⁷⁹ Pacific Island adoptions make up 80 per cent of adoptions recognised in accordance with section 17 of the Adoption Act.

³⁸⁰ See UNCROC, Hague Convention on Intercountry Adoption, UN Declaration on Child Placement.

³⁸¹ Submission, CYFS, 3 March 2000, 18–19.

308 The lack of protection for children adopted by New Zealanders using this route is in marked contrast to the assurances that must be sought from Hague Convention countries. This anomaly was pointed out to the Select Committee during its examination of the Adoption (Intercountry) legislation.³⁸² Not all countries of origin are Hague Convention States.³⁸³ It has been argued by Professor Tony Angelo of Victoria University of Wellington that:³⁸⁴

The current regime does not fully support the policy that motivated the Hague Convention. It is strongly argued that if the interests of children are to be protected by systems such as the Hague Convention those systems should as a matter of domestic law, in addition to the public international law system, be made to apply to all adoptions which are, within the terms of the Convention, intercountry adoptions. That is to say that New Zealand should extend the same protections to children and parents engaged in intercountry adoptions which involve states not parties to the Convention as apply when the states involved are parties.

309 Although the Select Committee acknowledged such concerns, it thought they would be better addressed in a comprehensive review of the Adoption Act.

310 We support the proposition that the same protections should be extended to apply to intercountry adoptions between New Zealand and countries not parties to the Hague Convention.

Recommendations

311 Section 17 should apply only to adoptions made overseas by persons not habitually resident in New Zealand.³⁸⁵ Intercountry adoptions³⁸⁶ should be specifically excluded from recognition under this section.

³⁸² Report of the Commerce Select Committee on the Adoption Amendment Bill (No 2).

³⁸³ As at 26 May 2000, Uruguay, the United Kingdom, the United States, Switzerland, Luxembourg, Ireland, Germany, Belarus, Belgium, Slovakia and Portugal had signed but not yet ratified the Convention; Mexico, Romania, Sri Lanka, Cyprus, Poland, Spain, Ecuador, Peru, Costa Rica, Burkina Faso, the Philippines, Canada, Venezuela, Finland, Sweden, Denmark, Norway, the Netherlands, France, Columbia, Australia, El Salvador, Israel, Brazil, Austria, Chile, Panama, Italy and the Czech Republic had ratified the Convention; and Andorra, Moldova, Lithuania, Paraguay, New Zealand, Mauritius, Burundi, Georgia, Monaco, Iceland and Mongolia had acceded to the Convention (www.hcch.net/e/status/adoshte.html).

³⁸⁴ Submission, Tony Angelo, 19 June 2000, 3.

³⁸⁵ As was the original purpose of section 17.

³⁸⁶ Defined in similar terms to the definition in the Hague Convention.

- 312 Any adoption of a child habitually resident in another State, by a person habitually resident in New Zealand, should be classed as an intercountry adoption and the Hague Convention procedures (or agreed procedures) applied.
- 313 New Zealand has already successfully negotiated agreed processes with China that parallel the Hague procedures. We propose that the Central Authority established by the Adoption (Intercountry) Act³⁸⁷ be responsible for negotiating acceptable intercountry adoption procedures with these countries. The Central Authority has counterparts in other Hague Convention States, and the status of the office is recognised around the world. Pending a more systematic process of approval of sending States, the Central Authority could make ad hoc decisions in relation to proposed adoptions from non-Hague Convention States.
- 314 At a more informal level, we propose that a committee be established to facilitate this process and to assist the Central Authority. We envisage that the committee could comprise representatives from the AISU, Ministry of Foreign Affairs and Trade, Internal Affairs (Citizenship division), Office of the Commissioner for Children, and a consumer representative.

We recommend that section 17 apply only to adoptions made overseas by persons not habitually resident in New Zealand. Intercountry adoptions should be excluded from the coverage of this section.

We recommend that intercountry adoptions be defined as “the adoption of a child habitually resident in another State by a person habitually resident in New Zealand”.

We recommend that procedures akin to those set out in the Hague Convention be applied to intercountry adoptions involving non-Convention States.

We recommend that the Central Authority be responsible for negotiating acceptable intercountry adoption procedures with non-Convention States.

³⁸⁷ The Chief Executive of CYFS.

Citizenship

- 315 When a New Zealand citizen adopts a child from overseas, the child automatically gains New Zealand citizenship by descent.³⁸⁸ This is a remarkably generous grant of citizenship. Other countries such as the United Kingdom, United States and Sweden usually grant such children residency but not citizenship. The benefits and privileges that flow from New Zealand citizenship and the ease with which adoptions can be obtained in some other jurisdictions (especially Samoa) mean that adoption has come to be viewed by some as a means of circumventing normal immigration requirements. An alternative interpretation is that adoption is a means by which New Zealand can obtain immigrants at a relatively early age, thus increasing the likelihood that they will become fully integrated, productive members of society.
- 316 By establishing a definition of “intercountry adoption” and requiring parties to go through appropriate procedures, many of the current abuses of the citizenship provisions will cease to occur.
- 317 There still remains, however, the issue of a foreign child who may have lived in New Zealand for some time before an application is made for adoption. Here we are contemplating the not so rare scenario where a young relative attends school in New Zealand, and is eventually the subject of an application for an adoption in order to secure New Zealand citizenship. The applicants and child are habitually resident (although not necessarily permanent residents) in New Zealand and inevitably such cases will fall within the jurisdiction of the Family Court.
- 318 This is a matter over which the Department of Immigration might properly exercise control. Children who have no legal right to be in New Zealand and who are not as a matter of New Zealand law placed under the guardianship of, or adopted by, the people with whom they are living in New Zealand, should not be permitted to remain in New Zealand indefinitely.

³⁸⁸ Provided the child was under the age of 14 at the time of the adoption (sections 3(2) and 7 of the Citizenship Act).

Who may be adopted?

AGE

Background

- 319 **T**HE PROPOSED CARE OF CHILDREN ACT should adopt a consistent policy to the question of age, namely at what age or ages the child ceases to be in need of the relevant order. In the case of adoption, which has permanent legal consequences, and of what we term enduring guardianship, which has permanent legal and social consequences, it might perhaps be argued that there should be no age ceiling upon such orders.
- 320 Only a small minority of submissions contended for such a result. That is in our view because there is a practical distinction between the age at which an order is made and the period for which that order subsists. The basic reason for the making of an adoption order is to provide a child with security for the future. That may be achieved by the making of an order that is both permanent and prospective. An adoption order does indeed have permanent consequences; but adults can achieve essentially the same result by other means – such as mutual agreement, a course of conduct, or by will.
- 321 It is therefore necessary to consider to what age a child continues to need the present security of future legal and social status as adopted child (or the social status of having an enduring guardian).

Submissions

- 322 The discussion paper asked the public to suggest an appropriate age limit for adoption orders. Eighteen years of age was the most common suggestion, closely followed by sixteen.

Policy options

- 323 Current legislation contains a number of variations. The Adoption Act provides that any child under the age of 20 may be adopted. The Guardianship Act covers children under the age of 20 years. A guardianship order automatically expires when the child reaches the age of 20, or sooner marries,³⁸⁹ or is adopted.³⁹⁰ The CYP&F Act covers children up to the age of 14 and young persons up to the age of 17. Custody orders made under the Act automatically cease to have effect when the child reaches the age of 17, or marries, or is adopted.³⁹¹ Guardianship orders made under the Act automatically³⁹² cease to have effect when the child reaches the age of 20, marries, or is adopted.
- 324 Use of the age 20 is linked to the age of majority.³⁹³ Other legislation judges a child to become independent at earlier ages.
- 325 If a general age limit of 16 were applied, it would resolve issues of eligibility where the young person is married or living in a de facto relationship, as 16 is the age of consent.³⁹⁴ A child may leave school or home without parental consent at this age.
- 326 The Human Rights Commission suggested that a “dependency” test be adopted. This would mean that legislation would not discriminate on the basis of age or marital status.

Recommendations

- 327 In our view, a specific age is needed in order to provide certainty as to the capacity to alter one’s status. We therefore do not accept the functional test proposed by the Human Rights Commission. Nor, in our view, is it required to conform with the provisions of section 19 of the New Zealand Bill of Rights Act 1990.³⁹⁵

³⁸⁹ Section 21 Guardianship Act.

³⁹⁰ Section 16(2)(h) Adoption Act.

³⁹¹ Section 108 CYP&F Act.

³⁹² Section 117 CYP&F Act.

³⁹³ Section 4 Age of Majority Act 1970.

³⁹⁴ Section 134 Crimes Act 1961.

³⁹⁵ See *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SCC).

328 The vulnerability of the child or young person that underlies the institutions of adoption, guardianship, custody, and orders under the CYP&F Act, gradually diminishes as the child or young person matures and becomes more autonomous. Although the age of majority is 20, young people have a range of rights at varying ages and stages of maturity. For example, a female child of any age can consent or refuse consent to an abortion.³⁹⁶ At the age of 16, a young person can consent to sexual relations, consent or refuse to consent to medical, surgical or dental procedures³⁹⁷ or marry (with parental consent). At the age of 18, a young person is eligible to vote,³⁹⁸ can serve as a member of our defence forces,³⁹⁹ and has recently been judged by Parliament sufficiently mature to legally purchase and consume alcohol.⁴⁰⁰ A court cannot direct a person of 18 or over to live with any other person⁴⁰¹ or grant any order against the wishes of a person over the age of 18,⁴⁰² unless there are exceptional circumstances. For the purposes of child support, a young person is deemed to be independent upon reaching age 19.

329 In light of the nascent autonomy of the young person and our assessment of the submissions, we propose a general age limit of 16. We see value, however, in allowing the court a residual discretion to make an adoption order up until the age of 20, where the needs of the young person require such an order. This proposal is consistent with age limits in the CYP&F Act and the Guardianship Act.

We recommend that in most cases the upper age limit for the making of an adoption order be 16 years.

The court should have discretion to make an order in respect of a person over the age of 16, but under the age of 20, in exceptional circumstances where it is clear that the welfare and interests of the young person require an adoption order to be made.

³⁹⁶ Section 25A Guardianship Act.

³⁹⁷ Section 25 Guardianship Act.

³⁹⁸ Sections 2 and 74 Electoral Act 1993.

³⁹⁹ Section 36 Defence Act 1990.

⁴⁰⁰ Section 155 Sale of Liquor Act 1989 amended by section 83(1) Sale of Liquor Amendment Act 1999.

⁴⁰¹ Section 10E(2) Guardianship Act.

⁴⁰² Sections 19(4), 19A(2) Guardianship Act.

Adult adoption

- 330 Several overseas jurisdictions allow for adult adoption in special circumstances if the person to be adopted is over the age of 18. This may be allowed where a young person has been brought up by or maintained by the applicant(s) and/or their spouse.⁴⁰³
- 331 Submissions were fairly evenly divided as to whether this option should be available. Some expressed the view that it might be useful in the case of a person who was severely physically or intellectually disabled. However, in our view, the Protection of Personal and Property Rights Act 1988 is specifically created with such a situation in mind. Most submitters rejected the suggestion that adult adoption should be permitted on the basis that they could not see what purpose it could serve. We do not see a need for adult adoption.

MARITAL STATUS

Married persons

- 332 If the adoption of young persons over the age of 16 years is allowed, a determination will be necessary as to whether a married person could be the subject of an order. The Adoption Act currently allows married persons to be adopted.
- 333 Most legislation that imposes age restrictions excludes married persons from such restrictions, on the basis that married persons are considered able to exercise independent judgment.⁴⁰⁴ Because we have suggested that the age limit for an adoption order be 16, with an adoption order only being made in respect of a young person aged 17–20 years in exceptional circumstances, we do not consider that it is necessary to specifically exclude married persons from being adopted. When a court is considering an application to adopt a young person aged 17–20 years, the court will consider the circumstances of the case in far more detail, and the young person's marriage will certainly be one factor to take into account.

⁴⁰³ See section 72 Adoption Act 1976 (UK); section 10 Adoption Act 1984 (Victoria); section 4 Adoption Act 1994 (Western Australia); section 6 Adoption of Children Act 1965 (New South Wales); section 12 Adoption Act 1995 (Northern Territories).

⁴⁰⁴ See, for example, sections 8 and 10B of the Guardianship Act.

Persons in de facto relationships

- 334 The same reasoning applies to the consideration of an application to adopt a young person aged 17–20 years who is living in a de facto relationship. The court should take this factor into account when considering whether there exist exceptional circumstances that justify the making of an adoption order.
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Who may adopt?

GENERAL APPROACH

- 335 **W**E WOULD LIKE TO SEE a general principle that persons are not disqualified from eligibility to adopt on account of their relationship status – that is, whether they are single, married, in a same-sex, or de facto relationship. What is important is the ability of these people to parent a child. It goes without saying that there should be no general “right” to adopt a child – a notion that is a relic of another era. Rather the question must be whether adoption by particular applicants is the best means of promoting the interests of a particular child.

GENDER

- 336 Section 4(2) of the Adoption Act provides that a single⁴⁰⁵ man may not adopt a female child, unless he is the father of the child or there are special circumstances justifying the proposed adoption. This constitutes a statutory presumption that it is inappropriate for single men to parent a female child.⁴⁰⁶ The discussion paper argued that rather than approach the issue as a question of general “eligibility”, an individual professional assessment should be made of “suitability”.⁴⁰⁷
- 337 There is no such restriction in either the Guardianship Act or the CYP&F Act. The majority of submitters who commented on this point argued that section 4(2) was no longer necessary or appropriate.⁴⁰⁸ As we observed in the preface to this report, modern

⁴⁰⁵ Or a man living in a de facto relationship.

⁴⁰⁶ Logic suggests that this was probably an attempt to protect female children from sexual abuse.

⁴⁰⁷ Law Commission, above n 2, paras 170–171.

⁴⁰⁸ Thirty-three answered that it was not appropriate, eleven stated that it was.

society recognises the legitimacy of many forms of parenting that depart from the traditional paradigms.

- 338 The policy of protecting a female child is no less important now than in 1955. But if her adoption by a single man is in her interests there should be no legal impediment to that course. We recommend removing the statutory bar, while emphasising the added responsibility that this imposes upon those charged with protecting her interests in the adoption process.

We recommend that the prohibition against a single male adopting a female child be removed.

MARITAL STATUS

- 339 There are no eligibility restrictions regarding marital status of applicants for guardianship of a child in the Guardianship Act or the CYP&F Act.

Single people

- 340 Except for the restriction placed upon a male adopting a female child, the Adoption Act allows single persons to adopt children. The discussion paper canvassed opinion regarding the eligibility of de facto and same-sex couples to adopt a child, but did not ask whether single persons should be eligible. When commenting on whether the prohibition against a male adopter of a female child was necessary or desirable, four submitters stated that single persons should not be entitled to adopt a child.
- 341 The issue might again be viewed as one of “eligibility” versus “suitability”. Should an entire class of persons be deemed ineligible, or should a professional evaluation on an individual basis determine the suitability of a particular person to adopt? Deeming a class of persons ineligible might remove a beneficial option for an individual child. American research indicates that single adoptive parents can be a good option for hard-to-place children.⁴⁰⁹
- 342 The issue also needs to be viewed within the context of our recommendation for the enactment of a Care of Children Act. It would be inconsistent to allow single persons to be guardians but not

⁴⁰⁹ V Groze “Adoption and Single Parents: A Review” (1991) 70 Child Welfare 321.

adoptive parents. But to remove single persons from the pool of potential guardians, a logical consequence if such restriction applies in the context of adoption, could unnecessarily restrict care options for a particular child.

- 343 We consider that if a single applicant is judged by the competent authorities to be suitable to adopt a child, and if the adoption will be in the best interests of the child, the law should not prevent that adoption from occurring. Single persons should not be prohibited from applying to adopt a child.

De facto couples

Background

- 344 Guardianship orders are made in favour of individual persons, but more than one person may be a guardian at any point in time. As such it does not matter whether a person is married or in a de facto relationship – the order is made in favour of each individual rather than the couple as a unit.
- 345 Because only one adoption order may be in force at any moment in time, it is important to consider the qualifications placed upon eligibility to adopt as a couple. The Adoption Act provides that two spouses may apply jointly to adopt a child.⁴¹⁰ There is currently some uncertainty regarding whether “spouses” includes de facto as well as married couples, as a result of differing opinions amongst Family Court judges.⁴¹¹ Because of this uncertainty, CYFS has stopped accepting de facto couples into the pool of potential adoptive parents. A de facto couple, whose application to enter the pool of adoptive parents was declined by CYFS because they were not married, lodged a complaint with the Human Rights Commission alleging that CYFS had discriminated against them on the basis of marital status. Because the Adoption Act limits lawful adoption to couples who are legally married, the Human Rights Commission concluded that it would not investigate the complaint further.⁴¹²

⁴¹⁰ Section 3(2).

⁴¹¹ See *Re Adoption by Paul and Hauraki* [1993] NZFLR 266 (FC); *Re TW (adoption)* (1998) 17 FRNZ 349 (FC); *In the matter of R (adoption)* [1998] NZFLR 145 (FC).

⁴¹² Decision of the full Human Rights Commission dated 25 February 2000.

Submissions

- 346 Forty-eight submitters agreed that adoption legislation should treat married and de facto applicants in the same way. Nineteen submitters objected to that proposal, most on the basis that de facto couples were not as committed to their relationship as married couples and that de facto relationships are more unstable than marital relationships. One submitter was prepared to support adoption by de facto couples if property rights legislation was enacted.
- 347 Sixteen submitters went on to comment that there should be a requirement that de facto couples have lived together for a certain amount of time before being eligible to adopt. The average duration suggested was between two to three years. A number suggested that a similar requirement should be applied to married couples. The emphasis of these submissions was that a duration requirement might be an indicator of the quality and stability of the relationship.

Recommendations

- 348 Again, the issue can be reduced to one of eligibility or suitability. Do we presume that de facto couples as a group are unsuitable to parent, or do we say de facto couples are eligible to adopt, but their suitability to adopt will be assessed on case-by-case basis? We consider that the latter is the preferable approach.
- 349 The stability of the couple's relationship is an issue that will affect the future security of the child. This can be assessed by social workers on a case-by-case basis as they determine who is most suitable to promote the best interests of the child. The social worker's report should address matters of relationship duration and stability and whether the application is being made by a de facto or married couple.

We recommend that de facto couples be permitted to apply to adopt.

Same-sex couples – applying to adopt generally

- 350 At present, same-sex couples face the same legal barrier to adoption as de facto couples. The unresolved state of the case law means that at present adoption as a couple is confined to married couples.⁴¹³ A

⁴¹³ Although an unmarried couple could make private arrangements and then apply to the court for an adoption order.

single lesbian woman may adopt a child of either sex; a gay male may only adopt a male child.⁴¹⁴

- 351 In principle we believe the issue of same-sex adopters should be determined by the interests of the child. It is important that the interests of children are not confused with the separate question of how the law should view same-sex relationships, on which the Commission's views are to be found in its study paper *Recognising Same-Sex Relationships*.⁴¹⁵
- 352 An issue on which New Zealanders' opinion is divided is whether it can ever be in the interests of a child to be adopted by applicants in a same-sex relationship. Most research regarding the experiences of children raised by homosexual parents has examined the experiences of children raised by lesbian mothers. The evidence suggests that on the whole, children do not experience any negative consequences as a result of being raised by lesbian mothers.⁴¹⁶
- 353 Very little research has been published regarding the experiences of children brought up by gay men. To date there have not been

⁴¹⁴ Unless there are special circumstances that would justify him adopting a female child, see section 4(2) Adoption Act.

⁴¹⁵ Law Commission *Recognising Same-Sex Relationships: NZLC SP4* (Wellington, 1999).

⁴¹⁶ See S Golombok and F Tasker "Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study of Lesbian Families" (1996) 32 *Developmental Psychology* 3; R Green, J Mandel, J Grey and L Smith "Lesbian Mothers and Their Children: A Comparison with Solo-Parent Heterosexual Mothers and Their Children" (1986) 15 *Archives of Sexual Behaviour* 167; S Golombok, A Spencer and M Rutter "Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal" (1983) 24 *Journal of Child Psychology and Psychiatry* 551; F Tasker and S Golombok "Children Raised by Lesbian Mothers: The Empirical Evidence" [1991] *Family Law* 184; M Gold, E Perrin, D Futterman and S Friedman "Children of Gay or Lesbian Parents" (1994) 15 *Pediatrics in Review* 354; F Tasker and S Golombok *Growing Up in a Lesbian Family: Effects on Child Development* (The Guilford Press, New York, 1997); CJ Patterson "Children of Gay and Lesbian Parents" (1992) 63 *Child Development* 1025; M Kirkpatrick, A Smith and R Roy "Lesbian Mothers and Their Children: A Comparative Study" (1981) 51 *American Journal of Orthopsychiatry* 545; M Kirkpatrick "Clinical Implications of Lesbian Mother Studies" (1987) 14 *Journal of Homosexuality* 210; F Tasker and S Golombok "The Role of Co-Mothers in Planned Lesbian-Led Families" (1998) 2 *Journal of Lesbian Studies* 49. For a summary of this research see Law Commission, above n 2, paragraphs 189–197.

sufficient studies to effectively evaluate the impact of male homosexual parenting on adopted children.⁴¹⁷

- 354 This distinction could be an important one. CYFS is concerned that adoption by same-sex couples adds yet another layer of difference for an adopted child to cope with. Adopted children already have to deal with a number of adoption-related issues. Is it really fair to add two mothers or fathers to the equation?
- 355 On the other hand, most birth parents are involved in choosing the adoptive parents of their child. If their choice is to have the child adopted by homosexual parents, and those people have been screened and assessed as suitable applicants to adopt that child by competent social workers, should the State intervene?
- 356 Another consideration is the information that would be recorded on birth certificates in such cases. The Department of Internal Affairs has expressed concern that adoptions may not be recognised overseas if two women or men are named as parents on a birth certificate. This is yet another factor that a judge should bear in mind when deciding whether to make an adoption order in respect of a same-sex couple.

Submissions

- 357 This issue attracted the second-largest response out of all the questions asked in the discussion paper.⁴¹⁸ The majority of those that supported adoption by same-sex couples considered the question as just one amongst a number of other adoption issues. Forty-six submitters agreed that applications to adopt a child by same-sex couples should be permitted and twenty-eight objected.

Recommendations

- 358 The view of the Commission is that:
- there is not sufficient evidence to establish that adoption by same-sex adopters cannot be in the best interests of the child so

⁴¹⁷ For a small study see J Bailey, D Bobrow, M Wolfe and S Mikach “Sexual Orientation of Adult Sons of Gay fathers” (1995) 31 *Developmental Psychology* 124.

⁴¹⁸ The largest response was to the question of whether adoption should continue to exist.

as to justify disqualifying same-sex couples from being eligible to apply;⁴¹⁹

- there is however no “right” of a same-sex couple to secure an adoption order⁴²⁰ – the relevant right is that of the child to the best arrangement that can be secured; and
- the question of the suitability of the adoptive parents should be determined by the Family Court, which will have the benefit of a social worker’s report focussing on the benefits and disadvantages of an order in each case.

359 The Commission’s view as to whether same-sex couples should be permitted to adopt is that, rather than create a blanket prohibition, the applicants should be assessed on their merits. The way in which the couple intends to involve opposite gender role models in the life of the child is a matter requiring investigation by the social worker.

360 It is in our view desirable that Parliament make plain that applications for adoption orders by same-sex couples should be judged by the essential question as to what is in the child’s best interests as a matter of *fact*, rather than by making assumptions as to eligibility of the applicants as a matter of *law*.

We recommend that there be no prohibition against applications by same-sex couples to adopt a child.

General recommendation

361 The legislation should make it clear that eligibility to adopt a child is not restricted to married heterosexual couples. There are two methods by which the legislation might express this principle.

362 One approach would be to substitute the term “partner” for “spouse” which is used in the current Adoption Act. The word “partner” would be defined in the following manner:⁴²¹

⁴¹⁹ Several submitters referred the Commission to an article by Professor Lynn Wardle, Brigham Young University (Utah, USA) entitled “The Potential Impact of Homosexual Parenting on Children” [1997] University of Illinois Law Review 833, and challenged the research upon which the Commission has relied. Upon further examination, the article proved to be based upon a flawed analysis and misinterpretation of the relevant literature and an obvious bias against homosexuality. For an effective critique of Wardle’s argument see C Ball and J Pea “Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents” [1998] University of Illinois Law Review 253.

⁴²⁰ Just as no other person has this “right”.

⁴²¹ This definition is used in the Domestic Violence Act 1995.

“Partner” means any other person (whether the same or the opposite gender) with whom the person lives in a relationship in the nature of marriage (although those persons are not, or were not, or are not or were not able to be, legally married to each other).

The word “partner” has become increasingly common in recent years and has the advantage that, so defined, it encompasses couples in married and unmarried heterosexual and homosexual relationships in the nature of marriage.

- 363 One of the Commissioners expressed the view that some married couples might take offence at being referred to as partners rather than spouses. An alternative means of expression would be for the Act to use both “spouse” and “partner”. “Spouse” would be defined as “any other person to whom the person is legally married”.
- 364 The section of the Act that sets out who is eligible to adopt will then refer to “two partners jointly” as well as “two spouses jointly”.⁴²²

We recommend that the terminology of a new Act make it clear that *de facto* (including same-sex) couples may adopt.

STEP-PARENT OR DE FACTO STEP-PARENT ADOPTION

Background

- 365 Step-parent and intra-family adoptions represent the majority of adoptions made today. Concern has been expressed that step-parent adoption is often used, perhaps inappropriately, to sever the relationship between the child and a non-custodial parent. An English judge has observed:⁴²³

It is quite wrong to use adoption law to extinguish the relationship between the protesting father and the child, unless there is some really serious factor which justifies the use of the statutory guillotine. The courts should not encourage the idea that after divorce the children of the family can be reshuffled and dealt out like a pack of cards in a second rubber of bridge. Often a parent who has remarried and has custody of the children from the first family is eager to achieve just that result, but such parents, often faced with very grave practical problems, are frequently blind to the real long-term interests of their children.

⁴²² See section 3(2) Adoption Act.

⁴²³ *Re B (a minor)* [1975] Fam 127, 143 per Cumming-Bruce J (CA).

- 366 A recent step-parent adoption case demonstrates the improper motivations that may be at work.⁴²⁴ An adoption order was made in favour of the natural mother and stepfather of a seven-year-old child in an application that was clearly motivated to avoid the birth father's child support obligations.⁴²⁵ The social worker noted that the child had adjusted well to her family situation and questioned whether an adoption order was warranted. Although counsel assisting the court submitted that the adoption should proceed, he was "of the view that it was imperative for contact between the child and her birth father to continue."⁴²⁶
- 367 Although the day-to-day social arrangements were unlikely to change in this case as a result of the adoption order and the parties expressed an intention to have an "open adoption arrangement", the birth father would have no legal right to enforce access to his child, and the child's legal relationship to one side of her family was severed by the making of the adoption order.
- 368 Family law generally favours maintaining links between children, their parents and extended family networks. Once an adoption has taken place, the existing parents of the child cease in law to be the child's parents and in the absence of guardianship, the court has no jurisdiction to award or enforce access. Step-parent adoption leaves the natural parent without any legal rights of custody or access. Although extended family members do not have any right to seek access, in practice many extended family members (such as grandparents, aunts, uncles, cousins) do have contact with the child. If a parent's rights of contact are stripped away by adoption, there is no guarantee that the child can continue to enjoy access to, or contact with, wider family members.
- 369 The Adoption Act does not require a social worker's report to be presented to the court in the case of a step-parent adoption, although a practice note issued by the Principal Family Court Judge requires a report to be sought in all adoption applications.⁴²⁷
- 370 A number of step-parent adoption applications have been dismissed, accompanied by an observation from the judge that guardianship is

⁴²⁴ *Adoption application by R* [1999] NZFLR 961 (FC).

⁴²⁵ Above n 424, 962, 963, 965.

⁴²⁶ Above n 424, 962.

⁴²⁷ Principal Family Court Judge Mahony *Family Court Benchbook* (1998) 12.

a more suitable option.⁴²⁸ *Butterworths Family Law in New Zealand* notes that:⁴²⁹

The most accurate expression of the legal reality of a step-parent family would be guardianship It is generally healthier to help the child to accept that he or she is a member of a reconstituted family and has two “fathers” (or “mothers”) rather than to conceal the truth, or to encourage the child to feel uncomfortable or ashamed about those facts, which is what resorting to adoption can do.

In many step-parent adoption cases, it is unclear how adoption can be said to promote the welfare and interests of the child. The step-parent is unlikely to suddenly refuse to act as a parent to the child if the order is not granted.

Submissions

- 371 Thirty-one submitters stated that there should be a presumption that a step-parent may only adopt where this is clearly preferable to being appointed an additional guardian. One submitter rejected this approach.

Recommendations

- 372 A consequence of our recommendation to reformulate the legal effects of adoption may be that some of the problems relating to step-parent adoption will be reduced – the existence and identity of birth parents will not be obscured,⁴³⁰ and plans may be made that anticipate ongoing contact.⁴³¹
- 373 We believe, however, that it is still necessary to impose a high threshold upon eligibility for step-parent adoption, for the reasons set out by Cumming-Bruce J. The court should not encourage the reshuffling and dealing out of a “new” family. Rather, the emphasis should be upon people coming to terms with the reality of their family situation.

⁴²⁸ See for example *Adoption Application by T* [1999] NZFLR 300 (FC); see *Re an Application by T* [1998] NZFLR 769 (HC); *Application to adopt M* [1993] NZFLR 744 (DC).

⁴²⁹ Webb et al *Butterworths Family Law in New Zealand* (8 ed, Wellington, 1997) 1186.

⁴³⁰ See the discussion of access to adoption information at chapter 16, particularly the proposals regarding birth certificates.

⁴³¹ See the discussion of adoption orders at chapter 15.

374 The New South Wales Adoption Bill requires step-parents of family members to have lived with the child and the child's parent for a period of not less than three years before applying to adopt the child.⁴³² We suggest that, unless there are special circumstances, a similar requirement might be appropriate.

375 As outlined in chapter 5, adoption is one of a range of care options for children and all options should be canvassed when considering making an adoption order. In the case of many step-parent adoptions, enduring guardianship may be more appropriate than adoption or guardianship in its current form. The law should be cautious about severing the birth parent–child relationship.

We recommend that in the case of step-parent adoption the judge must consider:

- the degree of contact that a child has with the other birth parent and that birth parent's extended family, and the effect that granting the adoption order might have on these relationships and degree of contact;
- whether enduring guardianship or guardianship would be a more appropriate option than adoption to regulate the status of the child in relation to a step-parent; and
- whether the step-parent has lived with the child for not less than three years preceding the adoption application.

We recommend that in all step-parent adoptions a social worker's report should be called for.

Birth parent supporting spouse or partner's application to adopt

376 Take the following hypothetical situation:

Anna and Brian are Clara's birth parents. Brian is not a guardian and has never been involved in Clara's life. Anna and Donald married when Clara was 14 months old and Donald is to all intents and purposes Clara's father. Donald applies to adopt Clara so that both he and Anna will be her legal parents.

377 At present both Donald and Anna would have to apply to adopt Clara, even though Anna is Clara's natural and legal mother. The resulting adoption order will make Donald and Anna Clara's

⁴³² Clause 30 Adoption Bill 2000, see paragraph 12 above.

parents, but will have the effect of terminating Anna’s existing legal relationship with her daughter and replacing it with an adoptive parent–child relationship.

- 378 We consider this unnecessary, as did the other 21 submitters who commented on this point. Where the partner of a parent wishes to adopt that parent’s child, the parent should not also have to adopt their own child. It should be sufficient that the parent consents to and supports the application of his or her partner.⁴³³

A parent whose spouse or partner is applying to adopt that parent’s child must consent to and support the spouse or partner’s application, but need not personally apply for an adoption order.

INTRA-FAMILY ADOPTION OR CARE

Consultation and placement

Background

- 379 Article 3 of the UN Declaration on Child Placement provides that “[t]he first priority for a child is to be cared for by his or her own parents.” Failing that option, Article 4 provides:

When care by the child’s own parents is unavailable or inappropriate, care by relatives of the child’s parents, by another substitute – foster or adoptive – family or, if necessary, by an appropriate institution should be considered.

- 380 The CYP&F Act operates on the principle that wherever possible, care and protection issues of children and young persons should be resolved by their own family, whānau, hapū, iwi and family groups.⁴³⁴

⁴³³ However, notifications of adoptions to the Registry of Births, Deaths and Marriages should include reference to the natural parent and the adopting step-parent for recording on the new birth certificate.

⁴³⁴ Sections 2, 4 and 5 CYP&F Act. A “family group” is defined in section 2 of the CYP&F Act as “including an extended family,—

(a) In which there is at least 1 adult member—

(i) With whom the child or young person has a biological or legal relationship; or

(ii) To whom the child or young person has a significant psychological attachment, or

(b) That is the child’s or young person’s whanau or other culturally recognised family group.”

In contrast, the Adoption Act does not provide for family members to become involved in deciding whether a child should be placed in another home or adopted.⁴³⁵

- 381 This lack of emphasis upon family involvement is yet another disjunction between the Adoption Act and other family-centred legislation, and is inconsistent with New Zealand's international obligations.⁴³⁶

Submissions

- 382 The discussion paper asked whether there should be a requirement that the social worker investigate the possibility that the child be cared for within the family group before adoption to non-related persons is considered. Forty-two submitters responded to this question in the affirmative, while five opposed the suggestion. A further twenty-nine agreed that the Family Court judge should be required to inquire whether family placement has been considered.

Recommendations

- 383 It is our opinion that there should be a legislative requirement to consider intra-family care. If a family is plainly unsuitable, a cursory consideration might be all that is needed, but in many cases the requirement to consider this option will emphasise how important the family is and may uncover opportunities for the child that previously may not have been considered.
- 384 A number of the submitters who disagreed with this proposal suggested that this should just be a matter of good social work practice, and that it does not need to be enshrined in legislation. In our view, expressing the requirement in legislation serves to emphasise its importance, and decreases the risk that a social worker may overlook family care as a legitimate care option for the child.

We recommend that the Care of Children Act require a social worker to investigate the possibility of care within the family group before adoption to non-related persons is considered.

We recommend that the Care of Children Act require the Family Court judge to inquire whether placement within the family group has been considered.

⁴³⁵ This does not mean that family members cannot be so involved.

⁴³⁶ See *Re SDJ (adoption application)* [2000] NZFLR 193 (HC) for comment as to the importance of New Zealand's international obligations.

Guardianship or adoption?

Background

385 If permanent care by a family member is recommended, consideration must be given to whether that care should be formalised by way of a guardianship or adoption order. Adoption within the family has been criticised for the resulting genealogical distortions⁴³⁷ and the potential hurt and conflict that may eventuate if the fact and nature of the adoption is not disclosed to the child.

Submissions

386 Twenty-six submitters suggested that there should be a presumption that guardianship or custody, rather than adoption, should be used to regulate the care of children by family members. Four objected to this proposition.

Recommendations

387 This creates many of the same issues that arise when considering step-parent adoption, and the policy options are similar. We believe that in the majority of cases of intra-family care, enduring guardianship or guardianship is preferable to adoption. It is in the best interests of the child that the child's biological "fit" within the family is openly acknowledged rather than distorted. Furthermore, we consider it desirable that the applicants are able to show an established relationship with the child, for example by requiring the applicants to have lived with the child for a three-year period preceding the application.

We recommend enacting a section that requires a judge to consider:

- the genealogical distortion that will result from the adoption order and the effect that might have on the child and other family members; and
 - whether enduring guardianship or guardianship would be a more appropriate option than adoption to regulate the care of the child by family members.
-

⁴³⁷ For example, if a child is adopted by her mother's parents, in law her grandparents become her parents and her mother becomes her sister.

A PARENT ALONE

Background

- 388 The Adoption Act allows a single parent to adopt his or her own child.⁴³⁸ In the 1950s and early 1960s this was a mechanism by which a parent could legitimise an illegitimate child.⁴³⁹ Since the Status of Children Act removed the legal stigma of illegitimacy, the only purpose such an adoption could serve is to be used as a mechanism to sever legal ties to one side of the child's family.

Submissions

- 389 We were unable to ascertain whether there have been any recent cases of a single parent adopting his or her own child – CYFS would not be involved in these cases, and court records are sealed.
- 390 The discussion paper asked whether this provision should be removed from the Adoption Act. Thirty submitters supported this suggestion, many commenting that such a provision was absurd.

We recommend that natural parents should not be eligible to adopt their own children.

⁴³⁸ Section 4(1)(c).

⁴³⁹ Section 16(1)(a) of the Adoption Act deems that the adopted child is the child of the adoptive parent, as if the child had been born to that parent in lawful wedlock.

14

Consent to an adoption application

PROCEDURAL ISSUES AND CONSENT

Information and counselling prior to consent

- 391 **T**HE ADOPTION ACT does not require parents giving up a child for adoption to undergo counselling before decisions are made or to seek independent legal advice. This heightens the risk of a birth parent regretting the decision and may also lead to a birth parent attempting to contest the adoption application. We recommended in chapter 9 that it should be mandatory for a birth parent to receive counselling before consenting to the adoption of his or her child. We also recommended that regulations made under the legislation to explain the effect of adoption should be set out in plain English, translated into a number of different languages, and include reference to the legal and social effects of adoption.
- 392 We recommended that a consent taken without following these procedures should be invalid. To give practical effect, we recommended that the counsellor should provide certification that such counselling has taken place.

Independent legal advice

- 393 The Adoption Act does not require that a birth parent receive independent legal advice prior to giving consent to an adoption. Witnessing consent is purely a statutory function exercised by an officer of the court.⁴⁴⁰

⁴⁴⁰ Section 7(8) specifies that a consent can be witnessed by a District Court judge, Registrar of the District Court or High Court, a solicitor, a judge, Commissioner or Registrar of the Māori Land Court. If consent is given in the Cook Islands or Niue, it may be registered by the New Zealand representative, a judge, Registrar, Deputy Registrar or Solicitor of the High Court of Niue or the Cook Islands. If consent is given elsewhere, it is admissible if witnessed and sealed by a Notary Public or Commonwealth representative.

- 394 Many of the significant legal decisions that a person makes during his or her lifetime require independent legal advice – for example, entering into a prenuptial matrimonial property agreement.⁴⁴¹ It is unacceptable that parents can sign away their legal relationship to their children and the right to care for them without receiving such advice.⁴⁴²
- 395 New legislation should require that a birth parent receive independent legal advice (preferably from a practitioner who specialises in family law) before a consent is signed. Consent should be witnessed by that independent barrister or solicitor.
- 396 Imposing a requirement for independent legal advice could pose financial difficulties for some birth parents. We would not like to see the prospective adoptive parents paying for the birth parent’s lawyer, as this creates a potential conflict of interest. There are indications that this is currently occurring. We recommend therefore that the provision of independent legal advice and witnessing of the consent be covered by a fixed charge on the legal aid fund if the birth parents are unable to pay.

We recommend that a birth parent must receive independent legal advice before signing a consent to adoption.

We recommend that there be a set charge on the legal aid fund for the giving of independent legal advice regarding adoption to a birth parent and the witnessing of a birth parent’s consent to adoption.

⁴⁴¹ Section 21(5) Matrimonial Property Act 1976.

⁴⁴² Although signing an adoption consent does not change the legal relationship between a birth parent and child, signing the consent sets in motion a chain of events that will eventually change the legal relationships. Once a consent is signed, it is almost impossible to stop these events occurring – see discussion below at paragraphs 420–428.

CONSENT OF THE BIRTH PARENTS

Mother's consent

Background

- 397 The Adoption Act provides that a natural mother cannot give consent to the adoption of her child unless the child is at least 10 days old. Parliamentary debates indicate that this period was chosen to ensure that consent was obtained before the birth mother left the hospital and “disappeared”.⁴⁴³
- 398 The original adoption Bill provided that a birth mother's consent could not be obtained until at least 28 days after the birth of the child. Some other jurisdictions will not allow a consent to be obtained until a child is two months old.⁴⁴⁴ Jurisdictions that allow consents to be taken within a shorter amount of time usually allow a period in which consent can be withdrawn.⁴⁴⁵

⁴⁴³ (26 October 1955) 307 NZPD 3349 per Hon J Marshall.

⁴⁴⁴ *United Kingdom*. Section 18 of the Adoption Act 1976 (UK) and section 17(4) of the Adoption (Northern Ireland) Order 1987 provide that consent is invalid if given within 6 weeks of the birth of the child. *Norway*. A parent cannot give consent within 2 months of the birth of the child (section 7 Adoption Act 1986). *Canada*. Nova Scotia: Consent will not be effective if given less than 15 days after the birth of the child (section 74(4) Children and Family Services Act 1990); British Columbia: Consent can only be given 10 days after the birth of the child (section 14 Adoption Act 1996). *Australia*. Victoria: Consent can be given after 14 days, or less if the Court deems it in the best interests of the child (section 42(2) and (3) Adoption Act 1984); Western Australia: Consent is not effective unless it is given 28 days after the child is born (section 18(1) Adoption Act 1994); New South Wales: No adoption order can be made if consent was signed by the mother on or within 3 days of birth unless it is proved that the mother was in a fit condition to give consent (section 31(3) Adoption of Children Act 1965); South Australia: Consent is invalid unless given 5 days after the birth of the child. Between 5 and 14 days after the birth of the child, consent will be recognised if supporting evidence is provided (section 15(2) and (3) Adoption Act 1988); Australian Capital Territory: The general rule is that consent will be invalid if given within 7 days of the birth unless there are circumstances that justify treating the consent as valid (section 34 Adoption Act 1993); Northern Territory: Consent is invalid if given within one month of the birth unless there are circumstances that justify treating the consent as valid.

⁴⁴⁵ For example, section 28 of the New South Wales Adoption of Children Act 1965 allows a consent to be revoked within 30 days after it is given.

Submissions

- 399 The Department of Child, Youth and Family Services stated in their submission:⁴⁴⁶

As the Commission has documented, the ten-day consent period without revocation currently utilised in the Adoption Act has proved to be insufficient time for a birthparent to weigh up the impact of their decision. It is suggested consent could be made after the child was 28 days old in order that the birthparents were able to be sure they have made the right decision. The Department would wish the option of an earlier consent able to be signed to the CEO of Child Youth and Family for exceptional circumstances, e.g. instances of rape, retained.

- 400 Mary Iwanek of AISU has informed the Commission that approximately two-thirds of women who approach AISU whilst pregnant decide not to give up their child for adoption after the child is born.⁴⁴⁷

- 401 Adoption Counselling and Education Services submitted:

From our experience it is impossible for first time mothers to appreciate the enormity of their decision of parental placement when they have not had the experience of giving birth before and are unable to attach meaning to the separation from their infant . . .

. . . we consider that a much longer period such as 6 weeks would enable time for the mother to care for her baby should she wish, or to visit or be separated from the infant and to begin to make sense of her emotional responses to her current situation.

- 402 Across all submissions received, 46 were in favour of the minimum consent period being extended while 22 were opposed. One month was the mean time period proposed.

- 403 Generally submissions favoured birth mother/family care, foster care or hospital care over the child being placed with the adoptive family before consent was given. If the child was placed with the proposed adoptive family, submissions noted that it should be emphasised to adoptive parents that consent might not be given, or that they might not be the adoptive parents finally decided upon. CYFS has suggested that the current practice of using the 28-day temporary care agreement in the CYP&F Act to regulate interim care could be continued.

⁴⁴⁶ Submission, CYFS, 3 March 2000, 24.

⁴⁴⁷ Adoption symposium with Family Court judges, 17–18 February 2000.

Recommendation

- 404 Taking precautions to ensure that the birth mother's decision is the correct one for her promotes the best interests of the child. If the birth mother regrets her decision and attempts to revoke her consent or challenge the adoption order, the prospective adoptive parents will feel less secure in their ability to parent the child or may even lose custody. This causes considerable disruption for the child.
- 405 We expressed concern in the discussion paper that a longer consent period might interfere with the child's ability to bond with the adoptive parents, and referred to research by John Bowlby into separation anxiety. Bowlby's research suggests that separation anxiety becomes apparent in a child after about seven months of age. He observed that younger infants:⁴⁴⁸

tended to respond to mother and observers without showing marked discrimination between them. Similarly, when mother departed, whereas older infants cried loudly and for a long time, even desperately, the younger ones showed no signs of protest.

Bowlby also observed that:⁴⁴⁹

How the responses of infants of under seven months are best understood, and what their significance for an infant's future development may be, is difficult to know.

It is plain . . . that the responses of these younger infants are different at every phase from those of the older ones, and that it is only after about seven months of age that the patterns that are the subject of this work are seen.

Bowlby's work is considered to represent the "cornerstone" of separation and attachment theory, even some 30 years after publication.⁴⁵⁰

- 406 It is clear that extending the minimum period for consent to 28 days would not cause any discernible problems for the child, if the transitions between placements are handled with care and sensitivity.⁴⁵¹ We emphasise that this period is a minimum only – birth parents may take longer to decide. We believe, however, that

⁴⁴⁸ J Bowlby *Attachment and Loss: Volume 2: Separation: Anxiety and Anger* (Penguin Books, London, originally published 1973; reprint 1991) 76.

⁴⁴⁹ Bowlby, above n 448, 77.

⁴⁵⁰ Jan Pryor, School of Psychology, Faculty of Science, Victoria University of Wellington, phone conversation with the Law Commission, 21 March 2000.

⁴⁵¹ See D Krugman "Working with separation" (1971) 50 *Child Welfare* 528.

it is the minimum period required for a parent to properly consider the implications of adoption. This in turn serves the best interests of the child.

We recommend that the consent of a birth parent to the adoption of the child be valid only if it is given at least 28 days after the birth of the child.

Father's consent

Background

407 The consent of the biological father to his child's adoption is required only if:

- he was married to the mother of the child at the time of the child's birth or after the time of conception;⁴⁵² or
- he was living with the mother in the nature of marriage at the time the child was born.⁴⁵³

In all other cases, the consent of the father will be required only if the consent is considered to be "expedient".

408 The Commission considers that the expediency test is inadequate. The non-guardian father (and his family) may well desire to play a role in his child's life and vice versa. Just as it is important for children to know their maternal heritage, so is it important for them to be aware of their heritage on the father's side of the family. Although the non-guardian father does not have any rights to make guardianship or custodial decisions in respect of the child, it should not be presumed that he does not have anything of value to offer the child.

Submissions

409 The discussion paper asked what status should be given to a non-guardian birth father's objection to an adoption order, and offered a number of possible options for reform, the response to which we summarise in Table 2.

⁴⁵² Section 7(2) and 7(3)(a) and (b) Adoption Act.

⁴⁵³ Section 7(2) and (3) Adoption Act and section 6(2) Guardianship Act.

TABLE 2: RESPONSE TO PROPOSED OPTIONS FOR REFORM

Proposed option	No of submitters in support	No of submitters against
Birth father can object to adoption by strangers	10	1
Birth father can object only where he or his family wish to raise the child	18	2
Birth father can object only to placement decision	4	3
Retain the status quo	8	6

410 However, 34 submitters favoured a legislative requirement that social workers make reasonable efforts to identify and locate the putative father. One submitter commented that these efforts should be as strenuous as those used by the Inland Revenue Department to track down fathers for child support liability. Only three submitters opposed this proposal. Fifteen submitters supported an exception to this in the case of rape, incest or domestic violence (seven opposed, some stating that a child has a right to know, whatever the circumstances).

411 There was minimal support for requiring the birth mother to identify or locate the birth father.

Recommendations

412 Article 8(1) of UNCROC requires States to “respect the right of the child to preserve his or her identity, including nationality, name and family relations . . .”. Part of a child’s identity will be knowledge of his or her father. We expressed concern in the discussion paper that a non-guardian father could be unaware of his child’s existence, let alone the prospect of the child’s adoption. We believe that there is a role for social workers to encourage birth mothers to disclose the name of the child’s father, so that the father can take part in making decisions regarding the child’s future if he so desires.

We recommend a legislative requirement that a social worker make reasonable efforts to identify and locate the putative father.

413 We believe it is in the best interests of the child that both birth parents take an active part in deciding whether or not to proceed with an adoption, where at all possible. This is necessary if all

possible intra-family placements are to be explored before adoption to strangers is considered.

- 414 We consider that, as far as practicable, the consent of a birth father to his child's adoption should be required, regardless of whether he is a guardian. However, the regime should not be made so restrictive that the difficult cases such as a pregnancy following a rape are encompassed by the proposed requirements. We consider that the existing provisions for dispensing with a birth parent's consent will be sufficient to provide for situations where the child was conceived as a result of rape, where the birth father's refusal to give consent for the adoption is vexatious, or where he is not proposing any suitable alternative parenting arrangements. Specific provision is needed for cases where reasonable effort by a social worker to identify and locate a birth father have failed. We discuss these issues in more detail at paragraphs 429–437.

We recommend that, save where dispensed with, the consent of both parents should be required in all cases, even where the birth father is not a guardian of the child.

The effect of a valid consent

Background

- 415 Consent is a necessary prerequisite to the adoption order, yet the legislation does not set out the legal effects of a valid consent. The discussion paper observed that a situation can arise where the intending adopters fail to complete the adoption process, the birth parents will remain the legal parents of the child:⁴⁵⁴

As birth parents are not notified when an adoption order is made, they may not be aware that the proposed adoption has not in fact occurred. In such circumstances the present legislation leaves doubt as to the status of the birth parents' legal relationship to the child.

- 416 The legislation does not state whether a consent remains valid if an interim or final adoption order is not made, or if an interim order lapses before a final adoption order is made. The discussion paper suggested that consent could last for a finite period, in order to clarify the legal situation and to encourage a prompt determination of the child's legal status.

⁴⁵⁴ Law Commission, above n 2, paragraph 233.

Submissions

- 417 The discussion paper asked whether new legislation should set out the status of the parties once a valid consent has been given. Thirty-one submitters favoured such clarification, while one opposed it. The same proportions of submitters favoured and opposed the proposal that the court be required to notify the birth parents when an adoption order has been made.
- 418 Thirty-two submitters supported the Commission's proposal that parental consent should expire after a defined period if an application for an order has not commenced or an order has not been made by the court.

Policy options

- 419 Parliament should take the opportunity to clarify the status of all the parties once a formal consent to the adoption has been given by the birth parents. We consider that a provision that a consent will lapse if action is not taken by the prospective adoptive parents will encourage parties to apply to the court expeditiously to determine the status of the child.

We recommend that the legislation state that once a valid consent has been signed:

- birth parents are still guardians but are no longer entitled to custody of the child;
- adoptive parents are entitled to custody and temporary guardianship of the child.

We recommend that a consent should lapse if:

- an application for an adoption order is not made within two months of signing;
- an application for a final adoption order has not been made within six months of the granting of an interim adoption order;⁴⁵⁵
- an adoption order is not granted.

We recommend that if a consent lapses, the social worker should (with the agreement of the birth mother) be required to convene a family or whānau mediation with birth parents and the prospective adoptive parents (and other family members if that is appropriate) to consider the child's future placement options.

⁴⁵⁵ Where the court has decided to make an interim order first, rather than a final order in the first instance. See paragraphs 453–454 for a discussion of our proposals regarding interim and final orders.

Revocation of consent

Background

- 420 The Adoption Act provides for withdrawal of consent only in exceptional circumstances. A consent to adoption by a specified person⁴⁵⁶ (other than the Director-General of Social Welfare) cannot be withdrawn until the proposed adoptive parents have been given an opportunity to apply to adopt the child or while an application is pending.⁴⁵⁷ Once an application is set in motion, it appears that a birth parent has no standing to oppose the application.
- 421 The effect of section 9 is that it is virtually impossible to withdraw a valid consent to an adoption. A number of other countries provide quite extensive periods for revocation of consent – for example, most Australian States provide approximately 30 days.⁴⁵⁸
- 422 Where the Director-General has been appointed as guardian under section 7(4) of the Adoption Act and consent has been given, consent to the adoption may be withdrawn at any time if neither an interim nor final order has been made.

Submissions

- 423 The discussion paper asked whether the entitlement to revoke consent should be extended to all adoptions. Thirty-four submitters favoured a revocation period, while twenty-three opposed it.

⁴⁵⁶ This is by far the majority of consents in New Zealand.

⁴⁵⁷ Section 9(1) Adoption Act.

⁴⁵⁸ Victoria: Consent can be revoked within 28 days (or 56 days in certain circumstances) of the signing of consent (section 41 Adoption Act 1984); Western Australia: Consent can be revoked up to 28 days after consent has been given (section 22 Adoption Act 1994); New South Wales: Consent may be revoked up to 30 days after the original consent was signed, or up until the day on which the adoption order is made, whichever event is the earlier (section 28 Adoption of Children Act 1965); South Australia: A parent may revoke consent up to 25 days (or 39 days with the approval of the Chief Executive of the Department for Family and Community Services) after the original consent was signed (section 15(6) Adoption Act 1984); ACT: Consent may be withdrawn within 30 days (or 44 days if notice has been given to the Registrar of the Court) of the consent being signed (section 31 Adoption Act 1993); Northern Territory: Consent may be revoked within one month of the consent being signed (section 33 Adoption of Children Act 1955).

424 CYFS submitted that if the period for giving consent were extended, and there was an emphasis upon counselling and ensuring a good decision is made in the first instance, there is little need for a revocation period:

Australian States have chosen a few days for consent followed by a longer period of revocation. This approach is not favoured as it adds stress to the birthmother considering revocation if the child is already in the adoptive home and her initial consent decision is made in the traumatic immediate post birth state.

Recommendation

425 We believe that the best interests of the child are best promoted by the making of a considered decision in the first instance,⁴⁵⁹ rather than allowing a period for the birth parents to change their mind at a later stage. Disruption once a placement has been made is undesirable and should occur only in limited circumstances.

Consent obtained by fraud or duress

426 Where the consent of a birth parent is obtained by fraud or duress⁴⁶⁰ this would provide grounds for the birth parent to apply to the court to revoke that consent. The court should be wary of making an interim or final order where it is claimed before such order is made that consent has been obtained by fraud or duress. Such issues should be resolved before the adoption application proceeds.

427 Regulations should provide a plain English explanation that consent can only be revoked where consent was obtained by reason of fraud or duress and a court has allowed consent to be revoked. In light of our recommendation that consent will expire if an application to adopt is not made within two months of consent being given, there is no need for a provision enabling revocation of consent where prospective adoptive parents have been given an opportunity to apply for an adoption order but have not done so.

428 Regulations should also set out a form to effect or apply for revocation of consent in these circumstances. This information should be given at counselling and before consent is signed.

⁴⁵⁹ This will be better assured by requiring counselling after the birth of the child and by extending the period before which consent can be given to 28 days after the birth of the child.

⁴⁶⁰ See the discussion at paragraphs 462–465.

We recommend no extension of the current law relating to revocation of consent, provided that a longer consent period is enacted and provision is made to ensure the giving of informed consent.

We recommend allowing a birth parent to apply to revoke consent where the consent is obtained by fraud or duress.

Where it is claimed that the consent was obtained by fraud or duress, the court should resolve such matters before hearing the adoption application.

We recommend that regulations set out in plain English the circumstances in which consent can be withdrawn.

Dispensing with consent

Background

- 429 Where a parent is physically or mentally unable to care for a child and that disability is likely to continue for some time,⁴⁶¹ or where a parent has abandoned, neglected, persistently failed to maintain or persistently ill treated the child, or failed to discharge obligations as a parent or guardian of the child,⁴⁶² the court may dispense with that parent's consent to adoption.

Submissions

- 430 The Donald Beasley Institute made a detailed submission on this issue, arguing that the provision for dispensing with consent on the grounds of a physical or mental disability was inappropriate and discriminatory, and in breach of our international obligations. Article 2(1) of UNCROC provides:

State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's . . . disability . . . or any other status.

⁴⁶¹ Section 8(1)(b) Adoption Act.

⁴⁶² Section 8(1)(a) Adoption Act.

431 The Adoption Act is the only piece of family-related legislation with a statutory reference to parental disability. The Institute argues:⁴⁶³

Such a provision presumes something about the quality of parenting by people with disabilities and allows the State to assume jurisdiction over the child of a parent with an intellectual disability under circumstances that would not justify termination of the parental rights of a non-intellectually disabled parent.

Use of section 8(1)(b)

432 Section 8(1)(b) sets out the grounds for dispensing with consent relating to physical and mental incapacity. A search of reported and unreported cases⁴⁶⁴ reveals that it appears that section 8(1)(b) has never been used on its own to justify dispensing with a birth parent's consent. In all the cases involving mental incapacity of a parent, the court has found that grounds are made out under section 8(1)(a) as well as section 8(1)(b).

433 The essential issue is whether the child will receive adequate care. If there is incapacity, it is unnecessary to stipulate further detail. We consider that section 8(1)(a) provides an adequate basis upon which to dispense with the consent of a parent whose intellectual disability entails incapacity to care for a child. Section 8(1)(a) does not require culpability on the part of the birth parent. In cases where a birth parent is never going to be equipped to parent a child, that child may be removed from the parent's care as a care and protection issue under the CYP&F Act. The fact that a parent has been unable to exercise the normal duty and care of parenthood because such a care and protection order has been granted will not militate against an order to dispense with that parent's consent to the adoption.⁴⁶⁵

Recommendations

434 We recommend that new legislation refer simply to incapacity when setting out grounds for dispensing with the consent of a parent to adoption.

⁴⁶³ Submission 1/29.

⁴⁶⁴ Using LINX and BRIEFCASE databases.

⁴⁶⁵ See *Re Adoption of Y, J and T* (1996) 15 FRNZ 191 (FC); *Adoption application by C* [1995] NZFLR 795 (FC).

- 435 An alternative is to remove section 8(1)(b) and broaden section 8(1)(a) to include circumstances where there exists a present disability that is likely to be a continuing one which would mean that the parent is unable to exercise the normal duty and care of parenthood. This would require a medical assessment of the present capacity and likely future incapacity of the parent whose consent was being dispensed with.
- 436 In view of our recommendation in chapter 5 that the responsibilities and rights of parents be set out in a definition of parental responsibility, we also recommend that reference in this section to failure to discharge the obligations as a parent or guardian should be changed to failure to “discharge parental responsibility”.
- 437 A further amendment to this section will be required as a result of our proposals regarding the consent of birth fathers. The legislation should be clear that where a social worker has made reasonable attempt to ascertain the identity or location of the birth father, and that attempt has failed, the court may dispense with the birth father’s consent.

We recommend replacing the current section 8(1) with a section that states:

Where a parent has abandoned, neglected, persistently failed to maintain or persistently ill-treated the child, or is incapable of or has failed to discharge parental responsibility, the court may dispense with that parent’s consent to adoption.

We propose that an objective test of the child’s interests and whether they are being met, or can be met, by the parent should be applied.

We recommend that there be provision for the court to dispense with a birth father’s consent where a social worker has been unable to confirm his identity or location.

Formal role in placement

Background

- 438 The Adoption Act allows birth parents to give a consent to adoption subject to conditions regarding religious denomination and practice of the applicants. The discussion paper asked whether a

religious condition was appropriate; and whether cultural or other conditions should also be able to be imposed.

439 The experience of the religious condition has been that it is particularly difficult to monitor and enforce compliance by the adoptive parents. In 1987, the Department of Justice recommended that the provisions allowing the imposition of a religious condition be removed altogether.⁴⁶⁶

Recommendation

440 Imposing a “condition” upon consent allowed birth parents to have some influence over the qualities and characteristics of the adoptive parents. Current adoption practice encourages birth parents to be involved in selecting the adoptive parents themselves. They are given a selection of profiles of prospective adoptive parents⁴⁶⁷ from which they choose the applicants they would like to meet, and ultimately who they want to adopt their child.

441 It is our view that this process is far more appropriate than one allowing conditions to be imposed. Birth parents can choose adopters whose background and values they can relate to, and with whom they feel comfortable. Rather than imposing a condition which is very difficult to enforce, the legislation should encourage birth parents to be involved in the selection of adoptive parents. This could be achieved by placing a provision in the legislation that requires CYFS, where practicable, to facilitate the involvement of birth parents in choosing the adoptive placement for their child.

442 Furthermore, our proposal that an adoption plan be attached to each adoption order gives birth parents some input into the way in which they would like to see their child raised.⁴⁶⁸

We recommend that the Care of Children Act recognise that where practicable, CYFS should facilitate the involvement of birth parents in choosing the adoption placement for their child.

⁴⁶⁶ Department of Justice *Adoption Act 1955: A Review by an Interdepartmental Working Party: Proposals for Discussion* (Wellington, 1987) paragraph 4.36.

⁴⁶⁷ These are prepared by people wishing to adopt a child, as part of their preparation for adoption process.

⁴⁶⁸ See paragraphs 106–111.

CONSENT OF THE APPLICANTS

- 443 Applicants for an adoption order are deemed to have consented to the adoption.⁴⁶⁹ Where a husband or wife alone is adopting the child, that person's spouse must consent to the adoption of the child, unless the court is satisfied that the spouses are "living apart and that their separation is likely to be permanent".⁴⁷⁰ This provision is not problematic and should be retained.

CHILD'S CONSENT

Background

- 444 The Adoption Act does not require children to consent to their own adoption. While section 11(b) states that due consideration should be given to the wishes of the child, in many cases this provision has been ignored.⁴⁷¹ This breaches Article 12 of UNCROC, which provides:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

- 445 Only a minority of adoptions today involve babies going to adoptive parents who are strangers to the birth parents. Most are intra-family or step-parent adoptions, many involving slightly older children. In these cases there is a real need to determine the wishes of the children and to obtain their consent to the adoption.

Submissions

- 446 The discussion paper asked whether the consent of a child old enough to give consent to the adoption should be required. Forty-one submitters said yes, three no. Twenty-eight submitters were in

⁴⁶⁹ Section 7(10) Adoption Act.

⁴⁷⁰ Section 8(4) Adoption Act.

⁴⁷¹ See for example *Re E*, above n 75.

favour of the application of a general competency test to determine whether consent should be required, seven were in favour of a specific age limit. Twenty-five submitters believed that the consent should be revocable up until an adoption order is made.

Recommendation

447 The Commission has considered a number of options:

- a child's views relating to the adoption must be ascertained, where that child is capable of forming his or her own views, those views being given due weight in accordance with the child's age and maturity;⁴⁷²
- a child's consent to the adoption could be required, where the child is of sufficient age and maturity to form his or her own views; or
- a child's consent to the adoption could be required where the child is over a particular age (for example 8, 10, 12 etc).

448 Where "consent" from the child is required:

- consent could be revocable up until the making of a care of children order; or
- judicial notice should be taken of a child's change of mind.

449 We consider that it is undesirable to fix a "hard and fast" rule relating to the consent of children, although it is necessary to strengthen the current provisions. For this reason, we favour the first option in the list in paragraph 447 above.

We recommend that a child's views relating to his or her adoption must be ascertained, where that child is capable of forming his or her own views, those views being given due weight in accordance with the child's age and maturity.

⁴⁷² This is a stronger formulation of section 11(b) of the Adoption Act.

15

Adoption orders

COURT POWERS

Counsel for child

- 450 **U**NLIKE OTHER FAMILY LEGISLATION, the Adoption Act does not empower the Family Court to appoint counsel for the child to represent the child's interests in the court proceedings.⁴⁷³ In other cases, counsel for the child is paid out of government funds appropriated for this purpose and often from a contribution from the parties.
- 451 As a result of our discussions with representatives of the Family Court bench,⁴⁷⁴ we consider the court should appoint counsel for the child in adoption cases, unless to do so would fulfil no useful purpose.⁴⁷⁵ This would establish consistency across all applications under the proposed Care of Children Act.

We recommend that the court appoint counsel for the child in an application for an adoption order, unless to do so would fulfil no useful purpose.

Calling for reports

- 452 The discussion paper observed that the Family Court should be able to call for such evidence and information as it thinks necessary to discharge its duties responsibly.⁴⁷⁶ Although section 25 of the Adoption Act allows the court to receive such evidence as it sees fit,

⁴⁷³ Section 159 CYP&F Act, section 30 Guardianship Act.

⁴⁷⁴ Who all agreed that the court should be able to appoint counsel for child. Similarly, all submitters who responded to this question were supportive of this proposal.

⁴⁷⁵ Compare with section 30 Guardianship Act.

⁴⁷⁶ Law Commission, above n 2, paragraph 406.

it does not empower the court to commission reports.⁴⁷⁷ We recommend that the court be able to call for reports⁴⁷⁸ when making any type of order under the Care of Children Act.⁴⁷⁹ This would allow effect to be given to our earlier proposal that reports relating to the cultural considerations in an adoption be commissioned.

We recommend that the court be able to call for reports when making any type of order under the Care of Children Act

FINAL ORDER IN THE FIRST INSTANCE

453 At present, the court usually makes an interim adoption order in the first instance, followed by a final order six months later.⁴⁸⁰ In most cases the making of the final order is simply a formality. In some cases the adopters never obtain the final order, a situation that we regard as highly undesirable, as it leaves the legal status of the child unresolved. We believe that our proposals implement a better system of initial counselling, preparation and assessment, which should mean that it is unnecessary to retain the two-step process.

454 In the interests of affording the newly constituted family security, we recommend making the adoption order final in the first instance, unless the court considers that there are good reasons to make an interim order only. In the latter case, the parties would be required to apply for a final order within the time specified by the court, or risk the interim order and consent expiring.

We recommend that the court make a final adoption order in the first instance, unless there are good reasons to make an interim order only.

We recommend that where an interim order is made, parties be required to apply for a final order within six months, or the interim order and consent will expire.

⁴⁷⁷ The power to receive evidence and call for specialist reports is specifically provided for in sections 17, 49, 52, 56, 128 and 178 CYP&F Act and sections 28A, 29 and 29A Guardianship Act.

⁴⁷⁸ "Reports" would encompass medical, psychological, social work and cultural reports on any of the parties to the adoption.

⁴⁷⁹ This proposition received almost unanimous support from submitters.

⁴⁸⁰ Section 5 Adoption Act – note that under certain circumstances a final order may be made in the first instance.

DISCHARGING AN ADOPTION ORDER

- 455 To obtain the discharge of an adoption order, an application must be made to the court with the permission of the Attorney-General. The court can only discharge an adoption order where the order was made as a result of a mistake as to a material fact or by a material misrepresentation to the court or to any other person concerned.⁴⁸¹
- 456 Where no legal ground exists to discharge an adoption order, a person may seek to have the adoption discharged by a private Act of Parliament.⁴⁸²

Significant and irretrievable breakdown

- 457 One submitter wrote of the neglect and relentless abuse he suffered at the hands of his adoptive parents before they abandoned him five years after the adoption.⁴⁸³ He changed his name by deed poll as soon as he could, but he had to seek the permission of his adoptive parents to marry and chafed at the prospect of their inheriting from him in the event of his dying intestate. He has subsequently traced his natural family and is treated by them as a family member. In law and on his birth certificate, the people he regards as transient abusers and their family (whom he never knew) are deemed his family.
- 458 The general objection to allowing an adoption order to be discharged is that normal parents and children cannot “divorce” one another. This is a somewhat simplistic argument and ignores the fact that adoption does differ from natural parenthood, and that by consenting to an adoption, birth parents (or adoptive parents in the case of a subsequent adoption) are in effect divorcing themselves from their children. Furthermore, the court can remove a parent’s rights as a guardian.
- 459 We consider that the court should be given the discretion to discharge an adoption order in special circumstances (which would include abuse or neglect of the child by the adoptive parents). The Family Court could discharge an adoption order where:

⁴⁸¹ Section 20 Adoption Act.

⁴⁸² See Thomson Adoption Discharge Act 1958, Thomas Adoption Discharge Act 1961, Liddle Adoption Discharge Act 1963, Papa Adoption Discharge Act 1982.

⁴⁸³ Submission 1/71.

- the adopted person applying is an adult;⁴⁸⁴ and
- the adoptive relationship has undergone a significant and irretrievable breakdown.

460 The Family Court would then have to state the effect of the discharge, and would choose from two options:

- the adopted person becomes “parent-less” at law; or
- the adopted person becomes a member of the birth family⁴⁸⁵ as if the adoption had not occurred.

We consider that the second option should be available only if the birth parent (or if deceased, their next of kin) support the application.

461 Current legislation requires a person seeking to discharge an order to seek permission from the Attorney-General to make an application to the court. Robert Ludbrook stated in his submission that:

From my experience this is a complex and time consuming process. It places a heavy burden on the Attorney-General with no statutory indications as to the matters to be considered when deciding such an application. It is part of the watertight compartment which surrounds adoption orders and there is no equivalent in any other area of family law.

This requirement should be removed. There is no reason why applications should not be made directly to the Family Court.

⁴⁸⁴ A person is an adult when he or she has attained the legal age of majority, which is at present 20 years (Section 4, Age of Majority Act 1970).

⁴⁸⁵ This could be either or both sides of the birth family. The Family Court would be able to re-establish legal relationships with the members of either side of the birth family only to the extent that they consent. The adopted person should not be able to challenge any testamentary disposition made before the time that the adopted person had his or her legal relationships with the birth family re-established.

We recommend that applications for the discharge of an adoption order should be made directly to the Family Court.

We recommend that the circumstances in which an adoption order may be discharged should be extended to allow an adopted person to apply in special circumstances, where:

- the person applying is an adult; and
- the adoptive relationship has undergone a significant and irretrievable breakdown.

If the adoption order is discharged and the application is supported by the birth parents, the adopted person will become a member of the natural family as if the adoption had not occurred.

If the adoption order is discharged and the adopted person is not supported by his or her natural parents, the adopted person will become a legal orphan, with no legal relationship to the adoptive family or natural family.

Adoption orders obtained by fraud or duress

Background

- 462 Circumstances may arise where a birth parent is unable to give true consent, for example, because of fraud or duress. Under the current law, if consent is given under these circumstances, it will not be considered a valid consent, and that birth parent might successfully challenge the making of an interim or final adoption order.⁴⁸⁶ This principle has evolved as case law and is not expressed in the legislation. As always, the welfare and best interests of the child would be a paramount consideration. The extent to which the adoptive parents were aware of or participated in the duress or the fraud would also be highly relevant.
- 463 Section 20(2) of the Adoption Act provides that the court may vary or discharge an adoption order if it was made as a result of a material misrepresentation to the court or any person involved.

⁴⁸⁶ See *H and R v C*, above n 328, for a case involving an invalid consent.

Recommendation

- 464 We consider it is desirable that the provision be amended to extend to cases of duress. The court's jurisdiction to discharge any adoption order made in such circumstances should be confirmed. Once made, an adoption order should not be deemed void as a result of fraud or duress, but should be voidable. The child or the birth parent should be able to apply to have the order discharged. The court should be directed to take into account the extent to which the adoptive parents were aware of or participated in the fraud or duress.
- 465 We consider that such applications must be brought within two years of the granting of the adoption order. Applications made after that time would be time-barred.⁴⁸⁷ The Commission considers that the best interests of the child justify the minimum disruption after that stage.

We recommend that consent obtained by fraud or duress or material misrepresentation should give the court jurisdiction to discharge the adoption order on application by a birth parent or adopted child.

We recommend that the court should consider the extent to which the adoptive parents were aware of or participated in the fraud or duress.

We recommend that an application for discharge of an adoption order on the grounds of consent obtained by fraud or duress be allowed only up until two years after the adoption order was made.

Informing the natural parents of a discharge of an adoption order or breakdown in the adoption

- 466 A number of submissions supported our suggestion that where an adoption order is discharged, the natural parents should be notified and given the opportunity to have input into any decisions regarding alternative placements for the child. Others went further and said that the birth parents should be informed of any major disjuncture in the placement – for example, the death of the child or adoptive parents, or the child entering into State care as a result of abuse or neglect. Many birth parents pointed out that circumstances

⁴⁸⁷ Although, should an adult adoptee seek to have an adoption order discharged, such fraud or duress would be a factor for the judge to take into account.

change and that the birth parents might in fact be in a position to resume responsibility for their child. They may have no desire to resume care for their child, but might still wish to have some say in the placement of the child. Others may not want to have any involvement. The desire for input will vary, but most indicated that they thought the natural parents should be informed and be given an opportunity to become involved (where this is considered appropriate).

We recommend that birth parents be notified if a major disjuncture occurs in the placement of the adopted child, and unless CYFS considers it inappropriate, be given an opportunity to be involved in decision-making regarding the child's future.

16

Access to information

BACKGROUND

467 **A**CCESS TO ADOPTION INFORMATION is a thorny issue. The central question is the extent to which the State ought to be able to control access to one's own personal information. It also raises significant privacy concerns; the right of individuals to access information about themselves must be balanced against the extent to which such information can be accessed by others and the extent to which individuals might be required to produce such information to others. It also raises questions as to the priority that should be assigned to the desire for confidentiality of the parties involved. Achieving this delicate balance is more difficult in New Zealand than in other countries because, unlike many other countries, we allow almost unrestricted public access to Births, Deaths and Marriages records.⁴⁸⁸

BIRTH CERTIFICATES

Current system

468 At present when a final adoption order is made, access to the child's original birth registration is restricted and a new birth certificate is issued.⁴⁸⁹ This certificate lists the adoptive parents as the child's parents and gives their ages as at the date of the birth of the child. The child is usually registered under a new name.

⁴⁸⁸ The only exception is original birth certificates in the case of an adopted person.

⁴⁸⁹ Sections 23, 24 and 76 Births, Deaths, and Marriages Registration Act; sections 3, 4, 5, 6, 7 and 11 Adult Adoption Information Act.

469 The Adult Adoption Information Act represents a partial inroad into the secrecy surrounding adoption. This Act allows adult adoptees to apply for a copy of their original birth certificate⁴⁹⁰ and allows birth parents to re-establish contact with their children.⁴⁹¹ Birth parents who had a child adopted before 1985, and persons adopted before 1985, may place a veto preventing access to adoption information and the original birth certificate held by the Registry of Births, Deaths and Marriages (BDM).⁴⁹²

Purpose of a birth certificate

470 Some of the objections to the current system of birth (and by implication, adoption) registration may stem from general confusion over the purpose of a birth certificate. The Births, Deaths and Marriages Act 1995 is described in the long title as:

An Act to provide for—

- (a) The recording of information relating to births, names, adoptions, sexual assignment and reassignment, deaths, and marriages; and
- (b) Access to information recorded in respect of any such matter; and
- (c) The provision and effect of certificates relating to such information recorded in respect of any birth, death, or marriage.⁴⁹³

471 A birth certificate is defined as a certificate that contains registered birth information relating to that person's birth.⁴⁹⁴ A birth certificate records the date and place of birth, the names of the birth parents (if the father is a legal guardian of the child), and the name of the child.

⁴⁹⁰ Section 4 Adult Adoption Information Act.

⁴⁹¹ Section 8 Adult Adoption Information Act.

⁴⁹² Sections 3 and 7 Adult Adoption Information Act.

⁴⁹³ See sections 5–17, 23–27, 28–33, 63–71 Births, Deaths, and Marriages Registration Act.

⁴⁹⁴ Section 2 Births, Deaths, and Marriages Registration Act.

472 However, birth certificates have come to record much more than the fact of an individual's birth. Adoption⁴⁹⁵ and sexual assignment⁴⁹⁶ or reassignment⁴⁹⁷ provide grounds for altering a birth certificate, as does a change of name by marriage or deed poll.⁴⁹⁸ Because a birth certificate reflects subsequent events in the life of a person, it is inaccurate to describe it simply as a certificate in relation to the birth of a person. It is more realistic to say that a birth certificate represents a snapshot of an individual's status at the time that the certificate is issued.

Submissions

473 An overwhelming number of submitters expressed dissatisfaction with the current birth certificate system and the restrictions placed on access to information. The main objection they made related to the restrictions placed upon access to the original birth certificate⁴⁹⁹ and the substitution of adoptive parents as if they were the birth parents of the child. Many adoptive parents commented that this is excessive and unnecessary, and even ludicrous where an open adoption is practised. One submitter, commenting on the fact that she had all the information that would appear on her child's birth certificate, wrote that:⁵⁰⁰

Our son's original birth certificate is a legal record of his birth therefore he should be allowed access to it now given the fact that he is already privy to all information on it.

Other objections related to limitations placed upon access to other adoption information.

⁴⁹⁵ Sections 23–27, 63 Births, Deaths and Marriages Registration Act.

⁴⁹⁶ Sexual assignment occurs where a child of indeterminate gender is born and the doctors and parents have to make a decision (this may involve surgical intervention and hormonal treatment) as to what gender the child should be. The guardians of the child may seek a declaration from the Family Court that the child is a child of indeterminate gender, or they may nominate a sex for the child. See section 29 Births, Deaths, and Marriages Registration Act.

⁴⁹⁷ Sections 28–33, 64 Births, Deaths, and Marriages Registration Act.

⁴⁹⁸ Section 21 Births, Deaths, and Marriages Registration Act.

⁴⁹⁹ Commonly referred to as the “sealing” of adoption records.

⁵⁰⁰ Submission 1/41.

474 We asked the following questions about what information might be reflected in a birth certificate:

- Should a birth certificate simply be a record of the birth of a child (as indicated in section 2 of the Births, Deaths, and Marriages Registration Act) or should it also contain information about the genetic and legal parenthood of that child?
- Is there any other information that might be recorded on a birth certificate?
- If it is to be a full record, should the original details and subsequent changes be shown on the face of the certificate?
- Would adoption be more appropriately reflected by a certificate of legal parenthood rather than in an altered birth certificate?
- Where artificial reproductive technology or a surrogacy arrangement is involved, should the genetic parents' and/or commissioning parents' names also appear on the birth certificate?

475 We received a range of responses to these questions. Many thought that a birth certificate should be a record of a person's birth, an immutable fact that cannot change. However, most also recognised the need for some form of official recognition that an adoption has taken place. Many suggested that there should also be a full birth certificate which shows all details relating to the genetic heritage, birth, and subsequent adoption of a person. Others thought that this information would better be recorded on a certificate of adoption or legal parenthood.

476 Most submitters commented that although they thought that the individuals involved should have full access to such information, they did not consider that all of this information should be shown on a document that would have to be used to establish identity for official purposes.

Recommendations

477 We recommend that where a person is adopted, two birth certificates should be created and issued. One certificate will simply record the current (that is, post-adoptive) name of the child, the date and place of birth, and the names of the adoptive parents. This short-form certificate will not indicate parentage other than that of the adoptive parents. This certificate will be available to all the world and will be the only certificate that a person can be compelled

to produce for the purposes of establishing identity. To a large extent this proposal replicates the status quo.

478 The second certificate will show the following details on the face of the certificate:

- the child's original name;
- the date and place of birth of the child;
- the birth parents;
- the adoptive parents names;
- the date that the adoption order became final;
- the date that the adoption order was discharged; and
- the new name of the child (if altered) and any subsequent changes of name.

479 Some amendments would need to be made to the Births, Deaths and Marriages Registration Act to allow for the creation of the new certificates and to alter the rules regarding the manner in which adoptions should be registered.

480 This long-form certificate would be available as of right only to the adoptee, adoptive parents and birth parents. The adoptee should never be required to produce this long-form certificate for identification purposes. However, adoptees who chose to use this document to identify themselves may do so, in which case it would be a legally effective document. This certificate would not be open to general search and might only be accessed if:

- the applicant has the permission of the adopted person (or the adoptive parents on behalf of the adoptee where the adoptee is not of sufficient age, maturity or capacity to make such a decision); or
- the adopted person is dead; or
- the applicant can demonstrate to the Family Court a genuine and proper interest in inspecting the record.⁵⁰¹ We envisage that the applicant would submit an application (with supporting evidence) to the Family Court to inspect the birth certificate. If the applications were successful the Family Court would notify BDM that approval has been granted and BDM would issue the certificate.

⁵⁰¹ See paragraphs 489–492 below relating to access to other adoption information.

481 At present adoptees can apply under the Adult Adoption Information Act for a copy of their original birth certificate. Some adoptees may continue to want a copy of the original birth entry without the other information contained in a long-form birth certificate. Adoptees, birth parents, adoptive parents, and other persons with a legitimate interest⁵⁰² should be able to apply for a copy of the original birth entry. Where such a certificate of the original birth entry is issued, it should be endorsed with the words “Superseded by adoption order” and the date upon which the adoption order was made.

482 We have consulted with the Privacy Commissioner and BDM. Both agencies support our proposal. The proposal resolves many privacy concerns because, whilst allowing individuals the autonomy to access information about themselves, it does not require them to produce this information to others if they do not wish to do so. BDM supports the idea of a short-form certificate showing place and date of birth, current name, and current legal parents. The automated system introduced at BDM allows the production of the long-form certificate. There is general support for subsidising the additional cost of the long-form certificate and issuing it at the same cost as the short-form certificate. We consider that this is justifiable in the interest of candour.

We recommend that upon registration of an adoption order, an adopted person automatically be provided with two birth certificates, a post-adoption birth certificate that only shows the adoptive parents, and a full birth certificate that lists all details of the person’s birth and subsequent adoption.

We recommend that access as of right to the full birth certificate be restricted to the persons named on the certificate. Others must establish that they have the adoptee’s permission or that the adopted person is dead, or must demonstrate to the Family Court that they have sufficient and proper personal interest in seeking access.⁵⁰³

⁵⁰² Subject to the same access restrictions as the long-form birth certificate.

⁵⁰³ This test mirrors rule 66 of the High Court Rules, which allows access to information held on court records. This test was favoured by the members of the Family Court bench and the Manager of AISU who attended the Adoption Symposium, as it allows more flexibility than a rigid prescription of categories of persons who may apply for access to information.

Adult Adoption Information Act 1985 vetoes

- 483 We observed in paragraph 468 that birth parents who gave a child up for adoption before 1985, and adopted persons, may veto access to the original birth certificate and identifying information. Vetoes must be renewed every 10 years after they are placed or they will expire. In 1986, after the introduction of the Adult Adoption Information Act, birth parents and adoptees placed 3730 vetoes. In 1996, only 489 of the 3730 vetoes due for renewal were renewed. The rate at which new vetoes are being placed has slowed remarkably.
- 484 Vetoes have declined in significance over the last 10 years, and will continue to do so. However, for those who have placed vetoes, the issue is extremely sensitive and of great importance.
- 485 We recommend that the new legislation provide transitional provisions to ensure the following:
- Vetoes that are in place should remain and the existing access to information provisions continue to apply.
 - Birth parents and adopted persons who are currently entitled to place vetoes, but have not done so, will be given a limited opportunity to place a veto before the system changes.

We propose a three-year period after which no new vetoes may be placed (although existing vetoes can be renewed at 10-year intervals until the death of the veto placer).

- 486 We considered whether adoptees and birth parents who fall under the old system or the transitional system should have the option of converting information vetoes into non-contact vetoes. Non-contact vetoes allow access to information but would make it an offence for a person to contact someone who has placed a veto. Though these appear to have worked well in New South Wales, some people have expressed concern about criminalising conduct that would not otherwise be considered criminal.⁵⁰⁴
- 487 Although the current system of vetoes denies access to the information on the birth register, it does not prevent people affected by adoption seeking further information. Libraries around the country hold indexes to the Register of Births, Deaths and

⁵⁰⁴ For example, a birth mother who watches her adopted child from afar, but who does not identify herself to the child or make contact with the child, would be committing an offence.

Marriages, and agencies such as Jigsaw provide guidelines to assist those attempting to find adopted relatives or birth families. In many cases, there have been successful reunions despite a veto being placed. To introduce a system of non-contact vetoes would be to further restrict rights that currently exist. We therefore do not recommend introducing an option of converting information vetoes into non-contact vetoes.

COUNSELLING

488 When an adoptee applies for access to his or her original birth certificate,⁵⁰⁵ or where a birth parent applies for identifying information about her or his child,⁵⁰⁶ they must first be offered counselling before the application will be processed.⁵⁰⁷ This requirement applies even in the case of an adoptee seeking a copy of the original birth certificate in circumstances where the adoptee may have always known the identity of the birth parent(s) and simply wants a further copy of the original birth certificate. When the Adult Adoption Information Act 1986 was enacted there was no provision for post-adoption counselling of adopted persons and birth parents, and the concept of reunion between birth parents and adopted persons on such a scale was, to a certain extent, uncharted territory. The counselling provisions provided a service to such persons that had hitherto been unavailable, and reassured those with concerns about reunion that the issues would be handled with tact, sensitivity and an assurance that support would be available if required. We recommended in chapter 10 that post-adoption counselling should be made available to adoptees and birth parents. In light of this recommendation, and of the increasing acceptance of openness in adoption that has occurred over the past 15–20 years, the Commission does not consider that there needs to be separate provision for counselling for access to adoption information.

We do not recommend retention of sections 5(2)(a)–(d) and 6(a)–(d) of the Adult Adoption Information Act which provides separately for counselling prior to access to adoption information.

⁵⁰⁵ Section 4 Adult Adoption Information Act.

⁵⁰⁶ Section 8 Adult Adoption Information Act.

⁵⁰⁷ Sections 5(2)(a)–(d), 6(a)–(d) Adult Adoption Information Act.

ACCESS TO COURT AND SOCIAL WELFARE ADOPTION RECORDS

489 The Family Court may allow the inspection of adoption records for the purpose of investigating any question as to the validity of the adoption order⁵⁰⁸ or forbidden degrees of marriage,⁵⁰⁹ for the purposes of the Adult Adoption Information Act,⁵¹⁰ for matters relating to the administration of an estate,⁵¹¹ and to enable evidence to be gathered for a prosecution for making a false statement.⁵¹² Otherwise a person must apply to the Family Court using section 23 of the Adoption Act to gain access to adoption records.⁵¹³ Most persons applying to inspect adoption records do so on the basis that there are “special grounds”. However, the approach to what constitutes “special grounds” taken by Family Court judges differs markedly throughout the country, with some judges applying a very rigid test and others construing the phrase liberally. Those that apply a rigid test usually refuse applications on the grounds that those seeking knowledge about their origins or the identity of relatives do not fit within the ambit of “special grounds”, as they are exhibiting a normal emotional response to adoption.⁵¹⁴ A submission from National Archives has drawn to our attention a further issue. National Archives holds court records, Department of Social Welfare records and adoption records from private organisations dating back to the nineteenth century.⁵¹⁵ Section 20 of the Archives Act 1957 establishes a principle of availability of all records deposited in National Archives. The Act does not set out general criteria to govern access to records. Section 20 allows records to be deposited in Archives subject to conditions. However, the depositing department must justify its restriction. Any restrictions placed on a record must also take into account the Official Information Act 1982, the Privacy Act 1993, and any other specific legislative provisions pertaining to the record deposited (for

⁵⁰⁸ Section 23(3)(b)(ii) Adoption Act.

⁵⁰⁹ Section 23(2) Adoption Act.

⁵¹⁰ Section 23(3)(a) Adoption Act.

⁵¹¹ Section 23(1) Adoption Act.

⁵¹² Section 23(3)(b) Adoption Act.

⁵¹³ The Adoption Act does not define “adoption records”.

⁵¹⁴ *Re Adoption of S* [1996] NZFLR 552 (FC).

⁵¹⁵ Records deposited with National Archives are generally 25 years old, but more recent records may be deposited with the permission of the Chief Archivist.

example, section 23 of the Adoption Act and the Adult Adoption Information Act). Under the current law National Archives can refuse to allow access to court records,⁵¹⁶ but the status of other adoption records⁵¹⁷ is unclear.

490 National Archives states that there is a legitimate community interest in adoption information which is not recognised by the current legislation. National Archives supports the principle that records should be available except where there is good reason to withhold the record. It favours opening all records to public research after a certain period⁵¹⁸ so that social science researchers and those seeking details concerning their family tree or whakapapa⁵¹⁹ can access such information. It believes that close consideration should be given to the question of who may access such records in order to provide sufficiently complete coverage of the situations where this may be appropriate.

Options

491 We have considered the following options:

- allowing full access to all adoption records; or
- restricting access to the parties involved and any person who can establish sufficient personal interest; or
- opening all records after a certain period of time and/or after the deaths of the parties involved.

Recommendations

492 Research⁵²⁰ has indicated the benefit of openness of access to adoption information, and the submissions have overwhelmingly favoured open access to information. We consider, however, that

⁵¹⁶ The limitations on access imposed by section 23 Adoption Act continue to bind National Archives (section 20(2) Archives Act 1957).

⁵¹⁷ For example, records held by CYFS or the private organisations that provide homes for unmarried mothers such as Bethany, which is run by the Salvation Army.

⁵¹⁸ At present, original birth certificates are available for search if all of the parties named on the certificate have died or if 120 years have elapsed, section 76 (3)(d)–(e) Births, Deaths, and Marriages Registration Act.

⁵¹⁹ Under our proposed system for access to records, such persons would fall within the description of “persons with a genuine or proper interest”.

⁵²⁰ For a discussion of the benefits of openness in adoption see paragraphs 78–85.

access to this information should be provided on the same terms as access to the proposed long-form birth certificate.

We recommend that adoption records (including court records and Department of Social Welfare records) be open to inspection as of right by adoptees, adoptive parents and natural parents.

We recommend that persons who have permission from the adoptee or who can establish that the adoptee is dead, or who can demonstrate to the Family Court a sufficient and proper interest in inspecting such records, should be entitled to have access to adoption records.

We recommend that where a veto has been lodged under the Adult Adoption Information Act, that veto should be extended to restrict access to all adoption records (whether held by the court, the AISU, private agencies, or National Archives).

17

Forbidden marriage
and incest

THE CURRENT LAW

493 **S**ECTION 16(2)(B) OF THE ADOPTION ACT provides that:

The adopted child shall be deemed to cease to be the child of his existing parents (whether his natural parents or his adoptive parents under any previous adoption), and the existing parents of the adopted child shall be deemed to cease to be his parents, and any existing adoption order in respect of the child shall be deemed to be discharged under section 20 of this Act:

Provided that, where the existing parents are the natural parents, the provisions of this paragraph shall not apply for the purposes of any enactment relating to forbidden marriages or to the crime of incest:

494 Case law demonstrates considerable confusion about whether this provision means that both adoptive parents and natural parents are considered parents for the purposes of any enactment relating to forbidden marriages or the crime of incest, or whether it applies only to natural parents and therefore adoptive parents are not considered parents for these purposes. The High Court has discretion to consent to a marriage within the prohibited degrees if the relationship is one of affinity,⁵²¹ but not consanguinity.⁵²² It has held in one case that the provision applies the prohibited degrees of marriage and the crime of incest to both natural and adoptive relationships⁵²³ but in another case that it applies only to natural relationships.⁵²⁴

⁵²¹ Persons related by relationship, for example, marriage or in the present case, adoption.

⁵²² Persons related by blood.

⁵²³ *In Re Thomson and Thomson* [1958] NZLR 580 (HC).

⁵²⁴ *An Application by Barlow and Hohaia* (1985) 3 NZFLR 714 (HC).

495 Fisher J, in a case involving the crime of incest, stated:⁵²⁵

The essence of the offence is the negation of parental responsibilities assumed in this situation. The parents having adopted this child, it is unfortunate that it should even be suggested that in some way culpability is reduced merely because an adoptive relationship is involved.

THE CONSIDERATIONS

496 There are two major reasons why the laws relating to incest and forbidden marriage are on the statute books today:

- the genetic risks inherent in inbreeding; and
- the protection of the integrity of the family unit.

Genetic factors

497 Statistically, hereditary diseases or disabilities are more likely to occur through inbreeding. Conversely, positive hereditary attributes and features are also more likely to be reproduced through inbreeding. New Zealand, however, has judged that the risk of negative consequences from inbreeding between certain degrees of relationship is too great, therefore incest is prohibited and limits have been placed upon the degrees within which related persons can marry.

498 That the biological or genetic connection is considered an important factor in these issues is demonstrated by the prohibitions contained in Leviticus 18:6-18, section 130 of the Crimes Act 1961, and the difference in treatment of the degrees of “affinity” and “consanguinity” in the Marriage Act 1955. Section 130 of the Crimes Act 1961, which creates the crime of incest, defines incest as between parent and child, grandparent and grandchild, and brother and sister “whether of the whole blood or half blood”. These are consanguineous relationships. The Marriage Act allows a couple to apply to the High Court for permission to marry if the relationship is one of affinity (related by marriage) but not if their relationship is one of consanguinity (related by blood). These pieces of legislation suggest that society considers the biological or genetic relationship to be an important factor in determining the crime of incest or giving permission to marry.

⁵²⁵ *S v Police* (1990) 7 CRNZ 173, 174 (HC).

499 However, logically this cannot be the only factor. Contraceptive measures can prevent a child being born of such a relationship; there must be other considerations that cause society to impose the above limitations.

Integrity of the family

500 We argued in the discussion paper that society's regard for the integrity of the family unit provides the additional reason for these prohibitions:⁵²⁶

Incest threatens the security and the stability of the family unit. Marriage within close family relationships is seen as undesirable for the same reasons. The Scottish Law Commission in its report on the law of incest observed that incest could give rise to psychological or other direct harm, a breakdown of trust within the family and may sometimes result in disruptive rivalries.

501 These considerations also apply to adoptive family relationships.

RELATIONSHIPS AFTER AN ADOPTION ORDER

502 The discussion paper suggested that the application of these prohibitions to adoptive relationships should depend primarily upon the weight given to the sanctity and integrity of the family relationship. It suggested that this may vary, depending upon the circumstances of a particular person's adoption:⁵²⁷

For example, there would be few compelling reasons to treat a child adopted at birth any differently to a child born to the same parents. However, if the situation involved a step-parent adoption, the child was 15 years of age at the time of adoption, there was a step-brother or sister who was of no blood relation to the child, and that sibling by adoption did not live within the family unit, it would be more difficult to explain why they should not be allowed to marry.

503 Such varying circumstances may explain why Parliament has seen fit to pass several private Acts to enable persons related by adoption to marry.⁵²⁸

⁵²⁶ Law Commission, above n 2, paragraph 297.

⁵²⁷ Law Commission, above n 2, paragraph 300.

⁵²⁸ See Liddle Adoption Discharge Act 1963, Thomas Adoption Discharge Act 1961, Thompson Adoption Discharge Act 1958, Papa Adoption Discharge Act 1982.

Forbidden marriage

504 The discussion paper proposed that the adoptive parent–child relationship should be deemed to be a relationship of consanguinity, and all other adoptive relationships of affinity, for the purposes of the prohibited degrees of marriage. The Family Court would then be empowered to consent to marriage between such persons in accordance with the following provision:

If, had the adoptive family been the adopted person’s natural family, the relationship would be considered to be a relationship of consanguinity, the court must consider:

- the age at which the child was adopted;
- the other party’s role and degree of participation in the family unit; and
- the need to protect the sanctity and integrity of the family relationship;

in order to determine that the proposed marriage is not repugnant to public interest.

505 This proposal enables the parties concerned to apply to the court for a decision about their relationship and proposed marriage, rather than have their lives aired in so public a forum as Parliament.

506 We received a significant amount of support for this proposal, with some submitters suggesting that the adoptive grandparent–grandchild relationship should also be deemed to be consanguineous. We are reluctant to consider the adoptive grandparent–grandchild relationship consanguineous simply as an extension of the sanctity conferred upon the parent–child relationship. While the adoptive parent has made a commitment to a parent–child relationship, that degree of commitment and the accompanying presumption of an important social relationship does not necessarily extend to the grandparent–grandchild relationship. A birth family has the genetic and biological ties that make the extension of this presumption automatic for these “vertical” familial relationships. We believe including the grandparent–grandchild relationship within the degrees of affinity emphasises the importance of the relationship, whilst allowing for the exceptional cases to be dealt with in a discrete manner.

We recommend that the adoptive parent–child relationship should be deemed to be a relationship of consanguinity for the purpose of the Marriage Act 1955.

All other adoptive relationships should be treated as relationships of affinity, for the purposes of the prohibited degrees of marriage.

We recommend that an adopted person may apply to the Family Court to marry an adoptive relative deemed to be related within the degrees of affinity, and if, had the adoptive family been the adopted person's natural family, the relationship would be considered to be a relationship of consanguinity, the court must consider:

- the age at which the child was adopted;
- the other party's role and degree of participation in the family unit; and
- the need to protect the sanctity and integrity of the family relationship;

in order to determine that the proposed marriage is not repugnant to public interest.

Incest

507 Section 130 of the Crimes Act establishes the crime of incest only in relation to a small number of consanguineous relationships.⁵²⁹ These relationships do not account for all of those consanguineous relationships that form the basis of the forbidden marriages set out in the Marriage Act. None of the relationships of affinity included within the schedule of forbidden marriages would give rise to an incestuous relationship if the relationship was of a sexual nature. It is safe to say that sexual relationships that are considered to be incestuous constitute only a small proportion of possible consanguineous relationships, and constitute no relationships of affinity.

⁵²⁹ See discussion above at paragraphs 493–495.

508 As we are proposing that only adoptive parent–child relationships are deemed to be consanguineous, it is logical to also recommend that the crime of incest also be restricted to the parent–child relationship in the case of adoption. If that were not so, it would be a crime for an adoptive brother or sister to have a sexual relationship, but they would be able to marry with the court’s permission. Considering that many couples now have a sexual relationship prior to marriage, this would be an illogical consequence of reform.

We recommend that in the case of birth relationships, liability to conviction for incest be unaffected by the making of an adoption order; and that in the case of adoptive relationships, the crime of incest be limited to the adoptive parent–child relationship.

Adoption and the challenges of assisted reproductive technologies

KEY ISSUES

- 509 **T**HE SUBJECTS DISCUSSED in this chapter – the regulation of surrogacy arrangements and the use of assisted human reproduction (AHR, also known as assisted reproductive technology (ART)) by same-sex couples – raise fundamental questions about the role of the law. The issues raise fundamental ethical and moral questions on which there are a wide range of opinions, as appears from the submissions received on the topics and the experiences of other countries in attempting to regulate the issues (or failing to do so). At present, in New Zealand, there is a legal vacuum which has permitted the growth of such practices before all the ethical and moral questions have been publicly debated. There is, in our view, a need to provide an adequate legal structure to regulate the way arrangements are made and to confer legal status upon the parent–child relationships that are created as a result of such arrangements.
- 510 The following questions arise in relation to whether the law should wholly or in part (and if so, in which part), by what criteria, and on what terms:
- discourage such practices;
 - acknowledge and permit them;
 - facilitate them; or
 - actively encourage them.
- 511 The issues discussed below are intended to air the moral and ethical questions raised by these practices, particularly that of surrogacy. We hope to promote discussion so that New Zealand society can come closer to a point where, even if consensus cannot be reached,

sensible and effective laws can be drafted to deal with the consequences of surrogacy and same-sex couple families assisted by AHR.

THE NEED FOR FURTHER WORK

- 512 Although the discussion paper canvassed issues that arise in surrogacy arrangements, the discussion was limited to the implications of surrogacy on adoption law. In some respects this avoided much of the controversy surrounding surrogacy – we did not presume to judge, or ask others to judge, the morality or virtue of surrogacy arrangements. We simply asked how best it could be regulated and whether adoption law was an appropriate mechanism by which to regulate surrogacy arrangements.
- 513 Because of this approach we received some constructive responses to this discussion. However, the feedback received was undoubtedly limited. We do not doubt that there are people who would have liked to comment but who, because of the title of the discussion paper, were unaware that the paper discussed surrogacy issues.
- 514 Because our focus was pragmatic, we avoided questioning the morality of surrogacy arrangements as a practice. Any legislation must, however, be both principled and pragmatic (or practices will be driven underground). It would, in our view, be useful to gauge the reaction of the wider community to such issues. The previous government declined to consider surrogacy practices because it believed there was no consensus in the community regarding the approach that should be taken.⁵³⁰
- 515 The Commission has recently invited the Government to give it a reference to examine further issues relating to surrogacy in order to further inform our proposals for a Care of Children Act.

GOVERNMENT INITIATIVES

- 516 Over the last 13 years, the Government has commissioned two reviews of the laws relating to assisted human reproduction

⁵³⁰ Sir Douglas Graham “Opening and Address” (Medically Assisted Surrogacy Symposium, University of Auckland, 20–22 August 1999).

(including surrogacy).⁵³¹ These reports covered a range of topics, such as donor insemination, access to donor information, the storage and use of embryos, surrogacy, licensing regimes, and access to assisted human reproduction services.

517 At present there are two Bills currently before the Health Select Committee: the Government Assisted Human Reproduction Bill 1998 (AHR Bill) and the Human Assisted Reproductive Technologies Bill put forward by Dianne Yates MP (HART Bill). The AHR Bill would prohibit:

- human cloning;
- fusion of human and animal gametes;
- implantation of human embryos in animals and vice versa;
- using a human cell to develop any procedure or technique for the above things; and
- trading in human gametes and embryos.

518 The Bill also establishes the National Ethics Committee on Assisted Human Reproduction (NECAHR)⁵³² as a statutory body, and prescribes its functions. It contemplates accredited providers obtaining approval from NECAHR when they wish to perform new or innovative practices. Obtaining such approval would not, however, be mandated (required).

519 The Bill would create a regime for the collection and storage of information about children born as a result of AHR. It provides for more opportunities to collect information than are currently available to adopted people and the birth families.⁵³³

520 The AHR Bill leaves many practices and issues, including surrogacy, untouched. AHR is an area involving complex ethical and legal issues. AHR raises ethical and legal concerns and the Commission

⁵³¹ The Department of Justice Law Reform Division released two papers, *New Birth Technologies: An Issues Paper on AID, IVF, and Surrogate Motherhood* (Wellington, March 1985) and *New Birth Technologies: A Summary of Submissions Received on the Issues Paper* (Wellington, December 1986). The Ministerial Committee on Assisted Reproductive Technologies released a report in 1994 *Assisted Human Reproduction: Navigating our Future* (Wellington, July 1994).

⁵³² NECAHR is a Ministerial Committee under the auspices of the Ministry of Health.

⁵³³ Note, however, that the proposals in this report for access to adoption information are wider still than those contained in the AHR Bill.

considers that the AHR Bill does not adopt a coherent or principled approach to such issues. The Commission is concerned that there are a range of issues which do not receive sufficient attention in the Bills or are simply not addressed.⁵³⁴

521 The HART Bill addresses surrogacy so far as to prohibit payment as consideration for a surrogacy arrangement and to prohibit advertising a willingness to give or receive consideration for a surrogacy arrangement. The Bill anticipates a licensing scheme which would encompass the authorisation of surrogacy arrangements.⁵³⁵

⁵³⁴ Issues include:

- The non-mandatory role of NECAHR, the role of NECAHR in making policy (it was constituted as an ethics committee) and its consultation process (transparency issues), the lack of New Zealand supplements to the Australian guidelines applied by NECAHR, vocational registration (and accreditation?) of providers of fertility services;
- Are there property rights in gametes and embryos, for example, who has the right to use them? (especially after one partner dies or the couple separate);
- What rules should govern the storage and disposal of gametes and embryos;
- Record keeping and access to information:
 - what genetic information should be recorded, and how?
 - the right of the child to identity (UNCROC);
- Payment for artificial reproductive services;
- Rights of the child and of the unborn or yet to be conceived child;
- The resulting legal status of the child and the use of adoption to regulate the child's status after the child has been created;
- Abortion – selective reduction of embryos once they have been implanted is unlikely to constitute abortion because a miscarriage is not induced;
- Use of AHR by persons able to conceive and carry a child to term, but who are seeking to create a child who is genetically “superior”;
- Consent issues:
 - taking sperm and ova from brain-dead or recently deceased persons;
 - taking ova from female fetuses.
- Human Rights Act 1993 issues relating to discrimination in allowing access to AHR;
- Consumer Guarantees Act 1993 and contractual issues – can a surrogacy arrangement be enforced to make the parties fulfil their contractual agreement?

⁵³⁵ However, there is some ambiguity in that the Bill appears to extend the ambit of the licensing scheme to the creation of all embryos – thus covering every type of pregnancy, whether natural or assisted.

SURROGACY

- 522 Table 3 sets out the range of procedures that might be used in a surrogacy arrangement, and the relationships that would be created.

Risks involved in surrogacy arrangements

Psychological risks

- 523 There has been no controlled research conducted into the psychological impact of surrogacy arrangements. In New Zealand this is probably because surrogacy has in the past been conducted in an “underground” fashion. The 1998 United Kingdom Brazier Report into surrogacy noted that there was no United Kingdom-based empirical research on surrogacy. However, one of the Review committee members was a Professor of Psychology. The Report speculated that there may be psychological risks for the surrogate mother, the commissioning parents, the children of the surrogate mother, and the commissioned child:⁵³⁶

It is not known, for example, how a child will feel about having been created for the purpose of being given away to other parents or, if the surrogate mother remains in contact with the family, what the impact of two mothers will be on his or her social, emotional and identity development through childhood and into adult life, particularly in families where the surrogate mother is also the genetic mother of the child. . . .

We are very much aware that the child born in consequence of a particular surrogacy arrangement is often not the only child at risk of psychological harm. It appears that those involved in surrogacy practice strongly recommend that the surrogate should have her own children. We are concerned . . . about the impact on the emotional security of these children of seeing their mother give up a sibling, especially for payment, and in some instances on more than one occasion. . . .

relatively little is known about the consequences for the adults involved in a surrogacy arrangement. Although studies of mothers who give up their babies for adoption have shown that this can be an extremely upsetting experience that remains with them throughout their lives, it is possible that relinquishing a child in the context of a

⁵³⁶ Margaret Brazier, Alastair Campbell and Susan Golombok *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation – Report of the Review Team* (October 1998) paragraphs 4.11, 4.15, 4.17 and 4.20 [Brazier Report].

TABLE 3: TYPES OF SURROGACY ARRANGEMENTS

	DIY* partial† surrogacy	Medically assisted partial surrogacy	Gestational‡ surrogacy – genetically related	Gestational – family relationship	Gestational surrogacy – not genetically related
Procedure	Natural insemination of surrogate	Artificial insemination of surrogate	Implantation of embryo into surrogate	Implantation of embryo into surrogate	Implantation of embryo into surrogate
Genetic relationship to commissioning (c'ing) parents	C'ing father's sperm used	C'ing father's sperm used	One or both c'ing parents' genetic material used to create embryo	Genetically related to family member of c'ing parents	Embryo created with donor egg and sperm
Risk of no genetic relationship to c'ing parents	Yes – surrogate may conceive with her own partner	Yes – surrogate may conceive with her own partner	Very minimal	Very minimal	No genetic connection anyway
Availability of proposed procedure	Yes – if genetic relationship confirmed with DNA testing	Yes – if genetic relationship confirmed with DNA testing	Yes – if genetic relationship confirmed with DNA testing	Yes – if genetic relationship confirmed with DNA testing	No – stranger adoption made to order

* “Do-it-yourself” – it is possible for a surrogate mother to be artificially inseminated without medical assistance.

† “Partial” surrogacy refers to a surrogacy arrangement where the surrogate mother is also the biological mother of the child.

‡ “Gestational” surrogacy refers to a surrogacy arrangement where the surrogate mother is not the biological mother of the child – an embryo made up of genetic material from either the commissioning parents or donors is implanted into the surrogate mother’s womb.

surrogacy arrangement may be less traumatic The long-term effects of being a surrogate mother . . . are unknown

The impact on the commissioning couple of having a child through surrogacy is also unknown It is possible that the involvement of a third party may have a negative effect on the couple's relationship, and on the woman's security in her mothering role, particularly in families where the surrogate mother and the commissioning father are the genetic parents of the child. The only available information on this issue . . . indicates that difficulties can sometimes arise in the relationship between the surrogate mother and the commissioning couple.

- 524 There have been two small, uncontrolled studies conducted in the United Kingdom into the experiences of surrogate mothers and commissioning parents. The first indicates that surrogate mothers may experience distress when giving up the child but that this is usually accompanied by feelings of satisfaction and happiness for the commissioning couple – and so feelings of distress may not be as traumatic as in adoption.⁵³⁷ The second study shows that the continuing relationship between the commissioning parents and the surrogate mother may not be straightforward, and that difficulties can sometimes arise.⁵³⁸

Identifiable risks

- 525 There are a number of clearly identifiable risks inherent in surrogacy arrangements:
- the surrogate mother may be at risk of contracting diseases such as HIV (AIDS) or hepatitis B or C if donor sperm is not screened before insemination occurs;
 - the relationship between the surrogate mother and the commissioning parents may deteriorate during the pregnancy, which places the intended outcome at risk;
 - the surrogate mother may not feel able to hand the child over to the commissioning parents – this may occur in gestational surrogacy as well as partial surrogacy arrangements;
 - many commissioning parents ask the surrogate mother to

⁵³⁷ E Blyth “ ‘I Wanted to Be Interesting, I Wanted to Be Able to Say ‘I’ve Done Something Interesting With My Life.’ ”: Interviews with Surrogate Mothers in Britain” (1994) 12 *Journal of Reproductive and Infant Psychology* 189.

⁵³⁸ E Blyth “ ‘Not a Primrose Path’: Commissioning Parents’ Experiences of Surrogacy Arrangements in Britain” (1995) 13 *Journal of Reproductive and Infant Psychology* 185.

undergo tests relating to the health of the baby – what happens if the commissioning parents wish the surrogate mother to have an abortion because the child is not perfect?

- the child may be born with handicaps or deformities – what will happen if the commissioning parents reject the child?
- the surrogate mother may indulge in destructive behaviour while pregnant – for example, alcohol or drug abuse. What rights do the commissioning parents have to protect their baby?
- what happens if a surrogate mother has a miscarriage – is she still entitled to her expenses? Can she enforce the original agreement?

526 These are only some of the issues that may arise in the course of a surrogacy arrangement. Most of these issues can be identified and discussed⁵³⁹ prior to entering into a surrogacy arrangement, but at the moment there is no requirement that people do so. The danger is that these issues may arise during the course of a surrogacy arrangement, that the parties are not prepared for them, and that the already tenuous relationships break down, placing the welfare of the child at risk. Even if these issues are addressed at an early stage, it is not clear that all points of agreement are legally enforceable, or even that parties would react to the situation in the way they had originally anticipated.

Moral and ethical issues in surrogacy arrangements

527 Surrogacy arrangements raise a myriad of moral and ethical issues. We attempt to identify below some of the major moral and ethical issues, and our preliminary views.

Welfare of the child

528 Our international obligations require us to treat the welfare of the child as paramount. But these obligations, and their expressions in our legislation, do not crystallise until a child is born. Prior to birth there is no legal obligation to have regard to the paramountcy of the interests of the child.

⁵³⁹ Although identification and discussion are in themselves unlikely to resolve issues, identification and discussion will mean that participants are more likely to be aware of issues that may arise during the course of a surrogacy arrangement.

- 529 Despite this, many consider it essential that we place the interests of the child at the centre of the process when considering surrogacy arrangements. Surrogacy arrangements differ in such a marked way from normal pregnancies that there is justification for treating surrogacy differently from the more usual form of parenthood. With surrogacy, the State is ultimately asked to regularise an arrangement involving the production of a “take-home baby” for the commissioning parents. Professor Donald Evans⁵⁴⁰ has argued that a specific child born to specific parents in a specific social setting has an outcome that is imminent and a future that can be forecast quite reasonably.⁵⁴¹ It makes sense to consider, and may in fact be irresponsible not to consider, the future harm that may be caused to that child if it is born.
- 530 The Brazier Report observed that any consideration of the welfare of the child is handicapped by the lack of empirical evidence about the effect of surrogacy on the children born as a result of the arrangements. Some people argue that because the risks cannot be quantified, they should be given no weight. The Brazier Report concluded that because no person suffers from not being alive:⁵⁴²

we do not have to show certainty of major harm to potential children before we are justified, either through personal decision or legislative restriction, in avoiding conception on grounds of risk to the welfare of the child. It is sufficient to show that, if such lives are brought into being, they could be significantly compromised physically or emotionally. By not bringing them into being we do no harm to a child, since none exists. This is not to say that people should aim for perfection in their progeny, or that the State should institute draconian measures to narrow people’s procreative choices. Rather, it justifies controlling, at least to some degree, this emotionally complex way of creating a family.

Exploitation of women

- 531 Some people object to surrogacy arrangements, or argue that they should be heavily regulated, on the grounds that surrogate mothers are exposed to exploitation, particularly so where a surrogate mother

⁵⁴⁰ Director, Otago Bioethics Centre, Otago University.

⁵⁴¹ D Evans “Addressing the Needs of Children” (paper presented at the Medically Assisted Surrogacy Symposium, Auckland University, 20–22 August 1999).

⁵⁴² Brazier Report, above n 536, paragraph 4.29.

is paid for her services. Evidence suggests that surrogate mothers are usually from the lower socio-economic groups, and almost always are less well-off financially than the commissioning parents:⁵⁴³

A number are unemployed, unsupported by a partner and responsible for children of their own. “Professional” surrogacy may appear to be an attractive option for women in these circumstances. Some women clearly regret taking up that option.

532 However, Rotherham cautions against assuming surrogacy arrangements are exploitative, and argues that the “concept of exploitation is a highly subjective one”.⁵⁴⁴ He states that:⁵⁴⁵

[a]nyone advocating State intervention should ask whether he or she is doing so to promote the individual’s welfare or to compel others to behave in a way which does not offend his or her moral code.

533 The Brazier Report argues that payment itself is not indicative of exploitation, rather the issue is whether people who choose to undertake risky occupations do so with full knowledge and understanding of the risks involved, and that payment is not of such a nature or level to induce them to take risks against their better judgment. The authors stated:⁵⁴⁶

Payment increases the risk of exploitation if it constitutes an inducement to participate in an activity whose degree of risk the surrogate cannot, in the nature of things, fully understand or predict. In our judgment, surrogacy does carry some unpredictable risks which become fully evident only after an agreement has been entered into, perhaps even some time after the baby has been handed over to the commissioning parents. Some women may be particularly vulnerable to these risks, because of their social, economic or personal situation. This is one of our reasons for rejecting the concept of surrogacy as a paid occupation . . . because it would imply a normalisation of what we believe to be a difficult personal choice, with an unknown degree of psychological risk.

534 The Brazier Report does not, however, consider the possibility of exploitation in non-commercial, altruistic surrogacy. Not paying the surrogate mother does not preclude her being subject to pressure or exploitation, and this danger may be more likely if the surrogacy is

⁵⁴³ Brazier Report, above n 536, paragraph 4.19.

⁵⁴⁴ Craig Rotherham “Surrogate Motherhood in New Zealand: A Survey of Existing Law and an Examination of Options for Reform” (1991) 7 *Otago Law Review* 426, 431.

⁵⁴⁵ Rotherham, above n 544.

⁵⁴⁶ Brazier Report, above n 536, paragraph 4.25.

entered into for the benefit of a family member. What type of pressure might be applied to the surrogate mother who starts to think that she might not be able to give up the child to her sister? One commentator has observed that:⁵⁴⁷

It is assumed that because there is no payment no exploitation can exist. However, subtle familial pressures may be more effective than financial reward in persuading a woman to enter into an altruistic arrangement. Relegating such decisions to the family not the legislature does not guarantee protection of women's rights because women are particularly vulnerable to exploitation within families. Certainly, commercial surrogacy can be exploitative, but the point is that altruistic surrogacy may be more exploitative and allow women less autonomy and control over reproductive capacity.

- 535 The issue of exploitation is not in itself sufficient to compel the prohibition or criminalisation of surrogacy arrangements, commercial or otherwise. Our preliminary view is that it is, however, sufficient to justify the regulation of the process leading up to the surrogacy agreement and the conception, in order to ensure that the surrogate mother is counselled and is fully aware of the implications of the arrangement she is entering into.

Reproductive freedom

- 536 An American feminist critique of surrogacy regulation has argued that:⁵⁴⁸

What is unacceptable is that the legitimacy of the wish to bear and raise a child is questioned only in the case of women whose reproductive organs do not work in the "normal" way.

This argument is not uncommon in discussions of whether and how surrogacy (or adoption) should be regulated. "Normal" couples do not have to subject themselves to scrutiny before conceiving a child. Even couples that resort to assisted human reproductive technologies such as donor insemination or in vitro fertilisation to help them conceive a child are not subjected to such scrutiny. Commissioning parents want a child who is genetically related to them – why should they be singled out? Some argue that such scrutiny constitutes discrimination against the infertile.

⁵⁴⁷ Sharyn L Roach Anleu "Reinforcing Gender Norms: Commercial and Altruistic Surrogacy" (1990) 33 *Acta Sociologica* 63, 72.

⁵⁴⁸ Juliette Zipper and Selma Sevenhuijsen "Surrogacy: Feminist Notions of Motherhood Reconsidered" in Michelle Stanworth (ed) *Reproductive Technologies: Gender, Motherhood and Medicine* (Polity Press, Cambridge, 1987) 134.

537 The Brazier Report argued that:⁵⁴⁹

procreative autonomy [is not] an absolute right, especially since it can come into conflict with the rights of others. Procreation is not just a matter of individual freedom. It entails bringing about the life of another human, whose welfare and autonomy deserves the highest attention from the State, because of the total dependency of children on others.

In view of this, we believe that when regulation is practicable and when it does not entail major State intrusion into the lives or bodily integrity of individuals, it may be ethically justifiable Moreover, . . . the rights of the surrogate and her children are also to be taken into account, and these must be balanced against the claims of infertile people to procreative liberty.

538 Our preliminary view is that the known and unknown risks involved in surrogacy arrangements justify some measure of State regulation to ensure that those entering into surrogacy arrangements have considered all the risks involved and are adequately counselled and informed, that there is a healthy relationship between all parties involved, and that the commissioning parents do not pose a risk to the intended child.

Commercialisation of reproduction

539 Many people object to the commercialisation of reproduction that commercial surrogacy is seen to represent. A surrogate mother is treated as the “means” to an end, rather than as an end herself, something the Warnock Report of 1985 considered morally repugnant.⁵⁵⁰ The New Zealand Women’s Health Action Trust, citing the Canadian Royal Commission into Assisted Reproductive Technologies, submitted that:

[Surrogacy arrangements] “instrumentalise human beings through the deliberate act of creating a child for the express purpose of giving it up”. Because this is so, “society may see fit to place limits on the exercise of free choice when the choice concerns an activity that society regards as fundamentally incompatible with values such as respect for human dignity and the inalienability of the person”.

540 Others argue that surrogates perform an extremely valuable service and should be entitled to recompense. As long as they are fully

⁵⁴⁹ Brazier Report, above n 536, paragraphs 4.32–4.33.

⁵⁵⁰ Brazier Report, above n 536, paragraph 2.4.

aware of the risks involved in surrogacy, why should they not be paid for their services? One critic of the Brazier recommendations has argued:⁵⁵¹

The Report fails to appreciate that withdrawing remuneration from surrogates will only drive potential surrogates away from regulated surrogacy into an invisible and socially uncontrolled world where the regulators will be more like pimps than adoption agencies. There is every reason to control surrogacy and to guard against perceived problems, but most women will expect to be rewarded. Brazier agrees and believes that surrogacy will rarely be undertaken by strangers once its recommendations are implemented. This prognosis is misplaced: surrogacy will continue; it will probably grow as infertility increases; it will go underground and the fees will become larger. We cannot stop women exercising their autonomy, nor can we persuade them that being paid aggravates their exploitation, when common sense tells them the reverse.

Access to surrogacy – genuine need or convenience?

- 541 Should access to surrogacy be limited to those people who are genuinely infertile, or should it be available to anyone that wishes to avail themselves of the services of a surrogate mother – for example, a woman that does not wish to experience the physical disruption of pregnancy? This is a subjective judgment, and some may argue that there is no reason why access should be restricted to anyone, if all parties are fully aware of the implications.
- 542 An important issue is whether the risks inherent in surrogacy arrangements are such that the law should permit only infertile people to enter into a surrogacy arrangement as commissioning parents. Even then, should surrogacy only be used to create a child that is genetically related to them? If there is no genetic or biological relationship, the situation is no different from adoption. Creating a child for the purposes of adoption, or to bypass lengthy adoption waiting lists, might be considered repugnant to morality.

Status of surrogacy agreements

- 543 A number of important questions arise when we consider whether surrogacy agreements should be legally enforceable:

⁵⁵¹ Michael Freeman “Does Surrogacy Have a Future After Brazier?” [1999] Medical Law Review 1, 10.

- What should be the status of a surrogacy agreement?
- Should an agreement to pay the pregnancy expenses of the surrogate mother be enforceable?
- Should an agreement to pay the surrogate mother a fee for her services be enforceable?
- Should an agreement by the surrogate mother not to undertake certain activities, not to eat certain foods, to undergo particular tests, and to have an abortion if the foetus is abnormal, be enforceable?
- Should a surrogate mother be forced to give the child to the commissioning parents once it is born?

544 New Zealand courts have not yet had to address such issues. Common sense seems to dictate that an agreement to pay the surrogate's expenses should be enforceable. For example, if a surrogate mother becomes pregnant and incurs certain expenses as a result of her agreement with the commissioning parents, the surrogate mother should be entitled to pursue the commissioning parents for costs incurred.

545 Courts in other jurisdictions have approached this issue as one of public policy, but have reached conflicting results. For example, in *Baby M 1* decided in the United States, the trial judge held that surrogacy contracts were enforceable provided they were in the best interests of the child.⁵⁵² However, the appeal judge held that surrogacy contracts conflicted with State public policy and were therefore unenforceable.⁵⁵³

The place of surrogacy within a Care of Children Act

Background

546 The surrogate mother and her husband or de facto husband (if she has one) will usually be the legal parents of the child born as a result of a surrogacy arrangement. The commissioning parents are likely to have no legal status in relation to the child, even if the child was conceived with their genetic material. This is because legislation

⁵⁵² (1987) A 2d 1128 (Sorkow PJFP, Family Part, Chancery Division, Superior Court of New Jersey).

⁵⁵³ (1988) 537 A 2d 1227 (Wilentz CJ, Supreme Court of New Jersey).

enacted to clarify the legal status of children did not anticipate surrogacy situations. We described in the discussion paper how the law would apply to these arrangements:⁵⁵⁴

356 The birth mother is regarded by current legislation as the child's mother, with no regard to the circumstances in which the child was conceived. If the birth mother becomes pregnant as a result of natural intercourse with the commissioning father and she is married, the law presumes that the birth mother's husband, if she has one, is the father of the child. If the marriage has been dissolved, a child born within 10 months of the dissolution is presumed to be the child of the former husband.⁵⁵⁵

357 These are legal presumptions, and the identity of the father may be rebutted by the facts of a particular case. In situations where the surrogate mother is not married, or the presumption of legal fatherhood is rebutted in favour of the commissioning father, the commissioning father will not have automatic guardianship rights even if he is named on the birth certificate.⁵⁵⁶

358 If the birth mother becomes pregnant as a result of artificial insemination, or becomes pregnant with a donated embryo, then she is the child's legal mother. Her husband [or de facto husband], if she has one, is the legal father of the child if he consented to the artificial insemination. The donors of sperm and ovum, and in surrogacy arrangements one or both of the commissioning parents, have no legal rights.⁵⁵⁷

547 For such an arrangement to come to its intended conclusion, the child must be adopted by the commissioning parents. This poses some conceptual difficulties – we have argued that the purpose of adoption should be to provide an option for children whose families cannot or will not care for them,⁵⁵⁸ whereas surrogacy involves deliberately creating a child to be handed over to another couple.

Submissions

548 The discussion paper asked whether it was appropriate for the status of children born as a result of surrogacy arrangements to be

⁵⁵⁴ Law Commission, above n 2.

⁵⁵⁵ Section 5 Status of Children Act.

⁵⁵⁶ Section 6(2) Guardianship Act. The father must apply to the court under section 6(3) of the Guardianship Act if he wishes to become a guardian.

⁵⁵⁷ Status of Children Amendment Act.

⁵⁵⁸ See the discussion of the purpose of adoption at chapter 8.

regularised by adoption, or whether a separate piece of legislation should provide specifically for surrogacy and its consequences.

549 Seven submitters favoured surrogacy arrangements being provided for in adoption legislation, while fourteen thought they should be enacted as a separate piece of legislation.

Policy options

550 We would expect that a balance can be struck by providing for surrogacy arrangements within the Care of Children Act. Ultimately, commissioning parents will be required to apply for an adoption order.

551 However, surrogacy cannot be treated in exactly the same manner as adoption. Legislation should explicitly recognise that surrogacy involves unique front-end issues – it should provide a structure to regulate what occurs before the baby is conceived. We anticipate that once the baby is conceived, the procedures set in place for adoption could be followed, and the surrogate mother would be entitled to the same protections as any other birth mother. An issue that needs further consideration is whether a gestational surrogate mother might require fewer protections than are afforded to a genetic surrogate mother.

Regulatory issues

552 There are a number of issues in the pre-conception stage that will need to be regulated:

- the suitability of the commissioning parents;
- the suitability of the proposed surrogate mother;
- advertising regarding surrogacy arrangements;
- payment;
 - for the gestation of a child;
 - for maintenance;
 - for pregnancy or birth-related expenses;
 - for loss of income;
- DNA testing.

553 In this section of the report we put forward our tentative views regarding options for regulating surrogacy arrangements. These

views are based upon the research we have conducted and the submissions that we received. We repeat our earlier caution that further research and consultation needs to take place to ascertain the views and perspectives of the wider community. We hope that by expressing these views we will stimulate informed debate regarding the regulation of these arrangements. We welcome public feedback regarding these issues.

Suitability of commissioning parents

- 554 At present, commissioning parents may apply to adopt the child without being screened by CYFS.⁵⁵⁹ If they are already caring for the child, as is usually the case, they are breaching the requirements regulating the placement of a child for the purposes of adoption. Alternatively, they may have approached CYFS only once the child has been conceived or born. In either case, CYFS or the court is presented with a *fait accompli*. Depending on how long the commissioning parents take to make an application, the child may have begun to bond with the commissioning parents.
- 555 Some advocates for those involved in surrogacy arrangements fail to see the need for commissioning parents to be screened for suitability.⁵⁶⁰ The child is usually genetically related to them. Other consumers of fertility treatments who bear children conceived with donor eggs and/or sperm (and thus may not be genetically related to them) are not similarly screened. The argument, however, that because care of the child is being transferred from the birth parent to a person unrelated at law, the State has a legitimate interest in ensuring the suitability of the proposed parents to care for the child, is a compelling one.
- 556 While some issues may be similar to adoption, others will be unique to a surrogacy arrangement. It is not appropriate that an assessment of the commissioning parents be made on exactly the same basis as for prospective adoptive parents, as surrogacy adds extra complications to the more typical adoption scenario. There will need to be extra assessment of the commissioning parents and the surrogate mother. There will also be unique issues relating to

⁵⁵⁹ The parties may have arranged a direct placement without the involvement of CYFS. Unless the commissioning parents are related to the surrogate this will constitute a breach of section 6 of the Adoption Act. See paragraphs 264–272 of this report.

⁵⁶⁰ See the issues canvassed below at paragraphs 554–557.

surrogacy that will need to be discussed with the commissioning parents and the potential surrogate mother.⁵⁶¹

557 Our preliminary view is that the issues involved are of such difficulty that in all cases, a pre-conception assessment of the commissioning parents in surrogacy arrangements should be carried out by CYFS.⁵⁶² This assessment should be based upon the education and counselling programme offered to prospective adoptive parents, but would also canvass surrogacy-related issues. We would also envisage State assessment of the proposed surrogacy arrangement. If the commissioning parents are approved, and the surrogacy arrangements are considered to be acceptable, then the commissioning parents could be deemed to be acceptable applicants for an adoption order once the child is born. This approval would be for a finite rather than an indeterminate period of time – we propose a period of 12 months, after which a reassessment would be required.

558 The benefit of going through this process prior to conception is that the commissioning parents can be certain their application for adoption will not be stalled or rejected.⁵⁶³ However, there must be a disincentive to persuade those involved in surrogacy arrangements not to present the court with a *fait accompli*. We suggest that anybody who fails to comply with these requirements would face a rebuttable presumption that they are not suitable parents for that child – this will make it more difficult to succeed in an application for adoption. Failure to become the legal parent of the child provides an incentive for commissioning parents to comply with the legal requirements.

We recommend that the following questions be considered:

- whether commissioning parents should be required to undergo pre-conception and assessment education, preparation and screening in order to be deemed suitable applicants for adoption;
- who should pay for the assessment, education and preparation;
- whether this pre-approval be reassessed every 12 months or expire; and
- whether a rebuttable presumption be imposed that commissioning parents are unsuitable applicants for adoption if they do not obtain pre-approval?

⁵⁶¹ See the discussion of some of these issues above at paragraphs 523–528

⁵⁶² We anticipate this assessment would be conducted by a social worker from the AISU who is trained in surrogacy issues.

⁵⁶³ Barring any major change in circumstances in the interim.

559 If this policy were adopted, efforts would need to be made to stop “underground” surrogacy practices. Medical practitioners should be forbidden to assist with a surrogacy arrangement unless that arrangement has received pre-approval. We are aware of a practice whereby a surrogate mother presents herself to maternity services using the name of the commissioning mother.⁵⁶⁴ If the commissioning parents are registered as the parents of the child at birth, there is no need to adopt. One way to reduce the likelihood of this occurring is to require the parents registering the child’s birth to provide a form of photo identification – for example, a drivers licence or a passport. Women younger than 15, or those who do not have the required identity documents, should be required to have someone attest to their identity – as is required in an application for a New Zealand passport.

We recommend that consideration be given to:

- the creation of an offence for medical practitioners to be party to an unapproved surrogacy arrangement; and
 - the introduction of identification procedures to prove the identities of those registering as a child’s parents.
-

Suitability of the surrogate mother

560 In order to minimise the inherent risks in a surrogacy arrangement, the proposed surrogate mother should undergo counselling and assessment before the commissioning parent’s application for pre-approval is approved. This would aim to ensure that the surrogate mother is physically, mentally and emotionally equipped to enter into such an arrangement, that she has received independent legal advice, and that she understands what her options are at every stage of the process.

561 The assessment should consider the relationship between the surrogate mother and the commissioning parents. This assessment would attempt to ensure that no undue influence was being exercised, and would attempt to judge the compatibility of the parties, in much the same way as a good “match” between the child and the adopting parents is sought in an adoption.

562 If each of these elements received approval, then the commissioning parents would be given pre-approval to make an application for legal parenthood.

⁵⁶⁴ P Trapski *Trapski’s Family Law* vol V (Brookers, Wellington, 1999) 4.4.02.

563 NECAHR, when deciding who should get ethical approval for a medically-assisted surrogacy arrangement, applies similar principles:⁵⁶⁵

There are sophisticated and rapidly developing medical technologies, substantial commercial interests, a legal maze, and psycho-social uncertainties about identities, roles and relationships. It is of ethical concern to NECAHR that parties proposing to involve themselves in surrogacy arrangements have the knowledge, understanding and freedom to make informed choices and decisions.

We recommend that consideration be given to:

- requiring a surrogate mother to undergo counselling and obtain independent legal advice before approval is given to a surrogacy arrangement;
 - who should pay for such counselling and legal advice; and
 - requiring an assessment of the relationship between the commissioning parents and the surrogate mother before approval is given to a surrogacy arrangement.
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Advertising

564 The discussion paper asked a series of questions regarding the role of advertising and payment in surrogacy arrangements. The general response indicates that the submitters oppose the commercialisation of surrogacy arrangements. Commercial surrogacy is an offence in most countries that have introduced legislation to govern surrogacy arrangements.⁵⁶⁶

565 Ten submitters favoured a prohibition upon advertising for surrogate mothers; one submitter did not. There were seven submitters for and seven against the proposition that there should be an exception for certified fertility clinics and/or providers.

566 Thirteen submitters favoured a more general proposition that advertising be restricted in relation to surrogacy arrangements, while five did not.

⁵⁶⁵ Rosemary J De Luca “Issues for the National Ethics Committee on Assisted Human Reproduction in Its Review of Medically Assisted Surrogacy, with Wider Implications for Ethical Review” (2000) 9 *Otago Bioethics Report* 8.

⁵⁶⁶ See, for example, section 2 Surrogacy Arrangements Act 1985 (UK) and Section 59 Infertility Treatments Act 1995 (Victoria, Australia).

567 While it would be preferable to survey a greater proportion of the community on this matter, we suggest that advertising should be restricted in a similar manner to the restriction on advertising for adoptions. This would provide for a general restriction, with an exception for accredited providers of surrogacy services⁵⁶⁷ to advertise that their services are available.

Payment

568 Commercialisation of surrogacy is opposed by many on the grounds that it may lead to the commodification of childbearing and is potentially exploitative of the surrogate mother.⁵⁶⁸ Some commentators argue that commercial surrogacy is “baby-selling”, which is contrary to Article 35 of UNCROC, which states:

State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

569 The Brazier Report observed that the core social value on which surrogacy should be based is the “gift relationship”. The contractual implications of commercial surrogacy were repugnant to the Committee.⁵⁶⁹

570 In New Zealand, the NECAHR currently decides on a case-by-case basis whether a medically-assisted surrogacy proposal is ethical or not.⁵⁷⁰ An unfavourable decision will usually mean that the fertility clinic does not assist with the surrogacy arrangement.⁵⁷¹ In relation to payment and advertising, NECAHR stated in their submission that:

it is not permissible to give or receive payment for being a surrogate mother, above the expenses of pregnancy and childbirth. This is in keeping with the concept that a child is not a commodity for which

⁵⁶⁷ Services in the sense of independent counselling or provision of fertility treatment.

⁵⁶⁸ We canvassed these issues above at paragraphs 531–540

⁵⁶⁹ Brazier Report, above n 536, 38.

⁵⁷⁰ NECAHR’s role is not to assess and create policy relating to surrogacy arrangements, but to consider the ethics of new reproductive technologies. An issue currently of concern to NECAHR is whether New Zealand might reach a point where surrogacy arrangements are not considered to be a new technology and fertility clinics do not feel obliged to obtain ethical approval.

⁵⁷¹ Fertility clinics are not legally bound to follow the ruling of NECAHR. However, most have accreditation under an Australian system that requires them to obey the decisions of ethical bodies.

payment may be made or received, and also that financial payment should not be made to induce a woman to become a surrogate mother It is the view of NECAHR that there should be a close relationship between the surrogate mother and the commissioning parents. Advertising would preclude such a relationship, and may also imply a commodification of the child and surrogate mother.

571 There seemed to be a general opposition to the idea of paying a surrogate for her services – that is, payment for the gestation of a child. Thirteen submitters stated that it should be an offence to offer or receive payment for the gestation of a child, while three disagreed with that option.

572 An analogy can be made to the selling of blood. Section 92B of the Health Act 1956 provides that it is an offence to accept financial or other consideration for one’s blood.

573 People seem more willing to accept that a surrogate mother should be compensated for pregnancy and birth-related expenses, as well as maintenance. Thirteen submitters supported this, while two opposed it. Some suggested that compensation for loss of income should also be paid if the surrogate is forced to stop work because of the pregnancy.

574 One prospect that many people wish to avoid is surrogacy being seen as a “career choice” for women suffering financial hardship.⁵⁷² It may be that the only way to avoid this prospect is to make it an offence to profit from the gestation of a child. This would still allow:

- compensation for pregnancy and birth-related expenses;
- other reasonable expenses related to the surrogacy; and
- payment for loss of income.

Care would need to be taken in drafting such a provision to ensure that fertility clinics and medical providers are still allowed to charge for and profit from services provided.

575 NECAHR objects to payment in lieu of employment, arguing that in effect it is payment for being a surrogate mother. However, many see no reason why a surrogate mother should not be compensated for loss of earnings if she is forced to take leave from her employment because of the pregnancy – it is compensation rather than profit.

⁵⁷² The Brazier Report noted that there is evidence that the majority of surrogates are significantly poorer than commissioning couples (above n 536, paragraph 4.19).

576 Concern is often expressed that prohibiting payment for surrogacy services will simply drive such payments, or the practice of surrogacy, underground. We reject the argument that because payment might be driven underground, no such offence should be created. It is defeatist to say that a criminal offence should not be created because people will commit the crime anyway. What is more concerning is that surrogacy arrangements themselves may driven underground, as this has potential health implications.⁵⁷³ We consider, however, that the proposals set out above⁵⁷⁴ would encourage people to follow the procedures we have suggested, as the ultimate goal is to be the legal parent to a child. The introduction of identification procedures for registration of births should eliminate fraudulent birth registrations.

Should an offence be created for:

- a surrogate mother to profit financially from the gestation of a child?
 - a commissioning parent to pay a surrogate mother for the gestation of a child?
 - any person to facilitate the payment of a surrogate mother for the gestation of a child?
-
-

DNA testing

577 Using a surrogacy arrangement to create a child who is genetically related to neither commissioning parent, nor to any member of either parent's family, is simply a means of avoiding the more rigorous procedures required for adoption. Other than the contractual agreement, there is no compelling reason to place the child created with the commissioning couple over the other applicants for adoption.

578 If it is considered that surrogacy arrangements are morally acceptable only where the commissioning parents are unable to have a child together by natural means⁵⁷⁵ and where their purpose is to create a child genetically related to at least one of the commissioning parents, and if our proposals for pre-approval of commissioning parents are adopted, then DNA testing of the child

⁵⁷³ See discussion above at paragraph 525.

⁵⁷⁴ At paragraphs 551–563.

⁵⁷⁵ Including same-sex parents who cannot naturally have a child together.

should be carried out at birth in order to confirm a genetic relationship with the commissioning parents. This will assure the surrogate mother that the child is not one conceived with her own partner,⁵⁷⁶ and will confirm the validity of the commissioning parent's application for adoption.

- 579 If the DNA test shows no genetic relationship between the child and either commissioning parent, the pre-approval should become void. If the surrogate mother still wishes to relinquish the child to the commissioning parents, and the commissioning parents wish to adopt, they will have to go through normal adoption procedures.

Should consideration be given to establishing compulsory DNA testing of the baby, surrogate mother and commissioning parents at the birth of the baby, in order to ensure that the child is genetically related to the commissioning parents?

ASSISTED REPRODUCTION AND THE STATUS OF CHILDREN

- 580 In our consideration of whether same-sex couples should be eligible to adopt a child, the issue of the status of children born to one partner of a same-sex relationship arose. Children born in such circumstances are likely to have been conceived with the assistance of AHR.

Heterosexual couples

- 581 When a heterosexual couple, whether married or de facto, is unable to have a child without the assistance of donor insemination or embryo implantation, any child conceived and born as a result of artificial insemination or embryo implantation is legally presumed to be the child of the couple, provided that the husband consented to the procedure.⁵⁷⁷
- 582 If the assistance to achieve pregnancy occurs via natural intercourse, then the legal presumptions begin to diverge. As noted above in the discussion of surrogacy, if the mother of the child is married then her husband is presumed to be the father of the child. If the marriage has been dissolved, the ex-husband will be presumed to be the father

⁵⁷⁶ Which can be a risk where the surrogate mother is to be the genetic mother of the commissioned child.

⁵⁷⁷ Status of Children Amendment Act 1987.

of the child if the child is born within 10 months of the dissolution.⁵⁷⁸ He may be registered as the child's father without his permission.⁵⁷⁹ These presumptions are rebuttable. If, however, the mother is not married, then no such presumptions apply. The father's permission must be obtained for his name to be registered on the child's birth certificate,⁵⁸⁰ and he will only be considered a legal guardian if he was living with the mother in a relationship in the nature of marriage when the child was born.⁵⁸¹

Lesbian couples

- 583 A significant number of lesbian couples are resorting to donor insemination in order to have families together. In these families one mother is the biological and legal parent of the child,⁵⁸² whilst the "other mother" has no legal status. The usual practice is for the co-mother to apply to become an additional guardian.
- 584 This position is not considered satisfactory by many of these women, as they feel that their children are not adequately protected by the law.⁵⁸³ One submitter stated:⁵⁸⁴

[O]ur little girl has only one legal parent – her birth mother. The Family Court has appointed her "other mother" to be guardian. In many respects this arrangement satisfies our needs as a family and, assuming no catastrophe, is unlikely to cause any of us significant problems as long as we know and remember to make the appropriate arrangements regarding wills, power of attorney and any other relevant legal family matters.

⁵⁷⁸ Section 5 Status of Children Act.

⁵⁷⁹ See Form Two, Schedule, Births, Deaths and Marriages Registration (Prescribed Information and Forms) Regulations 1995 which allows either the mother or father or both mother and father to register all details of the child's birth and parents if the parents are married.

⁵⁸⁰ See Form Two, Schedule, Births, Deaths and Marriages Registration (Prescribed Information and Forms) Regulations which provides that the father must sign the notice of birth form if his details are to be registered and he is not married to the child's mother.

⁵⁸¹ Section 6 Guardianship Act – although he may apply under section 6A to be declared a guardian.

⁵⁸² Usually the only legal parent: either because donor insemination has been carried out to achieve the pregnancy or because she cannot be described as living in a relationship in the nature of a marriage with the father of the child.

⁵⁸³ Submissions 1/27, 1/43 and 1/67.

⁵⁸⁴ Submission 1/27.

Yet there seems no just cause for our daughter's security to depend on the fact of no catastrophe, particularly the death of her birth mother when she has another committed caregiver. Nor does it seem right that she should have to rely on us to be aware enough to make the appropriate legal arrangements, and to be able to meet the cost of these, to ensure her security within our immediate and extended families.

Another submitter argued:⁵⁸⁵

While we realise there are those who do not agree with what we are doing – we are doing it nonetheless. We firmly believe that we are providing a good environment for our children and there is no evidence anywhere to suggest that any harm will come to our children from having been raised in a lesbian household. We do not believe our family and our children should be penalised because there are some people who disagree with us. There are an increasing number of lesbians who are raising children and the law should be changed if for no other reason than to protect those children and give them the secure family arrangement that other children have. We do not believe that changes to the law will have any bearing on the decision to have children just change the legal effect of those that do.

As stated above, if these couples were heterosexual the Status of Children Amendment Act 1987 would deem both spouses to be the parents of the child.⁵⁸⁶

585 The discussion paper asked whether the Status of Children Amendment Act 1987 should be amended to treat lesbian couples as parents in a donor-insemination situation. Twenty-five submitters replied yes, eight replied no.

586 A number of other more general issues regarding the Status of Children Amendment Act arose during our analysis of the submissions. The Act changes the legal status of the child in a similar way to the Adoption Act, and the birth certificate reads as if the legal parents are the biological parents. It is too early to know whether the children born as a result of such technology will experience similar issues to adopted persons, although early research

⁵⁸⁵ Submission 1/67.

⁵⁸⁶ Where a child is born to a woman as a result of donor insemination/implantation and where her husband or de facto partner has consented to the insemination/implantation, the husband or partner is deemed in law to be the father of the child and the sperm donor ceases to have any responsibility or liability in respect of the child, sections 5–11 Status of Children Amendment Act.

suggests that they might.⁵⁸⁷ While welcoming the prospect of being recognised as a legal parent, some submitters were reluctant to endorse the creation of another legal fiction. It may be that a more open system of adoption might better suit their needs, but we should also consider whether a re-examination of the Status of Children Amendment Act is warranted.

587 We consider that there are three viable options available to confer status upon planned lesbian-led families where one partner is the biological mother of the child.

588 The first option is to amend the Status of Children Amendment Act⁵⁸⁸ to give legal status to planned lesbian-led families. This could be achieved by changing the labels “husband” and “wife” that are used in the legislation to more gender neutral terms, and allowing a lesbian couple to be considered parents in the same manner as heterosexual couples.

589 The second option is to allow lesbian couples to opt into the presumptions set out in the Status of Children Amendment Act, rather than having the presumptions apply automatically. We envisage that such couples could apply to the Family Court prior to undergoing artificial insemination in order to obtain a declaration that the presumptions set out in the Status of Children Amendment Act would apply to the planned child.

590 The third option is to state that same-sex couples in this situation must apply for step-parent adoption or an enduring guardianship order.⁵⁸⁹ Since 1 July 1999, Denmark has allowed a person in a registered partnership to apply for step-parent adoption of the other partner’s child.⁵⁹⁰

⁵⁸⁷ Dr Vivienne Adair, Director, Centre for Child and Family Policy Research, Auckland University.

⁵⁸⁸ In respect of the first two options, we favour incorporating the matters contained in the Status of Children Amendment Act in the proposed Care of Children Act. Guardianship and adoption provisions at their most basic level describe the persons in whom parenthood naturally inheres, and how the status of parenthood might be conferred upon persons in whom such status does not inhere. The Status of Children Amendment Act and some Status of Children Act matters provide another means by which the status of parenthood may be conferred upon persons who otherwise would not be considered to be parents.

⁵⁸⁹ See the discussion of step-parent adoption at paragraphs 117–125, 366–375.

⁵⁹⁰ Unless the child was the subject of intercountry adoption – this exclusion was enacted due to fear that intercountry adoptions involving Denmark would not be allowed by the sending country (section 4(1) Danish Registered Partnership Act 1989).

- 591 The fourth option is to retain the status quo. This would need to be considered in the context of the child's best interests. Securing the child's legal status in relation to the child's parental figures is an important consideration.
- 592 The issue is whether Parliament should leave the regulation of such relationships to the discretion of the mother and her female partner, or whether Parliament should enact legal presumptions which will exclude a legal relationship between the donor father and the child. This issue is better considered by Parliament in the context of its consideration of the law relating to same-sex relationships.

Male same-sex couples

- 593 The most complicated situation arises where male same-sex couples wish to have their own biological children.⁵⁹¹ It is perhaps self-evident to observe that biology dictates that men cannot conceive and gestate a child (at the present time anyway). The legal result of this immutable fact is that a male homosexual couple cannot rely on the Status of Children Amendment Act to achieve legal recognition of their status in relation to the child.
- 594 This basic biological ineligibility raises the question of whether it is right to place more emphasis and perhaps more value upon a woman's ability to gestate and give birth to a child than upon the donation of genetic material. We suggested earlier that the issues that arise in gestating a child for someone else are so complicated that surrogacy arrangements may require their own regulatory regime. This can be contrasted with the approach taken to the donation of genetic material, where legal presumptions apply to clarify legal parentage and no independent assessment of the arrangements or participants is carried out.⁵⁹²
- 595 It is a biological reality that gay male couples will be forced into such assessments by virtue of the fact that they must use a surrogate mother in order to have a child genetically related to one of them. Gay male couples can never be eligible to rely upon the Status of Children Amendment Act presumptions in order to become legal parents of one partner's child, even if the law were amended to be

⁵⁹¹ Recently in the United Kingdom, a gay couple commissioned a surrogate to bear twins. The legal status of the relationship between the two men and the children in the United Kingdom has not yet been confirmed.

⁵⁹² Note that genetic material can be donated by women (egg donors) as well as men (sperm donors).

gender neutral. Gay men must rely upon a woman to gestate and give birth to the child for them – this is fundamentally different from a couple relying on the donation of genetic material alone.⁵⁹³ For this reason gay male couples will inevitably have to comply with whatever regulatory procedures are implemented to regulate surrogacy arrangements.

AHR AND ACCESS TO DONOR INFORMATION

- 596 The AHR Bill 1998 proposes much wider access to information for donors, children born of donor gametes, and the parents of children born of donor gametes.
- 597 The Bill provides for the collection of “general” information as well as information prescribed for the purposes of the Act. Providers⁵⁹⁴ must inform donors that personal information prescribed for the purposes of the Act⁵⁹⁵ will be gathered and retained. Some of the information will be forwarded to the Registrar-General of Births, Deaths and Marriages.
- 598 The Bill allows persons over the age of 18 years to access any donor information kept by a provider or the Registrar-General. A child under the age of 18 years must be given access to all non-identifying donor information that is in the provider or the Registrar General’s possession. A parent of a donor child under the age of 18 years is entitled to access information about the donor.
- 599 The Bill enables the donor child and parents to provide further information to be placed on the provider’s record. A child may request the provider to delete, amend or destroy any information that the provider holds (other than prescribed child information).
- 600 A donor child over the age of 18 years may consent to the disclosure of identifying information to the donor. Until that time, the

⁵⁹³ One procedure involves a small amount of the donor’s time in giving up some genetic material. The other involves nine months of pregnancy and the accompanying physical discomfort, may have implications for the woman’s ability to undertake paid employment for that period, may have other lifestyle implications (for example, recommended restrictions upon the consumption of alcohol), the woman will be subject to the pain of childbirth, and may experience emotional trauma when giving up an infant that she has potentially bonded with during pregnancy.

⁵⁹⁴ “Providers” refers to persons or organisations providing access to assisted reproductive technology.

⁵⁹⁵ Prescribed information will be set out in regulations.

provider or the Registrar-General must inform the donor if it holds information about the child and may release that information only where specifically requested and where the donor child has consented to its release. After the donor child has reached the age of 25 years, the provider or the Registrar-General must give the donor access to any information about the child.

- 601 There is a residual discretion for the provider or the Registrar-General to refuse to grant access to information about a donor if it is satisfied on reasonable grounds that to do so is likely to endanger any other person.
- 602 The Bill provides a statutory right of review for persons denied access to information or denied the right to amend, delete or destroy the information held by the provider or Registrar-General.

The Law Commission's view

- 603 The Commission can see no reason why, as a matter of policy, persons born as a result of assisted human reproduction should not have the same rights of access to information as adoptees. We do not see any justification for imposing an age restriction upon access to donor information. In the light of the recommendations made in chapter 16, we recommend that persons born of assisted human reproduction have the same rights to access information as adoptees.

We recommend that:

- persons born as a result of assisted human reproductive technology/donor insemination, their parents, and the donor should have the right to access donor information and donor child information; and
 - access to such information by other persons would be limited in the same way as for adoption information.⁵⁹⁶
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How should donor information be recorded?

- 604 How information about donors might be recorded and the form in which it is to be reflected is another matter. A donor–donor child register held by the Registrar-General of Births, Deaths and Marriages, as proposed in the AHR Bill, is one means of recording and storing information. Another means of recording might be to

⁵⁹⁶ See paragraphs 480–482.

record donor information on the long-form birth certificate proposed at paragraphs 478–480. It is the Commission’s understanding that the latter option was rejected as it was seen to place too much information in the hands of the State. At this stage, the Commission prefers not to express any final opinion as to which option should be adopted.

APPENDIX A

List of recommendations

CHAPTER 5 A CARE OF CHILDREN ACT

WE RECOMMEND that the Adoption Act and the provisions of the Guardianship Act and the CYP&F Act relating to the placement of children be incorporated in a Care of Children Act.

We recommend that the Care of Children Act contain a section describing the persons who are, in law, considered to be the parents of a child.

We recommend that the legal effect of adoption should be the transfer of permanent parental responsibility from birth parents to the adoptive parents.

We recommend that parental responsibilities and rights be specifically defined in the Care of Children Act.

We recommend that adoption have defined mandatory consequences and that a parenting plan accompany the order

We recommend that the role of “enduring guardian” be created to recognise the social status of a guardian who acts as a parent.

We recommend that the provisions governing who is, who can apply to be, and who may be removed as a guardian be transferred from the Guardianship Act and the CYP&F Act to the Care of Children Act.

CHAPTER 8 GUIDING PRINCIPLES

We recommend that the Care of Children Act state as a guiding principle that a placement within the extended family, where practicable, is preferable to a placement with strangers.

We recommend that the fundamental purpose of adoption should be to provide a child who cannot or will not be cared for by his or her own parents with a permanent family life.

We recommend that the welfare and interests of the child be the paramount consideration when considering any issue under the Care of Children Act.

We recommend that the Care of Children Act provide a list of factors that should be considered when determining the best interests of the child in the context of an application for adoption.

We recommend that the Care of Children Act set out the purpose of adoption in an objects clause.

CHAPTER 9 CULTURAL ADOPTION PRACTICES

We recommend that where practicable⁵⁹⁷ a child should be placed within a family of the same culture as the child.⁵⁹⁸ If that is not possible, the court should be satisfied that the prospective adopter(s) will help foster the child's cultural, social, economic and linguistic heritage, and facilitate contact with that child's family.⁵⁹⁹

We recommend that a Māori social worker provide the social worker's report in applications to adopt a Māori child.

We recommend that, where practicable, the Māori social worker have iwi affiliations with the child.

When considering cross-cultural adoption applications, the court should call for a report on cultural matters to ascertain the suitability of the placement and how the prospective adopters intend to foster the child's cultural heritage.

We recommend that the guiding principles of the Care of Children Act require decision-makers to take into account the cultural heritage of the child in such a way as to ensure that the child has full access to the child's cultural, social and economic heritage.

CHAPTER 10 SUPPORT SERVICES

We recommend that there should be mandatory pre-adoptive counselling for parents contemplating giving a child up for adoption. An adoption consent taken without counselling first being provided should be invalid.

⁵⁹⁷ This guideline needs to be given a common sense interpretation. A child should not languish in care because there are no suitable adopters available from that child's cultural group. As with all other provisions in the proposed legislation, this provision would be exercised in accordance with the overriding principle that the welfare and interests of the child are paramount.

⁵⁹⁸ And in a Māori context preferably with a whānau member or member of the same hapu or iwi.

⁵⁹⁹ This was supported by the Ministry of Women's Affairs in their submission.

We recommend that there be a distinction between counselling given before and after the birth of the child, and that at least one counselling session be given to the birth parents after the birth of the child.

We recommend that regulations set out an explanation of the legal and social effect of adoption expressed in plain English and translated into several languages.

We recommend that a children’s version of this explanation be created and issued to the child (or the adoptive parents where the child is an infant) for future use by the child.

We recommend that it be mandatory for prospective adoptive parents to receive counselling and education about adoption before receiving a child for adoption.

We recommend that before witnessing a consent to an adoption application the lawyer must certify having received a certificate from counsellors⁶⁰⁰ that the birth parents and prospective adoptive parents have received adoption counselling.

We recommend that a “family or whānau meeting” be available to discuss issues relating to adoption.

We recommend that a post-adoption family or whānau meeting or mediation be available to adoptive parents, birth parents, and adopted persons.

We recommend that post-adoption counselling be available to adoptive parents, birth parents, and adopted persons.

We recommend that counselling services be provided separately from adoption assessment services.

We recommend that CYFS prepare an accreditation framework for the provision of private adoption counselling services.

We recommend that only not-for-profit organisations be entitled to receive accreditation.

⁶⁰⁰ See paras 231–233 for a discussion of accreditation for counsellors.

We recommend that the AISU remain the sole assessor of the suitability of prospective adoptive parents.

We recommend that:

- All prospective adopters (including intercountry adopters) must be approved by CYFS;
- CYFS must assess the particular “match” between the child and the prospective adopters; and
- The birth parents retain their current role whereby they can select the parents whom they wish to adopt their child.
- CYFS must provide the birth parents with a range of prospective adopters.

(Proposed step-parent and intra-family adoptions should be exempt from the last requirement.)

- It should be an offence to place, receive or keep a child, or to facilitate the placement or receipt of a child, for the purpose of guardianship or adoption without a social worker’s prior approval. CYFS should be specifically empowered to prosecute persons who fail to comply with this requirement.
- Compliance with these procedures should be a condition that precedes the making of an adoption application.
- Persons whom CYFS has rejected as prospective adoptive parents may have that decision reviewed by CYFS and, if necessary, may appeal that decision to the Family Court.

We recommend that pre- and post-adoption services for adopted persons, birth parents and adoptive parents be State funded.

We suggest that a cap might be imposed on the number of state funded post-adoption counselling sessions for adopted persons, birth parents and adoptive parents.

We recommend that consideration be given to charging intercountry adoptive parents at least a portion of the cost of the counselling, education and preparation sessions.

We recommend that CYFS be able to charge intercountry adoptive parents the full cost of disbursements payable in relation to the adoption.

CHAPTER 11 JURISDICTION, INTERCOUNTRY ADOPTION AND CITIZENSHIP

We recommend that jurisdiction be limited to cases where:

- the child is habitually resident in New Zealand or coming to reside in New Zealand; and
- the applicants are New Zealand citizens or permanent residents who are resident, and have for three years been habitually resident, in New Zealand prior to the filing of the application to adopt.

We recommend that section 17 apply only to adoptions made overseas by persons not habitually resident in New Zealand. Intercountry adoptions should be excluded from the coverage of this section.

We recommend that intercountry adoptions be defined as “the adoption of a child habitually resident in another State, by a person habitually resident in New Zealand”.

We recommend that procedures akin to those set out in the Hague Convention be applied to intercountry adoptions involving non-Convention States.

We recommend that the Central Authority be responsible for negotiating acceptable intercountry adoption procedures with non-Convention States.

CHAPTER 12 WHO MAY BE ADOPTED

We recommend that in most cases the upper age limit for the making of an adoption order be 16 years.

The court should have discretion to make an order in respect of a person over the age of 16, but under the age of 20, in exceptional circumstances where it is clear that the welfare and interests of the young person require an adoption order to be made.

CHAPTER 13 WHO MAY ADOPT?

We recommend that the prohibition against a single male adopting a female child be removed.

We recommend that de facto couples be permitted to apply to adopt.

We recommend that there be no prohibition against applications by same-sex couples to adopt a child.

We recommend that the terminology of a new Act make it clear that de facto (including same-sex) couples may adopt.

We recommend that in the case of step-parent adoption the judge must consider:

- the degree of contact that a child has with the other birth parent and that birth parent's extended family, and the effect that granting the adoption order might have on these relationships and the degree of contact;
- whether enduring guardianship or guardianship would be a more appropriate option than adoption to regulate the status of the child in relation to a step-parent; and
- whether the step-parent has lived with the child for not less than three years preceding the adoption application.

We recommend that in all step-parent adoptions a social worker's report should be called for.

A parent whose spouse or partner is applying to adopt that parent's child must consent to and support the spouse or partner's application, but need not personally apply for an adoption order.

We recommend that the Care of Children Act require a social worker to investigate the possibility of care within the family group before adoption to non-related persons is considered.

We recommend that the Care of Children Act require the Family Court judge to inquire whether placement within the family group has been considered.

We recommend enacting a section that requires a judge to consider:

- the genealogical distortion that will result from the adoption order and the effect that might have on the child and other family members; and
- whether enduring guardianship or guardianship would be a more appropriate option than adoption to regulate the care of the child by family members.

We recommend that natural parents should not be eligible to adopt their own children.

CHAPTER 14 CONSENT TO AN ADOPTION APPLICATION

We recommend that a birth parent must receive independent legal advice before signing a consent to adoption.

We recommend that there be a set charge on the legal aid fund for the giving of independent legal advice regarding adoption to a birth parent and the witnessing of a birth parent's consent to adoption.

We recommend that the consent of a birth parent to the adoption of the child be valid only if it is given at least 28 days after the birth of the child.

We recommend a legislative requirement that a social worker make reasonable efforts to identify and locate the putative father.

We recommend that, save where dispensed with, the consent of both parents should be required in all cases, even where the birth father is not a guardian of the child.

We recommend that the legislation state that once a valid consent has been signed:

- birth parents are still guardians, but no longer entitled to custody of the child;
- adoptive parents are entitled to custody and temporary guardianship of the child.

We recommend that a consent should lapse if:

- an application for an adoption order is not made within two months of signing;
- an application for a final adoption order has not been made within six months of the granting of an interim adoption order;⁶⁰¹
- an adoption order is not granted.

We recommend that if a consent lapses, the social worker should (with the agreement of the birth mother) be required to convene a family or whānau mediation with birth parents and the prospective adoptive parents (and other family members if that is appropriate) to consider the child's future placement options.

We recommend no extension of the current law relating to revocation of consent, provided that a longer consent period is enacted and provision is made to ensure the giving of informed consent.

We recommend allowing a birth parent to apply to revoke consent where the consent is obtained by fraud or duress.

⁶⁰¹ Where the court has decided to make an interim order first, rather than a final order in the first instance. See paragraphs 453–454 for a discussion of our proposals regarding interim and final orders.

Where it is claimed that the consent was obtained by fraud or duress, the court should resolve such matters before hearing the adoption application.

We recommend that regulations set out in plain English the circumstances in which consent can be withdrawn.

We recommend that new legislation refer simply to incapacity when setting out grounds for dispensing with the consent of a parent to adoption.

We recommend replacing the current section 8(1) with a section that states:

Where a parent has abandoned, neglected, persistently failed to maintain or persistently ill-treated the child, or is incapable of or has failed to discharge parental responsibility, the court may dispense with that parent's consent to adoption.

We propose that an objective test of the child's interests and whether they are being met, or can be met, by the parent should be applied.

We recommend that there be provision for the court to dispense with a birth father's consent where a social worker has been unable to confirm his identity or location.

We recommend that the Care of Children Act recognise that where practicable, CYFS should facilitate the involvement of birth parents in choosing the adoption placement for their child.

We recommend that a child's views relating to his or her adoption must be ascertained, where that child is capable of forming his or her own views, those views being given due weight in accordance with the child's age and maturity.

CHAPTER 15 ADOPTION ORDERS

We recommend that the court appoint counsel for child in an application for an adoption order, unless to do so would fulfil no useful purpose.

We recommend that the court be able to call for reports when making any type of order under the Care of Children Act

We recommend that the court make a final adoption order in the first instance, unless there are good reasons to make an interim order only.

We recommend that where an interim order is made, parties be required to apply for a final order within six months, or the interim order and consent will expire.

We recommend that applications for the discharge of an adoption order should be made directly to the Family Court.

We recommend that the circumstances in which an adoption order may be discharged should be extended to allow an adopted person to apply in special circumstances, where:

- the person applying is an adult; and
- the adoptive relationship has undergone a significant and irretrievable breakdown.

If the adoption order is discharged and the application is supported by the birth parents, the adopted person will become a member of the natural family as if the adoption had not occurred.

If the adoption order is discharged and the adopted person is not supported by his or her natural parents, the adopted person will become a legal orphan, with no legal relationship to the adoptive family or natural family.

We recommend that consent obtained by fraud or duress or material misrepresentation should give the court jurisdiction to discharge the adoption order on application by a birth parent or adopted child.

We recommend that the court should consider the extent to which the adoptive parents were aware of or participated in the fraud or duress.

We recommend that an application for discharge of an adoption order on the grounds of consent obtained by fraud or duress be allowed only up until two years after the adoption order was made.

We recommend that birth parents be notified if a major disjuncture occurs in the placement of the adopted child, and unless CYFS considers it inappropriate, be given an opportunity to be involved in decision-making regarding the child's future.

CHAPTER 16 ACCESS TO ADOPTION INFORMATION

We recommend that upon registration of an adoption order, an adopted person automatically be provided with two birth certificates, a post-adoption birth certificate that only shows the adoptive parents, and a full birth certificate that lists all details of the person's birth and subsequent adoption.

We recommend that access as of right to the full birth certificate be restricted to the persons named on the certificate. Others must establish that they have adoptee's permission or that the adopted

person is dead, or must demonstrate to the Family Court that they have sufficient and proper personal interest in seeking access.⁶⁰²

We propose a three year period after which no new vetoes may be placed (although existing vetoes can be renewed at 10-year intervals until the death of the veto placer).

We do not recommend retention of sections 5(2)(a)–(d) and 6(a)–(d) of the Adult Adoption Information Act which provides separately for counselling prior to access to adoption information.

We recommend that adoption records (including court records and Department of Social Welfare records) be open to inspection as of right by adoptees, adoptive parents and natural parents.

We recommend that persons who have permission from the adoptee or who can establish that the adoptee is dead, or who can demonstrate to the Family Court a sufficient and proper interest in inspecting such records should be able entitled to have access to adoption records.

We recommend that where a veto has been lodged under the Adult Adoption Information Act, that veto should be extended to restrict access to all adoption records, (whether held by the Court, the AISU, private agencies or National Archives).

CHAPTER 17 FORBIDDEN MARRIAGE AND INCEST

We recommend that the adoptive parent–child relationship should be deemed to be a relationship of consanguinity for the purpose of the Marriage Act 1955 .

All other adoptive relationships should be treated as relationships of affinity, for the purposes of the prohibited degrees of marriage.

We recommend that an adopted person may apply to the Family Court to marry an adoptive relative deemed to be related within the degrees of affinity, and if, had the adoptive family been the adopted person's natural family, the relationship would be considered to be a relationship of consanguinity, the court must consider:

⁶⁰² This test mirrors r 66 HCR. This test was favoured by the members of the Family Court bench and Social Welfare who attended the Adoption Symposium, as it allows more flexibility than a rigid prescription of categories of persons who may apply for access to information.

- the age at which the child was adopted;
- the other party's role and degree of participation in the family unit; and
- the need to protect the sanctity and integrity of the family relationship;

in order to determine that the proposed marriage is not repugnant to public interest.

We recommend that in the case of birth relationships, liability to conviction for incest be unaffected by the making of an adoption order; and that in the case of adoptive relationships the crime of incest be limited to the adoptive parent–child relationship.

APPENDIX B

Issues for further consideration

CHAPTER 18 ADOPTION AND THE CHALLENGES OF ASSISTED REPRODUCTIVE TECHNOLOGIES

WE RECOMMEND THAT THE FOLLOWING questions be considered:

- whether commissioning parents should be required to undergo pre-conception and assessment education, preparation and screening in order to be deemed suitable applicants for adoption;
- who should pay for the assessment, education and preparation;
- whether this pre-approval be reassessed every 12 months or expire; and
- whether a rebuttable presumption be imposed that commissioning parents are unsuitable applicants for adoption if they do not obtain pre-approval?

We recommend that consideration be given to:

- the creation of an offence for medical practitioners to be party to an unapproved surrogacy arrangement; and
- the introduction of identification procedures to prove the identities of those registering as a child's parents.

We recommend that consideration be given to:

- requiring a surrogate mother to undergo counselling and obtain independent legal advice before approval is given to a surrogacy arrangement;
- who should pay for such counselling and legal advice; and
- requiring an assessment of the relationship between the commissioning parents and the surrogate mother before approval is given to a surrogacy arrangement.

Should an offence be created for:

- a surrogate mother to profit financially from the gestation of a child?
- a commissioning parent to pay a surrogate mother for the gestation of a child?
- any person to facilitate the payment of a surrogate mother for the gestation of a child?

Should consideration be given to establishing compulsory DNA testing of the baby, surrogate mother and commissioning parents at the birth of the baby, in order to ensure that the child is genetically related to the commissioning parents?

We recommend that:

- persons born as a result of assisted human reproductive technology/ donor insemination, their parents and the donor should have the right to access to donor information and donor child information; and
 - access to such information by other persons would be limited in the same way as for adoption information.
-

APPENDIX C

List of submitters

Judge Adams
Adoption Counselling & Education Services
Adoption Support Wanganui (Jean Hanna)
Adoption Information Services Unit of the Department of Child,
Youth and Family Services
Jean Allan JP
Professor Anthony H Angelo
Aotearoa Birthmothers Support Group Inc
Association Representing Mothers Separated from their Children by
Adoption (SA) Inc (ARMS)
Sandra and John Armstrong
WR Atkin, Reader in Law, Faculty of Law, Victoria University of
Wellington
Susan Atkinson
Auckland District Law Society
Auckland Medical Aid Trust
Auckland Women's Health Council
Barnardos National Office
RJ and LM Bateman
Andy Bearsley
Donald Beasley Institute (Dr Anne Bray)
Ann Bentley and Megan Davis
Margaret Bijl
SAM Bijl
Robyn Black
Mark and Paula Brown
Deborah Burns
Canterbury Fertility Society
Vanessa Caseley-Costello and Peter Costello
Pru Casey
Catholic Archdiocesan Commission for the Family
Central Otago Adoption Support Group

Bruce Cheriton
Don Clarkson
Anna Coffey-Noall
Glenda Cutler
Ken Daniels, Associate Professor, Department of Social Work,
Canterbury University
Megan Davis and Ann Bentley
Meg Dawson
Department of Child, Youth and Family Services
Department of Internal Affairs
Michael de Hamel
Kaye de Malmanche
Sarah Dentch
Michael and Mary Dixon
Anne Donnell
Glenda Donnell
Pamela Edmonds
Margaret J Elvines
Families Apart Require Equality (FARE)
Family Planning Association of New Zealand
Gillian Ferguson
Brian Fitzpatrick, Barrister and Solicitor, Copeland Fitzpatrick
Peter and Megan Fowler
Sue Freeman
Lynette Galvin (Dunedin Adoption Support Network)
Marlene Gaskin
J Geelan
Bryan and Diane Godliffe
Diana M Golding
Julia Grace
Rev Keith Griffith MBE
Brigid and Alan Groves
Jacqui Hannah
Roanne Haywood
Health and Disability Commissioner
Josie Hendry
Susan Jane Hickey
Susan M Hird
Human Rights Commission
Humanity

Rachelle Hunt
Jocelyn Hutton
Julie Ingham
Christine Inglis
Inter-country Adoption New Zealand (ICANZ)
Susan Iversen and Heather McDonald
Frank and Muriel Judkins
Betty-Ann Kelly
Donald Kerr
Linda Kindle
LDS Family Services
Joanne Leamy
Karina Ledwos
Rhondda Lewis
David J Lindsay
Jim Lowe
Janice Lowe
Robert Ludbrook, NSW Commissioner for Children
RK McArthur
Fiona McKenzie
John and Trish McKendry
Heather McDonald and Susan Iversen
Judith Mahood
Ron and Maureen Major
Suzette Major
Susan Marks
Elizabeth Marshall
Jodie-Anne Martin
Mana Men's Rights Group
Maternity Services Consumer Council
Dame Joan Metge
Dr K N P Mickleson
Briar Millar
S Miller
Ministry of Women's Affairs
Andrew Moore
Ms Mary Murray
Mr Robert Murray
Ms Ann Nation
National Archives (Department of Internal Affairs)

National Council of Women
National Ethics Committee on Assisted Human Reproduction
New Zealand Education Development Foundation (Bruce Logan)
New Zealand Immigration Service
New Zealand Infertility Society
New Zealand Law Society
New South Wales Committee on Adoption & Permanent Care Inc
Office of the Commissioner for Children
Office of the Privacy Commissioner
Office of the Race Relations Conciliator
Open Adoption Network (OPAN)
George Ormond
Sheryl Ormsby
Usha Patel, Barrister
Ellen Marie Peoples
Margie Phillips
Mike and Viv Pooley
Pregnancy Counselling Services
Lynda Pryde
Steve and Mary-Jane Rae
David Roberts
Rural Women New Zealand
Salvation Army
Linda Savage
Amelia Schaaf, Barrister and Solicitor
Pam and John Scott
Alice Searle
Judith Semich
David and Margaret Setters
Kees Sprengers
John and Marie Squire
Rachel Stace
Colleen Stanley
Clive Stephenson
Judith Stewart
Strengthening Families
Aroha Te Hau
Elizabeth Thompson
Anne Todd-Lambie
Monica Travaille

Margaret Trebilco
Sally Tringham
Arnold R Turner CMG
Dr James Veitch
Elaine Venville
Jan Veranese
Michael Wai Poi
Ann J Walker
Dennis Walker
Carol Webb
Professor P R H Webb
Wellington Infertility Society
Lynda Williams
Joanne Willis
Bev Wiltshire-Reweti
Women's Health Action
YouthLaw (Inc)

APPENDIX D

Terms of reference

TO REVIEW THE LEGAL FRAMEWORK for adoption in New Zealand as set out in the Adoption Act 1955 and the Adult Adoption Information Act 1985 and to recommend whether and how the framework should be modified to better address contemporary social needs.

In particular, the Commission is asked to consider:

- The principles that should apply in relation to adoption;
- Who may be adopted;
- Who should be permitted to adopt, including whether there should be any restrictions on step-parent or interfamily adoptions;
- Who should be required to consent to an adoption;
- Whether an adoption order may be cancelled by an adopted person;
- Whether there should be a statutory right of review for those refused approval as suitable applicants to adopt a child;
- Whether there should be a period for revocation of consent by birth parents;
- Whether the jurisdiction of the legislation should be limited to those cases where one or other party is resident in New Zealand;
- The recognition of overseas adoptions including the effect of section 3 of the Citizenship Act 1977;
- Whether special recognition should be given to Māori customary adoptions or any other culturally different adoption practices;
- Whether provision should be made for future contact between birth parents and other persons including grandparents, adoptive parents and the adopted child;
- The scope of applications under section 23 of the Adoption Act 1955 for information from the court;
- Whether the scope of the Adult Adoption Information Act 1985 should be expanded to cover a wider range of persons;

- At what stage should an adopted child be entitled to information about his or her identity;
- Whether the current procedures under the Adult Adoption Information Act 1985 are still appropriate.

The Commission is not asked to examine past or current social worker practice under either the Adoption Act 1955 or the Adult Adoption Information Act 1985.

APPENDIX E

Adoption Legislation

THE ADOPTION ACT 1955 1955, No 93

ANALYSIS

	<i>Effect of Interim Orders and Adoption Orders</i>
Title	
1. Short Title	15. Effect of interim order
2. Interpretation	16. Effect of adoption order
	17. Effect of overseas adoption
<i>Making of Adoption Orders</i>	
	<i>Maori Adoptions</i>
3. Power to make adoption orders	18. Application of Act to Maoris
4. Restrictions on making adoption orders	19. Adoptions according to Maori custom not operative
5. Interim orders to be made in first instance	
6. Restrictions on placing or keeping a child in a home for adoption	<i>Miscellaneous</i>
7. Consents to adoptions	20. Adoption order may be varied or discharged
8. Cases where consent may be dispensed with	21. Repealed
9. Withdrawal of consents	22. Applications not to be heard in open Court
10. Social Worker to report	23. Inspection of adoption records
11. Restrictions on making of orders in respect of adoption	24. Evidence in adoption cases
12. Revocation of interim order	25. Prohibition of payments in consideration of adoption
13. Issue of adoption order where an interim order has been made	26. Restriction upon advertisements
13A. Appeal against refusal to make interim order or adoption order	27. Offences
14. Date on which adoption order becomes effective	28. Regulations
	29. Consequential amendments
	30. Repeals and savings
	Schedules

THE ADOPTION ACT 1955
1955, No 93

**An Act to consolidate and amend certain enactments of the General
Assembly relating to the adoption of children**

[27 October 1955]

1. **Short Title**— This Act may be cited as the Adoption Act 1955.
2. **Interpretation**— In this Act, unless the context otherwise requires,—

“Adopted child” means any person concerning whom an adoption order is in force:

“Adoptive parent” means any person who adopts a child in accordance with an adoption order; and, in the case of an order made in favour of a husband and wife on their joint application, means both the husband and wife; but does not include a spouse who merely consents to an adoption:

“Adoption order” means an adoption order made . . . under this Act; and does not include an interim order:

[“Chief executive” means the chief executive of the department;]

“Child” means a person who is under the age of [20] years; and includes any person in respect of whom an interim order is in force, notwithstanding that the person has attained that age:

“Commonwealth country” means a country that is a member of the British Commonwealth of Nations; and includes every territory for whose international relations the Government of that country is responsible; and also includes the Republic of Ireland as if that country were a member of the British Commonwealth of Nations:

“Commonwealth representative” means an Ambassador, High Commissioner, Minister, Charge d’Affaires, Consular Officer, Trade Commissioner, or Tourist Commissioner of a Commonwealth country (including New Zealand); and includes any person lawfully acting for any such officer; and also includes any diplomatic secretary on the staff of any such Ambassador, High Commissioner, Minister, or Charge d’Affaires:

[“Court” means a Family Court or a District Court of civil jurisdiction; and includes the High Court acting in its jurisdiction on appeal under this Act]:

[“Department” means the department for the time being responsible for the administration of the Children, Young Persons, and Their Families Act 1989:]

["Director-General" Repealed by s 13 and the Schedule of the Department of Child, Youth and Family Services Act 1999.

"Interim order" means an interim order made under this Act:

"Maori" means a person who is a Maori within the meaning of the [Te Ture Whenua Maori Act 1993:]

"Publish", in relation to any advertisement, means—

- (a) Insert in any newspaper or other periodical publication printed and published in New Zealand; or
- (b) Bring to the notice of members of the public in New Zealand in any other manner whatsoever:

"Registrar", in relation to any Court, means the Registrar of the Court [and includes any Deputy Registrar]:

["Relative", in relation to any child, means a grandparent, brother, sister, uncle, or aunt, whether of the full blood, of the halfblood, or by affinity:]

["Social Worker"—

- (a) In relation to any application or proposed application by a Maori, whether jointly or singly, for an adoption order in respect of a Maori child, means
 - (i) Any Maori person employed as a Social Worker under Part V of the State Sector Act 1988 in the Department ; or
 - (ii) Any member of the Maori community nominated, after consultation with the Maori community, by the [chief executive] to carry out the duties of a Social Worker under this Act in respect of the adoption:
- (b) In relation to any other application or proposed application for an adoption order, means
 - (i) Any Maori person employed as a Social Worker under Part V of the State Sector Act 1988 in the Department ; or
 - (ii) If the Court so directs, any member of the Maori community nominated, after consultation with the Maori community, by the [chief executive] to carry out the duties of a Social Worker under this Act in respect of the adoption

Cf 1908, No 86, s 15; 1939, No 39, s 34.

Making of Adoption Orders

3. **Power to make adoption orders**— (1) Subject to the provisions of this Act, a Court may, upon an application made by any person whether domiciled in New Zealand or not, make an adoption order in respect of any child, whether domiciled in New Zealand or not.
- (2) An adoption order may be made on the application of 2 spouses jointly in respect of a child.
- (3) An adoption order may be made in respect of the adoption of a child by the mother or father of the child, either alone or jointly with his or her spouse.

Cf 1908, No 86, ss 16, 17; Adoption Act 1950, s 1 (UK).

- 4. Restrictions on making adoption orders—** (1) Except in special circumstances, an adoption order shall not be made in respect of a child unless the applicant or, in the case of a joint application, one of the applicants—
- (a) Has attained the age of 25 years and is at least [20] years older than the child; or
 - (b) Has attained the age of [20] years and is a relative of the child; or
 - (c) Is the mother or father of the child.
- (2) An adoption order shall not be made in respect of a child who is a female in favour of a sole applicant who is a male unless the Court is satisfied that the applicant is the father of the child or that there are special circumstances which justify the making of an adoption order.
- (3) Except as provided in subsection (2) of section 3 of this Act, an adoption order shall not be made providing for the adoption of a child by more than one person.
- (4) Any adoption order made in contravention of this section shall be valid, but may be discharged by the Court under section 20 of this Act.
- (5) Where any adoption order made in contravention of this section provides for the adoption of a child by more than one person, the High Court may, on the application of any such person made at any time while the adoption order remains in force, make such provision as appears just with respect to the custody, maintenance, and education of the child.
- Cf 1908, No 86, ss 16, 17, 19; Adoption Act 1950, s 2 (UK).
- 5. Interim orders to be made in first instance—** Upon any application for an adoption order, if the Court considers that the application should be granted, it shall in the first instance make an interim order in favour of the applicant or applicants:
- Provided that the Court may in any case make an adoption order without first making an interim order, if—
- (a) All the conditions of this Act governing the making of an interim order have been complied with; and
 - (b) Special circumstances render it desirable that an adoption order should be made in the first instance.
- 6. Restrictions on placing or keeping a child in a home for adoption—**
- (1) It shall not be lawful for any person to place or receive or keep any child under the age of 15 years in the home of any person for the purpose of adoption, unless—
- (a) Prior approval has been given by [a Social Worker], and that approval is for the time being in force; or
 - (b) An interim order in respect of the proposed adoption is for the time being in force.
- (2) Any approval granted by [a Social Worker] for the purposes of this section shall remain in force for one month after it is granted:
- Provided that, where application to the Court for an adoption

order is made before the expiration of one month from the date of the grant of the approval, the approval shall remain in force until the application is abandoned or dismissed or an order is made by the Court on the application.

- (3) An interim order may be made by the Court in respect of a child notwithstanding that [a Social Worker] has refused to grant an approval under this section.
- [(4) This section shall not apply in any case where—
 - (a) The child is in the home pursuant to any provision of the Children, Young Persons, and Their Families Act 1989 or to an order made pursuant to that Act; or
 - (b) The child is in the home pursuant to an order made pursuant to the Guardianship Act 1968; or
 - (c) The child is in the home of one of the child's parents and a step-parent of the child; or
 - (d) The child is in the home of a relative of the child (not being a relative who, in the absence of special circumstances, is prohibited, by reason of age or sex, from adopting the child).]

- 7. Consents to adoptions—** (1) Before the Court makes any interim order, or makes any adoption order without first making an interim order, consents to the adoption by all persons (if any) whose consents are required in accordance with this section shall be filed in the Court.
- (2) The persons whose consents to any such order in respect of any child are required as aforesaid, unless they are dispensed with by the Court under section 8 of this Act, shall be—
 - (a) The parents and guardians of the child as provided in subsections (3) to (5) of this section; and
 - (b) The spouse of the applicant in any case where the application is made by either a husband or a wife alone.
 - (3) The parents and guardians whose consents to any such order in respect of any child are required as aforesaid, unless they are dispensed with by the Court under section 8 of this Act, shall be,—
 - [(a) If the parents of the child were married to each other either at the time of the child's birth or at or after the time of his conception or if the father as well as the mother is or was a guardian of the child and there is no adoption order in force in respect of the child, the surviving parents or parent and the surviving guardians or guardian appointed by a deceased parent:
 - (b) In any other case where there is no adoption order in force in respect of the child, the mother or (if she is dead) the surviving guardians or guardian appointed by her:
Provided that the Court may in any such case require the consent of the father if in the opinion of the Court it is expedient to do so:]
 - (c) If there is an adoption order in force in respect of the child, the surviving adoptive parents or parent and the surviving guardians or guardian appointed by any deceased adoptive parent.
 - (4) Subject to the prior consent of the [chief executive], any parent who desires to have his or her child adopted may in writing appoint

[the chief executive] as the guardian of the child until such time as the child is legally adopted, and may impose conditions with respect to the religious denomination and practice of the applicants or any applicant to adopt the child or as to the religious denomination in which the applicants or applicant intend to bring up the child; and the [chief executive], when so appointed, may give such consent to the adoption of the child as is required from the person who appointed him as guardian of the child:

Provided that any such appointment by the mother of a child shall be void unless the child is at least 10 days old at the date of the appointment:

Provided also that nothing in this subsection shall relieve the parent from any liability for the maintenance of the child until the child is adopted.

- (5) In the case of a refugee child within the meaning of Part 1 of the Child Welfare Amendment Act 1948, a consent by [the chief executive], or by any other person who has been granted the guardianship of the child under that Act, shall take the place of every other consent by a parent or guardian of the child.
- (6) The consent by any parent or guardian of a child to an adoption may be given (either unconditionally or subject to conditions with respect to the religious denomination and practice of the applicants or any applicant or as to the religious denomination in which the applicants or applicant intend to bring up the child) without the parent or guardian knowing the identity of the applicant for the order.
- (7) A document signifying consent by a mother of a child to an adoption shall not be admissible unless the child is at least 10 days old at the date of the execution of the document.
- (8) Except where it is given by the [chief executive], a document signifying consent to an adoption shall not be admissible unless,—
 - (a) If given in New Zealand, it is witnessed by a District Court Judge, a Registrar of the High Court or of a District Court, or a Solicitor, or a Judge or Commissioner or Registrar of the Maori Land Court:
 - [(aa) If given in the Cook Islands or Niue, it is witnessed by—
 - (i) The New Zealand Representative; or
 - (ii) A Judge, Registrar, or Deputy Registrar, of the High Court of the Cook Islands or the High Court of Niue (as the case requires); or
 - (iii) A solicitor of the High Court of the Cook Islands or the High Court of Niue (as the case requires) or the High Court of New Zealand:]
 - (b) If given in any other country, it is witnessed by and sealed with the seal of office of a Notary Public or Commonwealth representative who exercises his office or functions in that country.
- (9) Except where it is given by the [chief executive], the form of the document signifying consent to an adoption shall contain an explanation of the effect of an adoption order and shall have

endorsed thereon a certificate by the witness that he has personally explained the effect of an adoption order to the person who is giving the consent.

- (10) Every person who is an applicant for an adoption order shall be deemed to consent to the adoption, and it shall not be necessary for him or her to file a formal consent under this section.

Cf 1908, No 86, s 18; 1947, No 60, s 26; 1948, No 48, s 10; Adoption Act 1950, s 3(3) (UK).

- 8. Cases where consent may be dispensed with—** (1) The Court may dispense with the consent of any parent or guardian to the adoption of a child in any of the following circumstances:

- (a) If the Court is satisfied that the parent or guardian has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child; and that reasonable notice of the application for an adoption order has been given to the parent or guardian where the parent or guardian can be found:
- (b) If the Court is satisfied that the parent or guardian is unfit, by reason of any physical or mental incapacity, to have the care and control of the child; that the unfitness is likely to continue indefinitely; and that reasonable notice of the application for an adoption order has been given to the parent or guardian:
- (c) If a licence has been granted in respect of the child under section 40 of the Adoption Act 1950 of the Parliament of the United Kingdom, or under the corresponding provisions of any former or subsequent Act of that Parliament, or under the corresponding provisions of any Act of the Parliament of any Commonwealth country.
- (2) The Court may dispense with the consent of any parent or guardian as aforesaid notwithstanding that the parent or guardian may have made suitable initial arrangements for the child by placing the child under the care of the authorities of a children's home, the [chief executive], or some other person.
- (3) On application by any person having the care of a child, the Court may dispense with the consent of a parent or guardian of a child under this section before any application is made for an adoption order in respect of the child; and any order so made shall lapse after the expiration of 6 months from the date on which it is made for all purposes except an application made to the Court within that period for an adoption order in respect of the child.
- (4) The Court may dispense with the consent of the spouse of an applicant for an adoption order if it is satisfied that the spouses are living apart and that their separation is likely to be permanent.
- (5) In any case where a [mentally disordered person] is a parent or guardian of a child in respect of whom an application for an adoption order has been made, service of notice of the application on the

[manager] or administrator of the estate of the parent or guardian or on the person with whom the parent or guardian resides or under whose care he is, shall (unless the Court otherwise orders) be sufficient service thereof for the purposes of this section.

- [(5A) In any case where a District Court has refused to make an order dispensing with the consent of any parent or guardian or spouse, the person or persons who sought the dispensation may, within one month after the date of the refusal, appeal to the High Court against the refusal, and the High Court may dispense with the consent if it thinks fit.]
- (6) Any person whose consent is dispensed with under this section may, on notice to every applicant for an adoption order in respect of the child and within one month after the making of the order dispensing with consent, make application for the revocation of that order and of any consequential interim order to the High Court . . . ; and the Court to which the application is so made may in its discretion revoke any such order.
- (7) In any case where the Court has made an adoption order within one month after making the order dispensing with consent, any person whose consent is dispensed with under this section may, on notice to every adoptive parent and within one month after the making of the order dispensing with consent, make application for the revocation of that order and the discharge of the adoption order to the High Court . . . ; and the Court to which the application is so made may in its discretion discharge any such order. All the provisions of section 20 of this Act, so far as they are applicable and with the necessary modifications, shall apply in connection with any such discharge of an adoption order.
- (8) In any case where the High Court . . . revokes any interim order or discharges any adoption order in accordance with this section, that Court may include in its order an order for the refund by some person specified in the order of money spent by any adopter or proposed adopter for the child's benefit. Any such order for the refund of money shall be enforceable as a judgment of the Court which made the order in favour of the person to whom the money has to be repaid. Cf 1908, No 86, s 23; 1941, No 26, s 36; 1951, No 81, s 15; Adoption Act 1950, s 3 (UK).
9. **Withdrawal of consents**— (1) Where any consent to an adoption of a child by any specified person or persons is given by any parent or guardian of the child except [the Director-General], the consent shall not be withdrawn at any time while an application by the said person or persons to adopt the child is pending, or until the said person or persons have had a reasonable opportunity to make an application to adopt the child.
- (2) Subject to the provisions of subsection (1) of this section, any consent to an adoption, and any appointment of the [chief executive] as the guardian of a child under subsection (4) of section 7 of this

Act, may be withdrawn at any time while neither an interim order nor an adoption order has been made in connection with the adoption, but shall not be withdrawn after any such order has been made. Where any such appointment of the [chief executive] is so withdrawn, any consent given by him shall lapse.

10. Social Worker to report— (1) Before the Court makes any interim order, or makes any adoption order without first making an interim order,—

- (a) The Registrar of the Court shall require [a Social Worker] to furnish a report on the application;
- (b) Reasonable time shall be allowed to enable [the Social Worker] to furnish a report, and the Court shall consider any report which [the Social Worker] may furnish; and
- (c) The Registrar shall give [the Social Worker] reasonable notice of the hearing of the application:

Provided that this subsection shall not apply in any case where the applicant or one of the applicants is an existing parent of the child, whether his natural parent or his adoptive parent under any previous adoption.

(2) [The Social Worker] shall be entitled to appear at the hearing of the application, and to cross-examine, call evidence, and address the Court.

11. Restrictions on making of orders in respect of adoption— Before making any interim order or adoption order in respect of any child, the Court shall be satisfied—

- (a) That every person who is applying for the order is a fit and proper person to have the custody of the child and of sufficient ability to bring up, maintain, and educate the child; and
- (b) That the welfare and interests of the child will be promoted by the adoption, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child; and
- (c) That any condition imposed by any parent or guardian of the child with respect to the religious denomination and practice of the applicants or any applicant or as to the religious denomination in which the applicants or applicant intend to bring up the child is being complied with.

Cf 1908, No 86, s 18(1)(c); Adoption Act 1950, s 5 (UK).

12. Revocation of interim order— (1) On the application of any person, the Court may in its discretion revoke an interim order in respect of any child on such terms as the Court thinks fit, including an order for the refund by some person specified in the order of money spent by any proposed adopter for the child's benefit.

[(1A) Where on the application of any person a District Court has refused to revoke an interim order in respect of any child, that person may, within one month after the date of the refusal, appeal to the High

Court against the refusal; and the High Court may in its discretion make any order which the District Court could have made under subsection (1) of this section.

- (1B) Where any interim order has been revoked as aforesaid, the person or persons in whose favour the interim order was made may, within one month after the date of the revocation, appeal to the High Court against the revocation or against the terms of the revocation; and the High Court may, if it thinks fit, cancel the revocation or vary the terms thereof.]
- (2) Any such order for the refund of money shall be enforceable as a judgment of the Court in favour of the person to whom the money has to be repaid.

13. Issue of adoption order where an interim order has been made—

(1) The person or persons in whose favour an interim order has been made in respect of any child may apply to the Court for the issue of an adoption order in respect of the child, if—

- (a) The interim order is in force at the date of the application and has continued in force for not less than the prescribed period specified in subsection (2) of this section; and
- (b) In any case where the child is under the age of 15 years, the child has been continuously in the care of the applicant or applicants for not less than the said prescribed period since the adoption was first approved by [a Social Worker] or the interim order was made, whichever first occurred.

[(2) The prescribed period mentioned in subsection (1) of this section shall be 6 months, or such shorter period as may in special circumstances be specified by the Court either in the interim order or, whether or not a shorter period has already been specified in the interim order, subsequent to the making of the interim order.

(2A) Notwithstanding the foregoing provisions of this section, the Court may, if special circumstances render it desirable to do so, issue an adoption order before the termination of the prescribed period:

Provided that no order under this subsection shall be made without a hearing by the Court.

(3) Where an application is duly made to the Court under subsection (1) of this section, the Registrar shall issue the adoption order without any further hearing if—

(a) [A Social Worker] has filed a report recommending that an adoption order be issued:

(b) The interim order did not require the application to be dealt with by the Court; . . .

[(c) No proceedings for the revocation of the interim order are pending in a District Court or on an appeal to the High Court; and

(d) A District Court has not, within the immediately preceding month, refused to revoke the interim order,]—

but the adoption order shall not be issued without a further hearing in any other case.

- (4) In any case where a hearing by the Court of an application under this section is required as aforesaid —
 - (a) The Registrar shall require [a Social Worker] to furnish a report on the application:
 - (b) The Registrar shall appoint a time and place for the hearing of the application, and in so doing shall allow reasonable time to enable [the Social Worker] to furnish his report as aforesaid:
 - (c) The Court shall consider any report which [the Social Worker] may furnish:
 - (d) The Registrar shall give [the Social Worker] reasonable notice of the hearing of the application, and [the Social Worker] shall be entitled to appear, cross-examine, call evidence, and address the Court.
- (5) In any case where an adoption order could issue under this section in favour of one person only, the Court may, upon application by that person and his or her spouse and after further hearing, issue the adoption order in favour of that person and his or her spouse jointly without requiring any further consents to the adoption.

[13A. Appeal against refusal to make interim order or adoption order—

In any case where a District Court has refused to make an interim order or an adoption order in respect of any child, the person or persons who applied for the order may, within one month after the date of the refusal, appeal to the High Court against the decision; and the High Court may, if it thinks fit, grant the order that is sought.]

- 14. Date on which adoption order becomes effective—** (1) An adoption order made after the commencement of this Act shall be deemed to be made,—
- (a) In any case where it is issued after an interim order has been made and without further hearing, on the date on which it is so issued:
 - (b) In any other case, on the date of the actual granting of the order by the Court, whether or not a formal order is ever signed.
- (2) Where before the commencement of this Act an adoption order has been granted in New Zealand by any Court but no adoption order in the prescribed form has ever been signed, the order shall be deemed to have been signed and to have become effective on the date of the actual granting of the order by the Court:

Provided that, for the purposes of any deed or instrument (except a will) made before the commencement of this Act, or of the will or intestacy of any testator or intestate who died before the commencement of this Act, or of any vested or contingent right of the adopted child or any other person under any such deed, instrument, will, or intestacy, this subsection shall not apply to any adoption order which has been granted before the commencement of this Act.

Effect of Interim Orders and Adoption Orders

- 15. Effect of interim order—** (1) An interim order in respect of any child—
- (a) May require that the adoption order shall not be issued without a further hearing:
 - (b) Shall not effect any change in the child's names, but may specify how they are to be changed by the adoption order:
 - (c) Shall remain in force for one year or until it is sooner revoked or an adoption order is sooner made in respect of the child:
Provided that a further interim order may be made by the Court upon application duly made to it in that behalf:
 - (d) Shall not be deemed to be an adoption order for any purpose.
- (2) So long as an interim order remains in force in respect of any child—
- (a) The person or persons in whose favour the order is made shall be entitled to the custody of the child; and shall comply with such terms, if any, as may be specified in the order in respect of the custody of the child:
 - (b) Any [Social Worker] may, at all reasonable times, visit and enter the residence in which the child lives:
 - (c) The child shall not be taken out of New Zealand without leave of the Court:
 - (d) The person or persons in whose favour the order is made shall give to [a Social Worker] at least 7 days' notice before changing his, her, or their residence:

Provided that where an immediate change of residence is necessitated by an emergency it shall be sufficient if notice is given within 48 hours after leaving the residence occupied prior to the change.

Cf Adoption Act 1950, s 6(4) (UK).

- 16. Effect of adoption order—** [(1) Every adoption order shall confer on the adopted child a surname, and one or more given names.
- (1A) The names conferred on an adopted child by an adoption order shall be those specified by the applicant for the order, unless the Court is satisfied it is not in the public interest for the child to bear those names.
- (1B) Notwithstanding subsection (1) of this section, if the Court is satisfied that it is contrary to the religious beliefs of cultural traditions of the applicant for an adoption order for the adopted child to bear a given name, the order may confer on the child a surname only.]
- (2) Upon an adoption order being made, the following paragraphs of this subsection shall have effect for all purposes, whether civil, criminal, or otherwise, but subject to the provisions of any enactment which distinguishes in any way between adopted children and children other than adopted children, namely:
- (a) The adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to

become the parent of the child, as if the child had been born to that parent in lawful wedlock:

Provided that, where the adopted child is adopted by his mother either alone or jointly with her husband, the making of the adoption order shall not prevent the making of an affiliation order or maintenance order, or of an application for an affiliation order or maintenance order, in respect of the child:

- (b) The adopted child shall be deemed to cease to be the child of his existing parents (whether his natural parents or his adoptive parents under any previous adoption), and the existing parents of the adopted child shall be deemed to cease to be his parents, and any existing adoption order in respect of the child shall be deemed to be discharged under section 20 of this Act:

Provided that, where the existing parents are the natural parents, the provisions of this paragraph shall not apply for the purposes of any enactment relating to forbidden marriages or to the crime of incest:

- (c) The relationship to one another of all persons (whether the adopted child, the adoptive parent, the existing parents, or any other persons) shall be determined in accordance with the foregoing provisions of this subsection so far as they are applicable:
- (d) The foregoing provisions of this subsection shall not apply for the purposes of any deed, instrument, will, or intestacy, or affect any vested or contingent right of the adopted child or any other person under any deed, instrument, will, or intestacy, where the adoption order is made after the date of the deed or instrument or after the date of the death of the testator or intestate, as the case may be, unless in the case of a deed, instrument, or will, express provision is made to that effect:
- [(e) Subject to the Citizenship Act 1977, the adoption order shall not affect the race, nationality, or citizenship of the adopted child:]
- (f) The adopted child shall acquire the domicile of his adoptive parent or adoptive parents, and the child's domicile shall thereafter be determined as if the child had been born in lawful wedlock to the said parent or parents:

...

- (g) ...
- (h) Any existing appointment as guardian of the adopted child shall cease to have effect:
- (i) Any affiliation order or maintenance order in respect of the adopted child and any agreement (not being in the nature of a trust) which provides for payments for the maintenance of the adopted child shall cease to have effect:

Provided that, where the adopted child is adopted by his mother either alone or jointly with her husband, the order or agreement shall not cease to have effect by reason of the making of the adoption order:

Provided also that nothing in this paragraph shall prevent the

- recovery of any arrears which are due under any order or agreement at the date on which it ceases to have effect as aforesaid.
- (3) This section shall apply with respect to all adoption orders, whether made before or after the commencement of this Act:
- (a) For the purposes of any appointment, affiliation order, maintenance order, or agreement to which paragraph (h) or paragraph (i) of subsection (2) of this section applies, the adoption order, if made before the commencement of this Act, shall be deemed to have been made on the date of the commencement of this Act:
 - (b) For the purposes of any other deed or instrument (except a will) made before the commencement of this Act, or of the will or intestacy of any testator or intestate who died before the commencement of this Act, or of any vested or contingent right of the adopted child or any other person under any such deed, instrument, will, or intestacy, this section shall not apply, and the adoption order shall have effect for the purposes of the deed, instrument, will, or intestacy according to the law existing at the date on which the deed, instrument, will, or intestacy took effect:
 - (c) An adoption order made before the 1st day of April 1954, shall not affect the operation of any rule of Maori custom as to intestate succession to Maori land.
- [(4) Subsection (2)(i) of this section applies to all maintenance orders, whether made before, on, or after 1 July 1992.
- (5) The first proviso to subsection (2)(a) of this section applies subject to section 6(2) of the Child Support Act 1991.
- (6) The first proviso to subsection (2)(i) of this section applies subject to section 25(1)(b)(iii) of the Child Support Act 1991.]
- Cf 1950, No 18, s 2
- 17. Effect of overseas adoption—** (1) Where a person has been adopted (whether before or after the commencement of this section) in any place outside New Zealand according to the law of that place, and the adoption is one to which this section applies, then, for the purposes of this Act and all other New Zealand enactments and laws, the adoption shall have the same effect as an adoption order validly made under this Act, and shall have no other effect.
- (2) Subsection (1) of this section shall apply to an adoption in any place outside New Zealand, if—
- (a) The adoption is legally valid according to the law of that place; and
 - (b) In consequence of the adoption, the adoptive parents or any adoptive parent had, or would (if the adopted person had been a young child) have had, immediately following the adoption, according to the law of that place, a right superior to that of any natural parent of the adopted person in respect of the custody of the person; and

- (c) Either—
- [(i) The adoption order was made by any Court or judicial or public authority whatsoever of a Commonwealth country, or of the United States of America, or of any State or territory of the United States of America, or of any other country which the Governor-General, by an Order in Council that is for the time being in force, has directed to be deemed to be referred to in this subparagraph; or]
 - (ii) In consequence of the adoption, the adoptive parents or any adoptive parent had, immediately, following the adoption, according to the law of that place, a right superior to or equal with that of any natural parent in respect of any property of the adopted person which was capable of passing to the parents or any parent of the person in the event of the person dying intestate without other next of kin and domiciled in the place where the adoption was made and a national of the State which had jurisdiction in respect of that place—
- but not otherwise.
- [(2A)The production of a document purporting to be the original or a certified copy of an order or record of adoption made by a Court or a judicial or public authority in any place outside New Zealand shall, in the absence of proof to the contrary, be sufficient evidence that the adoption was made and that it is legally valid according to the law of that place.]
- (3) Nothing in this section shall restrict or alter the effect of any other adoption made in any place outside New Zealand.
 - (4) In this section the term “New Zealand” does not include any territory in which this Act is not in force.
 - [(5) This section does not apply to any adoption in another Contracting State that is an adoption—
 - (a) By a person habitually resident in New Zealand; and
 - (b) To which the Convention applies; and
 - (c) Which takes place in that Contracting State on or after the date on which the Convention has entered into force as between New Zealand and that Contracting State.
 - [(6) In subsection (5), “Contracting State” and “Convention have the same meaning as in the Adoption (Intercountry) 1997.]

Maori Adoptions

- 18. Application of Act to Maoris—** An adoption order may be made under this Act on the application of any person, whether a Maori or not, in respect of any child, whether a Maori or not.
- 19. Adoptions according to Maori custom not operative—** (1) No person shall hereafter be capable or be deemed at any time since the commencement of the Native Land Act 1909 to have been capable

of adopting any child in accordance with Maori custom, and, except as provided in subsection (2) of this section, no adoption in accordance with Maori custom shall be of any force or effect, whether in respect of intestate succession to Maori land or otherwise.

- (2) Any adoption in accordance with Maori custom that was made and registered in the Maori Land Court before the 31st day of March 1910 (being the date of the commencement of the Native Land Act 1909), shall during its subsistence be deemed to have and to have had the same force and effect as if it had been lawfully made by an adoption order under Part IX of the Native Land Act 1909.
Cf 1953, No 94, s 80.

Miscellaneous

20. **Adoption order may be varied or discharged**— (1) The Court may, in its discretion vary or discharge any adoption order (whether the order was made before or after the commencement of this Act) or any adoption to which subsection (2) of section 19 of this Act applies, subject to such terms and conditions as it thinks fit.
- (2) The Court may, in its discretion and subject to such terms and conditions as it thinks fit, discharge any adoption made in any place outside New Zealand either before or after the commencement of this Act, if—
- (a) The person adopted is living and is domiciled in New Zealand; and
 - (b) Every living adoptive parent is domiciled in New Zealand.
- (3) No application for the discharge of any adoption order or adoption shall be made without the prior approval of the Attorney-General; and no adoption order or adoption shall be discharged unless—
- (a) The adoption order or adoption was made by mistake as to a material fact or in consequence of a material misrepresentation to the Court or to any person concerned; or
 - (b) The discharge is expressly authorised by any other section of this Act.
- (4) Where the Court discharges any adoption order or adoption as aforesaid, it may confer on the person to whom the order or adoption related such surname with such first or Christian name as the Court thinks fit; but, if it does not do so, the names of the person shall not be affected by the discharge of the order.
- [(5) Any person may, at any time within one month after the date of the decision of the Court under this section, appeal to the High Court against the decision.]
- (6) Upon an adoption order, or an adoption to which subsection (1) of section 17 of this Act applies, or an adoption to which subsection (2) of section 19 of this Act applies, being discharged under this section after the commencement of this Act—
- (a) The relationship to one another of all persons (whether the adopted child, the adoptive parents, the natural parents, the

guardians of the child at the date of the adoption order or adoption, or any other persons) shall be determined as if the adoption order or adoption had not been made; and any appointment as guardian of the adopted child which was made while the adoption order or adoption was in force shall cease to have effect:

Provided that the discharge of the order or adoption shall not affect anything lawfully done or the consequences of anything unlawfully done while the order or adoption was in force:

- (b) No change in the child's domicile shall occur by reason only of the discharge; but, where during the infancy of the child any natural parent resumes custody of the child to whom the discharged order or adoption related, the domicile of the child shall thereafter be determined as if neither the discharged order or adoption nor any prior adoption order or adoption in respect of the child had been made:
- (c) Any affiliation order, maintenance order, or agreement for payment of maintenance which ceased to have effect under paragraph (i) of subsection (2) of section 16 of this Act shall thereafter have effect according to the terms thereof:

Provided that nothing in this paragraph shall cause the order or agreement to have any effect in respect of the period while the adoption order or adoption remained in force:

Provided also that notice of the discharge of the adoption order or adoption shall be served on every person who is bound by the affiliation order, maintenance order, or agreement, but nothing in this proviso shall restrict the effect of the affiliation order, maintenance order, or agreement, between the date of the discharge of the adoption order or adoption and the service of notice of the discharge:

- (d) For the purposes of any other deed or instrument (except a will) made while the order or adoption was in force, or of the will or intestacy of any testator or intestate who died while the order or adoption was in force, or of any vested or contingent right of the adopted child or any other person under any such deed, instrument, will, or intestacy, the order or adoption shall be deemed to continue in force.
- (7) Upon the discharge of any adoption made in any place outside New Zealand, not being an adoption to which subsection (1) of section 17 of this Act applies,—
- (a) If at the date of the discharge adoptions could be discharged in the place where the adoption in question was made, the discharge shall have the same effects as if it was made in that place:
 - (b) If at the date of the discharge adoptions could not be discharged in the place where the adoption in question was made, the discharge shall have the same effects, so far as they are applicable, as the discharge of an adoption order made under this Act.

- (8) Where an adoption order has been discharged before the commencement of this Act, the effect of the discharge shall be determined by reference to the law existing at the date of the discharge.
Cf 1908, No 86, s 22; 1950, No 18, s 4.

21. Repealed by s 7 of the Adoption Amendment Act 1962

- 22. Applications not to be heard in open Court**— No application under this Act shall be heard or determined in open Court, and no report of proceedings under this Act shall be published except by leave of the Court which heard the proceedings.

- 23. Inspection of adoption records**— (1) An adoption order shall be open to inspection by any person who requires to inspect it for some purpose in connection with the administration of an estate or trust of which that person is executor, administrator, or trustee.

- (2) Adoption records shall be open to inspection by any Registrar of Marriages or marriage celebrant under the Marriage Act 1955 for the purpose of investigating forbidden degrees of relationship under that Act.

- (3) Adoption records shall not be available for production or open to inspection except—

(a) To the extent authorised by subsection (1) or subsection (2) of this section or by section 11(4)(b) of the Adult Adoption Information Act 1985; or

(b) On the order of a Family Court, a District Court, or the High Court, made—

(i) For the purposes of a prosecution for making a false statement; or

(ii) In the event of any question as to the validity or effect of any interim order or adoption order; or

(iii) On any other special ground.

- 24. Evidence in adoption cases**— The Court to which any application is made under this Act may receive as evidence any statement, document, information, or matter that may in its opinion assist it to deal effectually with the application, whether or not the same would be otherwise admissible in a Court of law.

- 25. Prohibition of payments in consideration of adoption**— (1) Except with the consent of the Court, it shall not be lawful for any person to give or receive or agree to give or receive any payment or reward in consideration of the adoption or proposed adoption of a child or in consideration of the making of arrangements for an adoption or proposed adoption:

[Provided that this section shall not apply to the payment of the hospital and medical expenses of the confinement of the mother of a child in any licensed hospital or separate institution within the

meaning of [the Hospitals Act 1957], being a licensed hospital or separate institution that is under the control of any society or body of persons caring for the welfare of children, if—

- (a) The payment is made by an applicant for an adoption order in respect of the child direct to the society or body of persons that controls the licensed hospital or separate institution; and
 - (b) The amount paid has been approved by the Director-General of Health in the particular instance, or is in accordance with a scale approved generally by the Director-General of Health.]
- [(2) This section does not apply to the payment of reasonable costs and expenses to any organisation approved as a New Zealand accredited body under Part 2 of the Adoption (Intercountry) Act 1997, provided those costs—
- (a) Are in connection with the exercise of a function delegated to that body under Part 1 of that Act; and
 - (b) Are set out in an invoice or statement of account rendered by that body which sets out details of the costs and expenses, and the services or functions to which they apply.]

Cf 1908, No 86, s 20.

26. Restriction upon advertisements— (1) It shall not be lawful for any person, other than the [chief executive] or [a Social Worker], to publish any advertisement indicating—

- (a) That the parent or guardian of a child desires to cause the child to be adopted; or
- (b) That any person desires to adopt a child; or
- (c) That any person or body of persons is willing to make arrangements for the adoption of a child:

Provided that the [chief executive] may in his discretion approve in particular cases of advertisements published by any group or society caring for the welfare of children.

27. Offences— (1) Every person commits an offence against this section who—

- (a) Places or receives or keeps any child in the home of any person for the purpose of adoption in contravention of section 6 of this Act;
- (b) Takes out of New Zealand without leave of the Court any child in respect of whom an interim order is in force;
- (c) Being a person in whose favour an interim order has been made, fails to give any notice of change of residence required by paragraph (d) of subsection (2) of section 15 of this Act;
- (d) Gives or receives or agrees to give or receive any payment in contravention of section 25 of this Act:

- (e) Publishes any advertisement in contravention of section 26 of this Act:
 - (f) Makes any false statement for the purpose of obtaining or opposing an interim order or adoption order or any variation or discharge of any such order.
- (2) Every person who commits an offence against this section shall be liable on summary conviction before a District Court Judge to imprisonment for a term not exceeding 3 months or to fine not exceeding [\$15,000] or to both.
- (3) Where the Court is satisfied that an offence against this section has been committed in respect of any child, whether or not any person has been convicted of the offence, the Court may order the child to be removed to a place of safety until he can be restored to his parents or guardian or until other arrangements can be made for him.
- 28. Regulations—** (1) The Governor-General may from time to time, by Order in Council, make all such regulations as may in his opinion be necessary or expedient for giving effect to the provisions of this Act and for the due administration thereof.
See SR 1959/109.
- 29. Consequential amendments—** The enactments specified in the First Schedule to this Act are hereby amended in the manner indicated in that Schedule.
- 30. Repeals and savings—** (1) The enactments specified in the Second Schedule to this Act are hereby repealed.
- (2) Without limiting the provisions of the Acts Interpretation Act 1924, it is hereby declared that the repeal of any provision by this Act shall not affect any document made or anything whatsoever done under the provision so repealed or under any corresponding former provision, and every such document or thing, so far as it is subsisting or in force at the time of the repeal and could have been made or done under this Act, shall continue and have effect as if it had been made or done under the corresponding provision of this Act and as if that provision had been in force when the document was made or the thing was done.
- (3) All applications, matters, and proceedings commenced under any such enactment and pending or in progress at the commencement of this Act may, at the discretion of the Court, be continued and completed—
- (a) Under this Act; or
 - (b) Under the said enactments in all respects as if the said enactments continued in force and as if this Act had not been passed.

SCHEDULES

FIRST SCHEDULE

CONSEQUENTIAL AMENDMENTS

The enactments specified in this Schedule have been repealed by:
Section 134(1) of the Domestic Proceedings Act 1968 (impliedly).
Section 4(3) of the Births and Deaths Registration Amendment Act 1961.
Section 204(1) of the Education Act 1964.
Section 12(2) of the Status of Children Act 1969

SECOND SCHEDULE

ENACTMENTS REPEALED

- 1925, No 22 — The Child Welfare Act 1925: So much of the Third Schedule as relates to section 24 of the Infants Act 1908. (1931 Reprint, Vol III, p 1113).
1939, No 39 — The Statutes Amendment Act 1939: Section 34.
1941, No 26 — The Statutes Amendment Act 1941: Section 36.
1942, No 18 — The Statutes Amendment Act 1942: Sections 14 to 17.
1947, No 60 — The Statutes Amendment Act 1947: Section 26.
1948, No 48 — The Child Welfare Amendment Act 1948: Section 10.
1950, No 18 — The Infants Amendment Act 1950.
1951, No 81 — The Statutes Amendment Act 1951: Section 15.
1953, No 94 — The Maori Affairs Act 1953: Part IX.

This Schedule was amended by s 2(c) of the Infants Act Repeal Act 1989.

ADULT ADOPTION INFORMATION ACT 1985
1985, No 127

ANALYSIS

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- 1 **Short title and commencement**— (1) This Act may be cited as the Adult Adoption Information Act 1985.
 - (2) Sections 4 to 6, 8, and 9 of this Act shall come into force on the 1st day of September 1986.
 - (3) Subject to subsection (2) of this section, this Act shall come into force on the 1st day of March 1986.

- 2 **Interpretation**— In this Act, unless the context otherwise requires,—

“Adopted person” means a person in respect of whom an adoption order has at any time been made; and “adopted” has a corresponding meaning:

“Adoption order” means an adoption order made under the Adoption Act 1955 or any corresponding former enactment; and includes an instrument details of which have been registered under section 21A of the Births and Deaths Registration Act 1951:

“Adoptive parent”, in relation to any other person, means a person who has at any time, either alone or pursuant to an application made jointly with a spouse, adopted that other person under an adoption order; but no person shall be an adoptive parent by reason only of—

 - (a) Having consented to an adoption by a spouse; or
 - (b) Having become the spouse of an adoptive parent after the adoption concerned:

“Adult” as a noun means a person who has attained the age of 20 years; and as an adjective it has a corresponding meaning:

“Approved organisation” means an organisation for the time being approved under section 12(1) of this Act:

“Approved person” means a person for the time being approved under section 12(1) of this Act; and includes a person whose name is for the time being notified under section 12(2) of this Act:

“Birth parent”, in relation to any other person, means a person who is that other person’s biological mother or father:

[“Chief executive” means the chief executive of the Department:]

[“Department” means the department for the time being responsible for the administration of the Children, Young Persons, and Their Families Act 1989:]

“Director-General”: Definition repealed.

“Identifying information”, in relation to any person, means that person’s name or address; and includes any information that is likely to enable any other person to ascertain that person’s name or address:

[“Original birth certificate”, in relation to any person, means a birth certificate (within the meaning of the Births, Deaths, and Marriages Registration Act 1995) containing information recorded under that Act or a former Act (within the meaning of that Act) relating to the person’s birth, bearing on its face the words “ISSUED FOR THE PURPOSES OF THE ADULT ADOPTION INFORMATION ACT 1985”; and includes any such certificate from which there have been omitted, in

accordance with this Act, any details relating to either or both of the person's birth parents:]

"Registrar-General" means the Registrar-General appointed under the Births and Deaths Registration Act 1951:

"Social worker" means a social worker [employed as such under Part V of the State Sector Act 1988 in the Department []]; and, in relation to any matter undertaken by one social worker, includes any other social worker dealing with that matter.

Access to Information

- 3 **Birth parent may restrict access to identifying information—**
- (1) Either birth parent of a person adopted before the 1st day of March 1986 may at any time request the Registrar-General to have the original entry of the birth of that person endorsed to the effect that that person is not to have access to identifying information relating to the person making the request.
 - (2) The following provisions shall apply to every request under subsection (1) of this section:
 - (a) The Registrar-General shall inform the person making that request of the counselling available in the area in which that person lives, from social workers and approved persons and organisations:
 - (b) That person shall indicate to the Registrar-General whether or not that person desires counselling:
 - (c) If that person indicates that that person desires counselling, the Registrar-General shall take no further action until that person requests the Registrar-General to proceed with the original request:
 - (d) If that person—
 - (i) Indicates that that person does not desire counselling; or
 - (ii) Under paragraph (c) of this subsection requests the Registrar-General to proceed with the original request,—the Registrar-General shall cause the original entry of the birth of the adopted person concerned to be endorsed accordingly, and to be endorsed also with the date on which it was so endorsed.
 - (3) The fact that there is upon the original entry of the birth of any person one unexpired endorsement under subsection (2) of this section relating to any person shall not prevent a further endorsement under that subsection relating to that person.
 - (4) Subject to subsection (5) of this section, every endorsement under subsection (2) of this section shall continue in force until the expiration of 10 years from the date of its making, and shall then expire.
 - (5) A birth parent of an adopted person may at any time request the Registrar-General to have removed from the original entry of that person's birth all endorsements under subsection (2) of this section relating to that parent; and in that case the Registrar-General shall

cause that entry to be noted accordingly, and those endorsements shall then expire.

4 Adult adopted person may apply for original birth certificate—

(1) Any adult may make a written application to the Registrar-General for an original birth certificate in relation to the applicant; and in that case the following provisions shall apply:

(a) Where it does not appear from the records of the Registrar-General that the applicant is adopted, the Registrar-General shall so notify the applicant in writing:

(b) Subject to subsection (2) of this section, where it appears from the records of the Registrar-General that the applicant was adopted before the 1st day of March 1986, and that—

(i) Details relating to only one of the applicant's birth parents appear in the original entry of the applicant's birth, and there is on that entry any unexpired endorsement under section 3(2) of this Act relating to that parent; or

(ii) Details relating to both of the applicant's birth parents appear in the original entry of the applicant's birth, and there are on that entry unexpired endorsements under section 3(2) of this Act relating to each of those parents,—
section 5(1) of this Act shall apply to the applicant:

(c) Where it appears from the records of the Registrar-General that the applicant was adopted before the 1st day of March 1986, and that—

(i) Details relating to both of the applicant's birth parents appear in the original entry of the applicant's birth, but there are on that entry unexpired endorsements under section 3(2) of this Act relating to only one of them; or

(ii) There are no unexpired endorsements under section 3(2) of this Act on that entry,—
section 5(2) of this Act shall apply to the applicant:

(d) Where it appears from the records of the Registrar-General that the applicant was adopted after the 28th day of February 1986, section 6 of this Act shall apply to the applicant.

(2) Where—

(a) There is on the original entry of the birth of an adopted person any unexpired endorsement under section 3(2) of this Act relating to a birth parent of that person; and

(b) The Registrar-General is satisfied that that parent is dead,—
paragraphs (b) and (c) of subsection (1) of this section shall apply to any application under that subsection as if that endorsement had expired.

5 Certificates for persons adopted before commencement of Act—

(1) The Registrar-General shall inform every applicant to whom this subsection is applied by section 4(1)(b) of this Act of the existence, effect, and date of expiry of the endorsements concerned, and, notwithstanding section 21(7) of the Births and Deaths Registra-

- tion Act 1951, shall send the applicant an original birth certificate from which [there have been removed all details relating to the applicant's birth parents, and every reference to any surname registered for the applicant].
- (2) Notwithstanding section 21(7) of the Births and Deaths Registration Act 1951, but subject to subsection (3) of this section, the following provisions shall apply to every application under section 4(1) of this Act made by an applicant to whom this subsection is applied by section 4(1)(c) of this Act:
- (a) The Registrar-General shall notify the applicant in writing,—
 - (i) If the applicant lives within New Zealand, of the counselling available in the area in which the applicant lives, from social workers and approved persons and organisations; and
 - (ii) That except where the applicant lives outside New Zealand, an original birth certificate will not be given to the applicant until the applicant has received counselling;
 - (b) If the applicant notifies the Registrar-General in writing that the applicant desires counselling from a social worker or a specified approved person or organisation, the Registrar-General shall forthwith send an original birth certificate to—
 - (i) The appropriate office of the Department; or
 - (ii) The approved person or organisation specified by the applicant,—
 as the case requires:
 - (c) The person or organisation to whom or to which an original birth certificate is sent under paragraph (b) of this subsection shall release it to the applicant after the applicant has received counselling;
 - (d) If it appears to the Registrar-General that the applicant is permanently resident outside New Zealand, the Registrar-General shall send the applicant an original birth certificate and the address of the [chief executive].
- (3) There shall be omitted from every original birth certificate sent under subsection (2) of this section all details relating to any birth parent of the applicant concerned if—
- (a) There is on the original entry of the applicant's birth an unexpired endorsement under section 3(2) of this Act relating to that parent; and
 - (b) The Registrar-General is not satisfied that that parent is dead.
- [(4) There shall be omitted from every original birth certificate sent under subsection (2) of this section every reference to any surname registered for the applicant if—
- (a) There is on the original entry of the applicant's birth an unexpired endorsement under section 3(2) of this Act relating to a parent who has that surname; and
 - (b) The Registrar-General is not satisfied that that parent is dead.]
- 6 Certificates for persons adopted after commencement of Act—**
Notwithstanding section 21 (7) of the Births and Deaths Registration

Act 1951, the following provisions shall apply to every application under section 4(1) of this Act by an applicant to whom this section is applied by section 4(1)(d) of this Act:

- (a) The Registrar-General shall notify the applicant in writing—
 - (i) Of the counselling available in the area in which the applicant lives, from social workers and approved persons and organisations; and
 - (ii) That if within 28 days the applicant notifies the Registrar-General in writing that the applicant desires counselling from a social worker or a specified approved person or organisation, an original birth certificate will be sent to the appropriate office of the Department or that person or organisation; and
 - (iii) That if the applicant does not desire counselling, or fails within 28 days to inform the Registrar-General that the applicant does desire counselling, an original birth certificate will thereafter be held on the applicant's behalf:
- (b) If the applicant—
 - (i) Notifies the Registrar-General in writing that the applicant does not desire counselling; or
 - (ii) Has not, within the 28 days following the dispatch to the applicant of the notice under paragraph (a) of this section, notified the Registrar-General in writing that the applicant desires counselling from a social worker or a specified approved person or organisation,—
the Registrar-General shall forthwith notify the applicant in writing that an original birth certificate is held on the applicant's behalf:
- (c) If the applicant is notified under paragraph (b) of this section that an original birth certificate is held on the applicant's behalf, and thereafter notifies the Registrar-General in writing that the applicant wishes it sent to the applicant, the Registrar-General shall send it to the applicant:
- (d) If, within the 28 days following the dispatch to the applicant of the notice under paragraph (a) of this section, the applicant has notified the Registrar-General that the applicant desires counselling from a social worker or a specified approved person or organisation, the Registrar-General shall forthwith send an original birth certificate to—
 - (i) The appropriate office of the Department; or
 - (ii) The approved person or organisation specified by the applicant,—
as the case requires; and the applicant shall be entitled to uplift it at any reasonable time.

- 7 Adopted person may register desire not to have contact with birth parents—** (1) An adopted person who has attained the age of 19 years may at any time request the Registrar-General to have the original entry of that person's birth endorsed to the effect that that

- person does not desire any contact with a specified birth parent, or with either of that person's birth parents.
- (2) The following provisions shall apply to every request under subsection (1) of this section:
 - (a) The Registrar-General shall inform the person making that request of the counselling available in the area in which that person lives, from social workers and approved persons and organisations:
 - (b) That person shall indicate to the Registrar-General whether or not that person desires counselling:
 - (c) If that person indicates that that person desires counselling, the Registrar-General shall take no further action until that person requests the Registrar-General to proceed with the original request:
 - (d) If that person—
 - (i) Indicates that that person does not desire counselling; or
 - (ii) Under paragraph (c) of this subsection requests the Registrar-General to proceed with the original request—the Registrar-General shall cause the original entry of that person's birth to be endorsed accordingly, and to be endorsed also with the date on which it was so endorsed.
 - (3) The fact that there is upon the original entry of a person's birth one unexpired endorsement under subsection (2) of this section relating to a parent shall not prevent a further endorsement under that subsection relating to that parent.
 - (4) Subject to subsection (5) of this section, every endorsement under subsection (2) of this section shall continue in force until the expiration of 10 years from the date of its making, and shall then expire.
 - (5) Any person may at any time request the Registrar-General to have removed from the original entry of that person's birth any endorsements under subsection (2) of this section; and in that case the Registrar-General shall cause that entry to be noted accordingly, and those endorsements shall then expire.
- 8 Access by birth parents to identifying information—** (1) Any person may make a written application to the [chief executive] for identifying information relating to an adult adopted person whose birth parent the applicant is.
- (2) Where the [chief executive] is satisfied that an applicant under subsection (1) of this section is a birth parent of the adult adopted person to whom the information sought relates, the following provisions shall apply:
 - (a) Where the [chief executive] is satisfied that the adopted person concerned is dead, the [chief executive] shall so inform the applicant; and the [chief executive] may disclose to the applicant such information as the [chief executive] thinks fit relating to that person, that person's circumstances at the time

of that person's death, and the circumstances of that person's death:

- (b) Where the [chief executive] is not satisfied that the adopted person concerned is dead, the [chief executive] shall enquire of the Registrar-General if there is on the original entry of the birth of that person any unexpired endorsement under section 7(2) of this Act relating to the applicant; and in that case the Registrar-General shall inform the [chief executive] whether or not there is such an entry and, if so, when it (or if more than one the most recent of them) will expire:
- (c) Where the Registrar-General informs the [chief executive] that there is such an endorsement on that entry, the [chief executive] shall give the applicant the information given to the [chief executive] by the Registrar-General under paragraph (b) of this subsection, and shall inform the applicant of the effect of the endorsement concerned:
- (d) Where the Registrar-General informs the [chief executive] that there is no such endorsement on that entry—
 - (i) If the [chief executive] does not know the name and address of the adopted person concerned but, in the [chief executive's] opinion, it is probable that a social worker can ascertain identifying information relating to that person without undue effort, the [chief executive] shall cause a social worker to attempt to do so:
 - (ii) If the [chief executive] knows the name and address of the adopted person concerned and, in the [chief executive's] opinion, it would be possible for a social worker to contact that person without undue effort, the [chief executive] shall cause a social worker to attempt to do so and to ascertain whether or not that person is willing to have that person's name and address communicated to the applicant:
 - (iii) The name and address of the adopted person concerned shall not be communicated to the applicant unless that person has indicated to that social worker that that person is willing for them so to be communicated:
 - (iv) If the adopted person concerned has indicated to that social worker that that person is willing to have that person's name and address communicated to the applicant, the [chief executive] shall communicate them to the applicant and inform both the adopted person and the applicant of the effect of section 10 of this Act.

9 Access by adult adopted persons to identifying information—

- (1) Any adult adopted person may make a written application to the [chief executive] for identifying information relating to either or both of that person's birth parents.
- (2) Every application under subsection (1) of this section shall be accompanied by an original birth certificate relating to the applicant.

- (3) The [chief executive] shall disclose to an applicant under subsection (1) of this section all available identifying information relating to any birth parent concerned, and inform that person of the effect of section 10 of this Act, if, and only if,—
 - (a) Details of that parent appear in the original birth certificate accompanying the application; or
 - (b) The [chief executive] is satisfied that that parent is dead.
- (4) Where—
 - (a) The [chief executive] is required by subsection (3) of this section to disclose to an applicant under subsection (1) of this section identifying information relating to a birth parent; and
 - (b) The [chief executive] does not know the name and address of that parent; and
 - (c) In the opinion of the [chief executive], it is probable that a social worker can ascertain identifying information relating to that parent without undue effort,—the [chief executive] shall cause a social worker to attempt to do so; and subsection (3) of this section shall apply to all identifying information obtained as a result.

10 Departmental assistance in approaching parent or child—

- (1) An adult adopted person who has ascertained the name and address of a birth parent may request any social worker to approach that parent on that person's behalf.
- (2) Any person who has ascertained the name and address of an adult adopted person whose birth parent that person is may request any social worker to approach that adopted person on that person's behalf.
- (3) Any adoptive parent of an adopted person who has ascertained the name and address of a birth parent of that adopted person may request any social worker to approach that parent on that adoptive parent's behalf.
- (4) A social worker to whom a request is made under this section may decline that request.
- (5) Where a social worker accepts a request made under this section, that social worker shall approach the person concerned and ask if that person is willing to meet the person who made the request, and if so under what circumstances; and—
 - (a) If the person concerned is unwilling to meet the person who made the request, the social worker shall so inform the person who made the request; and
 - (b) If the person concerned is willing to meet the person who made the request, the social worker shall inform the person who made the request of the circumstances under which the person concerned is willing to do so.
- (6) Where a social worker accepts a request under this section, and approaches any person,—
 - (a) If the person who made that request is an adult adopted person,

or an adoptive parent of an adult adopted person, that social worker shall inform the person approached of the rights (if any) that that person has under section 3 of this Act in relation to any other child of that person who may have been adopted:

- (b) If the person who made that request is a birth parent, that social worker shall inform the person approached of the rights that that person has under section 7 of this Act in relation to the other birth parent of that person.

11 Access to information on medical grounds—

- (1) For the purposes of this section,—

“Doctor” means a registered medical practitioner:

“Medical” includes psychiatric:

“Relative”, in relation to any other person, means a person who is by blood the grandparent, parent, child, grandchild, or (whether of the whole or half blood) brother, sister, or cousin, of that other person:

“Unknown relative”, in relation to any person, means a relative whose name and address are unknown to that person by virtue of the confidentiality attendant upon the adoption of that person, that relative, or some other person who is a relative of them both.

- (2) A doctor who is—

- (a) Responsible for the medical treatment and advice of any patient; and

- (b) Satisfied that it is necessary or desirable, for the purpose of providing treatment of or advice relating to any medical condition of that patient, or for the purpose of providing genetic counselling for or in relation to that patient, to obtain information about the medical or genetic history of an unknown relative,—

may give the [chief executive] notice in writing to that effect, specifying the information concerned.

- (3) Where, in the opinion of any doctor, any information obtained as a result of that doctor’s dealings with any patient is likely to be relevant to the provision of treatment of or advice relating to any medical condition or potential medical condition of any unknown relative, or the provision of genetic counselling for or in relation to any unknown relative, that doctor may with the consent of that patient (or, where that patient is not an adult, of that patient’s guardian) give the [chief executive] notice in writing to that effect, together with a separate statement of that information.
- (4) A social worker may produce a notice under subsection (2) or subsection (3) of this section—

- (a) To the Registrar-General; and in that case, notwithstanding [section 63 of the Births, Deaths, and Marriages Registration Act 1995], the social worker shall be entitled to obtain an original birth certificate of the adopted person concerned:
 - (b) To the Registrar of the Court where the Court file relating to the adoption concerned is held; and in that case the social worker shall be entitled to search, inspect, and take a copy of any document on the file concerned.
- (5) A social worker may disclose to the doctor concerned (in the case of a notice under subsection (2) of this section) or the doctor of any unknown relative (in the case of a notice under subsection (3) of this section) any information whatsoever (not being identifying information) relevant to the medical or genetic history of the patient or relative concerned.
- (6) No doctor shall disclose to any person any identifying information obtained by the use of information obtained under this section.

Approved Persons and Organisations

12 Minister may approve persons and organisations for purposes of Act—

- (1) The Minister of Social Welfare may from time to time, by notice in the Gazette, approve any person or organisation (whether incorporated or unincorporated) to undertake counselling under this Act.
- (2) Any approved organisation may from time to time notify the [chief executive] of the name of any member or employee authorised to act on behalf of that organisation; and may at any time notify the [chief executive] that the authority of that member or employee has been withdrawn.

General

[12A Fees—(1) Regulations made under section 13(1)(a) of this Act may prescribe fees for—

- (a) The making of any application or request under this Act to the Registrar-General, the [chief executive], or a social worker; or
 - (b) The approval of any person or organisation under section 12 of this Act; or
 - (c) The doing of any other act under this Act by the Registrar-General, the [chief executive], or a social worker.
- (2) Notwithstanding anything in the Official Information Act 1982, the Registrar-General, the [chief executive], or a social worker (as the case may be) may refuse to—
- (a) Accept any application or request under this Act; or

- (b) Approve any person or organisation under section 12 of this Act; or
 - (c) Do any other act under this Act,—
for which or for the making or doing of which a fee is prescribed (whether under this Act or by or under any other enactment) unless the fee has been paid.
- (3) Notwithstanding subsection (2) of this section,—
- (a) The Registrar-General may—
 - (i) Dispense with the payment of all or any part of any fee payable to the Registrar-General under this Act; or
 - (ii) Refund all or any part of any fee paid to the Registrar-General under this Act; and
 - (b) The [chief executive] may—
 - (i) Dispense with the payment of all or any part of any fee payable to the [chief executive] or a social worker under this Act; or
 - (ii) Refund all or any part of any fee paid to the [chief executive] or a social worker under this Act.]

13 Regulations—(1) The Governor-General may from time to time, by Order in Council, make regulations for either or both of the following purposes:

- (a) Prescribing fees payable under this Act:
 - (b) Providing for such other matters as are contemplated by or necessary for giving full effect to this Act and its due administration.
- (2) Repealed.
- (3) Repealed.

14 Act not to affect disclosure of non-identifying information—
Nothing in this Act shall affect the disclosure to any person of any information relating to any other person that is not, in relation to that other person, identifying information.

15 Amendment to Adoption Act 1955—
The Adoption Act 1955 is hereby amended by repealing section 23, and substituting the following section:

“23. Inspection of adoption records—

- “(1) An adoption order shall be open to inspection by any person who requires to inspect it for some purpose in connection with the administration of an estate or trust of which that person is executor, administrator, or trustee.
- “(2) Adoption records shall be open to inspection by any Registrar of Marriages or marriage celebrant under the Marriage Act 1955 for the purpose of investigating forbidden degrees of relationship under that Act.
- “(3) Adoption records shall not be available for production or open to inspection except—

- “(a) To the extent authorised by subsection (1) or subsection (2) of this section or by section 11 (4) (b) of the Adult Adoption Information Act 1985; or
 - “(b) On the order of a Family Court, a District Court, or the High Court, made—
 - “(i) For the purposes of a prosecution for making a false statement; or
 - “(ii) In the event of any question as to the validity or effect of any interim order or adoption order; or
 - “(iii) On any other special ground.”
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APPENDIX F
International obligations

UNITED NATIONS CONVENTION ON
THE RIGHTS OF THE CHILD

PREAMBLE AND PART 1

PREAMBLE

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognising that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, 4/ proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 5/ and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 2/ and recognised in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), 4/ in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) 4/ and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”,

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognising that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognising the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the

maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

Article 6

1. States Parties recognise that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of

the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 2, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognised in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others; or
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect

public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognise the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognise the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to

his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognise that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance

with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organisations or non-governmental organisations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 23

1. States Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognise the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognising the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

4. States Parties shall promote, in the spirit of international co-operation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled

children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
 - (a) To diminish infant and child mortality;
 - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
 - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
 - (d) To ensure appropriate pre-natal and post-natal health care for mothers;
 - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of accidents;
 - (f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
4. States Parties undertake to promote and encourage international cooperation with a view to achieving progressively the full realisation of the right recognised in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognise the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognise for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect of the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment

nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of:

any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

- (a) No child shall be alleged as, be accused of, or recognised as having infringed the penal law by reason of facts or omissions that were not prohibited by national or international law at the time they were committed;
- (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law;
 - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
 - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
 - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the

participation and examination of witnesses on his or her behalf under conditions of equality;

- (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
- (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
- (vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of law, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular:

- (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
- (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in:

- (a) The law of a State Party; or
- (b) International law in force for that State.

UNITED NATIONS DECLARATION ON SOCIAL AND LEGAL
PRINCIPLES RELATING TO THE PROTECTION AND WELFARE
OF CHILDREN, WITH SPECIAL REFERENCE TO FOSTER
PLACEMENT AND ADOPTION NATIONALLY AND
INTERNATIONALLY

Adopted by General Assembly resolution 41/85 of 3 December 1986

The General Assembly

Recalling the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women,

Recalling also the Declaration of Rights of the Child, which it proclaimed by its resolution 1386 (XIV) of 20 November 1959,

Reaffirming principle 6 of that Declaration, which states that the child shall, wherever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security,

Concerned at the large number of children who are abandoned or become orphans owing to violence, internal disturbance, armed conflicts, natural disasters, economic crises or social problems,

Bearing in mind that in all foster placement and adoption procedures the best interests of the child should be the paramount consideration,

Recognizing that under the principal legal systems of the world, various valuable alternative institutions exist, such as the kafalah of Islamic Law, which provide substitute care to children who cannot be cared for by their own parents,

Recognizing further that only where a particular institution is recognized and regulated by the domestic law of a State would the provisions of this Declaration relating to that institution be relevant and that such provisions would in no way affect the existing alternative institutions in other legal systems,

Conscious of the need to proclaim universal principles to be taken into account in cases where procedures are instituted relating to foster placement or adoption of a child, either nationally or internationally,

Bearing in mind, however, that the principles set forth hereunder do not impose on States such legal institutions as foster placement or adoption,

Proclaims the following principles:

A. GENERAL FAMILY AND CHILD WELFARE

Article 1

Every State should give a high priority to family and child welfare.

Article 2

Child welfare depends upon good family welfare.

Article 3

The first priority for a child is to be cared for by his or her own parents.

Article 4

When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute – foster or adoptive – family or, if necessary, by an appropriate institution should be considered.

Article 5

In all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration.

Article 6

Persons responsible for foster placement or adoption procedures should have professional or other appropriate training.

Article 7

Governments should determine the adequacy of their national child welfare services and consider appropriate actions.

Article 8

The child should at all times have a name, a nationality and a legal representative. The child should not, as a result of foster placement, adoption or any alternative regime, be deprived of his or her name, nationality or legal representative unless the child thereby acquires a new name, nationality or legal representative.

Article 9

The need of a foster or an adopted child to know about his or her background should be recognized by persons responsible for the child's care unless this is contrary to the child's best interests.

B. FOSTER PLACEMENT

Article 10

Foster placement of children should be regulated by law.

Article 11

Foster family care, though temporary in nature, may continue, if necessary, until adulthood but should not preclude either prior return to the child's own parents or adoption.

Article 12

In all matters of foster family care, the prospective foster parents and, as appropriate, the child and his or her own parents should be properly involved. A competent authority or agency should be responsible for supervision to ensure the welfare of the child.

C. ADOPTION

Article 13

The primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family.

Article 14

In considering possible adoption placements, persons responsible for them should select the most appropriate environment for the child.

Article 15

Sufficient time and adequate counselling should be given to the child's own parents, the prospective adoptive parents and as appropriate, the child in order to reach a decision on the child's future as early as possible.

Article 16

The relationship between the child to be adopted and the prospective adoptive parents should be observed by child welfare agencies or services prior to adoption. Legislation should ensure that the child is recognized in law as a member of the adoptive family and enjoys all the rights pertinent thereto.

Article 17

If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family.

Article 18

Governments should establish policy, legislation and effective supervision for the protection of children involved in intercountry adoption. Intercountry adoption should, wherever possible, only be undertaken when such measures have been established in the States concerned.

Article 19

Policies should be established and laws enacted, where necessary, for the prohibition of abduction and of any other act for illicit placement of children.

Article 20

In intercountry adoption, placements should, as a rule, be made through competent authorities or agencies with application of safeguards and standards equivalent to those existing in respect of national adoption. In no case should the placement result in improper financial gain for those involved in it.

Article 21

In intercountry adoption through persons acting as agents for prospective adoptive parents, special precautions should be taken in order to protect the child's legal and social interests.

Article 22

No intercountry adoption should be considered before it has been established that the child is legally free for adoption and that any pertinent documents necessary to complete the adoption, such as the consent of competent authorities, will become available. It must also be established that the child will be able to migrate and to join the prospective adoptive parents and may obtain their nationality.

Article 23

In intercountry adoption, as a rule, the legal validity of the adoption should be assured in each of the countries involved.

Article 24

Where the nationality of the child differs from that of the prospective adoptive parents, all due weight shall be given to both the law of the State of which the child is a national and the law of the State of which the prospective adoptive parents are nationals. In this connection due regard shall be given to the child's cultural and religious background and interests.

CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

The States signatory to the present Convention

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,

Recognizing that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin,

Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children,

Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986),

Have agreed upon the following provisions —

CHAPTER 1 — SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are —

- a* to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;
- b* to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- c* to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

Article 2

1 The Convention shall apply where a child habitually resident in one Contracting State (“the State of origin”) has been, is being, or is to be moved to another Contracting State (“the receiving State”) either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

2 The Convention covers only adoptions which create a permanent parent-child relationship.

Article 3

The Convention ceases to apply if the agreements mentioned in Article 17, sub-paragraph c, have not been given before the child attains the age of eighteen years.

CHAPTER II — REQUIREMENTS FOR INTERCOUNTRY ADOPTIONS

Article 4

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin —

- a* have established that the child is adoptable;
- b* have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;
- c* have ensured that
 - (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,
 - (2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,
 - (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and
 - (4) the consent of the mother, where required, has been given only after the birth of the child; and
- d* have ensured, having regard to the age and degree of maturity of the child, that
 - (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,
 - (2) consideration has been given to the child's wishes and opinions,

- (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
- (4) such consent has not been induced by payment or compensation of any kind.

Article 5

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State —

- a* have determined that the prospective adoptive parents are eligible and suited to adopt;
- b* have ensured that the prospective adoptive parents have been counselled as may be necessary; and
- c* have determined that the child is or will be authorised to enter and reside permanently in that State.

CHAPTER III — CENTRAL AUTHORITIES AND ACCREDITED BODIES

Article 6

1 A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

2 Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

1 Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.

2 They shall take directly all appropriate measures to —

- a* provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms;
- b* keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.

Article 8

Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

Article 9

Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to —

- a* collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;
- b* facilitate, follow and expedite proceedings with a view to obtaining the adoption;
- c* promote the development of adoption counselling and post-adoption services in their States;
- d* provide each other with general evaluation reports about experience with intercountry adoption;
- e* reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

Article 10

Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.

Article 11

An accredited body shall —

- a* pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation;
- b* be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and
- c* be subject to supervision by competent authorities of that State as to its composition, operation and financial situation.

Article 12

A body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both States have authorised it to do so.

Article 13

The designation of the Central Authorities and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau of the Hague Conference on Private International Law.

CHAPTER IV — PROCEDURAL REQUIREMENTS IN INTERCOUNTRY ADOPTION

Article 14

Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

Article 15

1 If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including

information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.

2 It shall transmit the report to the Central Authority of the State of origin.

Article 16

1 If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall —

- a* prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;
- b* give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;
- c* ensure that consents have been obtained in accordance with Article 4; and
- d* determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.

2 It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed.

Article 17

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if —

- a* the Central Authority of that State has ensured that the prospective adoptive parents agree;
- b* the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;
- c* the Central Authorities of both States have agreed that the adoption may proceed; and

- d* it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State.

Article 18

The Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State.

Article 19

1 The transfer of the child to the receiving State may only be carried out if the requirements of Article 17 have been satisfied.

2 The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parents.

3 If the transfer of the child does not take place, the reports referred to in Articles 15 and 16 are to be sent back to the authorities who forwarded them.

Article 20

The Central Authorities shall keep each other informed about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

Article 21

1 Where the adoption is to take place after the transfer of the child to the receiving State and it appears to the Central Authority of that State that the continued placement of the child with the prospective adoptive parents is not in the child's best interests, such Central Authority shall take the measures necessary to protect the child, in particular —

- a* to cause the child to be withdrawn from the prospective adoptive parents and to arrange temporary care;
- b* in consultation with the Central Authority of the State of origin, to arrange without delay a new placement of the child with a view to adoption or, if this is not appropriate, to arrange alternative long-term care; an adoption shall not take place until the Central

Authority of the State of origin has been duly informed concerning the new prospective adoptive parents;

c as a last resort, to arrange the return of the child, if his or her interests so require.

2 Having regard in particular to the age and degree of maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken under this Article.

Article 22

1 The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.

2 Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who —

a meet the requirements of integrity, professional competence, experience and accountability of that State; and

b are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.

3 A Contracting State which makes the declaration provided for in paragraph 2 shall keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these bodies and persons.

4 Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with paragraph 1.

5 Notwithstanding any declaration made under paragraph 2, the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with paragraph 1.

Article 23

1 An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph c, were given.

2 Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities.

Article 24

The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

Article 25

Any Contracting State may declare to the depositary of the Convention that it will not be bound under this Convention to recognize adoptions made in accordance with an agreement concluded by application of Article 89, paragraph 2.

Article 26

- 1 The recognition of an adoption includes recognition of
- a* the legal parent-child relationship between the child and his or her adoptive parents;
 - b* parental responsibility of the adoptive parents for the child;
 - c* the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.

2 In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State and in any other Contracting State where the adoption is recognized, rights equivalent to those resulting from adoptions having this effect in each such State.

3 The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognizes the adoption.

Article 27

1 Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognizes the adoption under the Convention, be converted into an adoption having such an effect —

a if the law of the receiving State so permits; and

b if the consents referred to in Article 4, sub-paragraphs *c* and *d*, have been or are given for the purpose of such an adoption.

2 Article 23 applies to the decision converting the adoption.

CHAPTER VI — GENERAL PROVISIONS

Article 28

The Convention does not affect any law of a State of origin which requires that the adoption of a child habitually resident within that State take place in that State or which prohibits the child's placement in, or transfer to, the receiving State prior to adoption.

Article 29

There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs *a* to *c*, and Article 5, sub-paragraph *a*, have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.

Article 30

1 The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular

information concerning the identity of his or her parents, as well as the medical history, is preserved.

2 They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.

Article 31

Without prejudice to Article 30, personal data gathered or transmitted under the Convention, especially data referred to in Articles 15 and 16, shall be used only for the purposes for which they were gathered or transmitted.

Article 32

1 No one shall derive improper financial or other gain from an activity related to an intercountry adoption.

2 Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.

3 The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

Article 33

A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.

Article 34

If the competent authority of the State of destination of a document so requests, a translation certified as being in conformity with the original must be furnished. Unless otherwise provided, the costs of such translation are to be borne by the prospective adoptive parents.

Article 35

The competent authorities of the Contracting States shall act expeditiously in the process of adoption.

Article 36

In relation to a State which has two or more systems of law with regard to adoption applicable in different territorial units —

- a* any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b* any reference to the law of that State shall be construed as referring to the law in force in the relevant territorial unit;
- c* any reference to the competent authorities or to the public authorities of that State shall be construed as referring to those authorised to act in the relevant territorial unit;
- d* any reference to the accredited bodies of that State shall be construed as referring to bodies accredited in the relevant territorial unit.

Article 37

In relation to a State which with regard to adoption has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 38

A State within which different territorial units have their own rules of law in respect of adoption shall not be bound to apply the Convention where a State with a unified system of law would not be bound to do so.

Article 39

1 The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

2 Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

Article 40

No reservation to the Convention shall be permitted.

Article 41

The Convention shall apply in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the receiving State and the State of origin.

Article 42

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII — FINANCIAL CLAUSES

Article 43

1 The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Seventeenth Session and by the other States which participated in that Session.

2 It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 44

1 Any other State may accede to the Convention after it has entered into force in accordance with Article 4, paragraph 1.

2 The instrument of accession shall be deposited with the depositary.

3 Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *b* of Article 48. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 45

1 If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2 Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3 If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 46

1 The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 43.

2 Thereafter the Convention shall enter into force —

a for each State ratifying, accepting or approving it subsequently, or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b for a territorial unit to which the Convention has been extended in conformity with Article 45, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 47

1 A State Party to the Convention may denounce it by a notification in writing addressed to the depositary.

2 The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Article 48

The depositary shall notify the States Members of the Hague Conference on Private International Law, the other States which

participated in the Seventeenth Session and the States which have acceded in accordance with Article 44, of the following —

- a* the signatures, ratifications, acceptances and approvals referred to in Article 43;
- b* the accessions and objections raised to accessions referred to in Article 44;
- c* the date on which the Convention enters into force in accordance with Article 46;
- d* the declarations and designations referred to in Articles 22, 23, 25 and 45;
- e* the agreements referred to in Article 39;
- f* the denunciations referred to in Article 47.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on theday of19 *, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Seventeenth Session and to each of the other States which participated in that Session.

*The Convention was signed on the 29th of May 1993 and thus bears that date.

APPENDIX G

Rules relating to customary adoption and succession⁶⁰³

- G1 **C**OMplete ADOPTION would be where the child was taken in early infancy, and lived with its adopting parent up to marriage or manhood.
- G2 Where the adoption was not of the complete character above mentioned, the surrounding circumstances would have to be taken into consideration in determining the rights, if any, of the adopted child.
- G3 It does not appear that any special ceremonies or formalities were observed upon the adoption being made. It would be sufficient that the adopted child be generally recognised as such.
- G4 The adopted child would almost invariably be a relative by blood of the adopting parent.
- G5 If the adoption were made with the consent of the “hapū” or tribe, and the adopted child remained with such tribe or hapū, it would be entitled to share the tribal or hapū lands.
- G6 Under such conditions (as above mentioned) the adopted child would be entitled to succeed to the whole of the interest of the adopting parent.
- G7 If there were no near relatives, and the adopted child had duly cared for the adopting parent in his old age, he would succeed to the whole of the interest of the adopting parent.
- G8 If there were near relatives, the adopted child would share in the succession.
- G9 The adopted child would lose his rights if he neglected his adopting parent in his old age, or ceased to act with, or as a member of, the hapū, or tribe.

⁶⁰³ Guidelines laid down in judgments of Native Land Court by Judges Edgar and Mair, Aperahana te Kume and Hemi Erueti in certain judgments delivered in Hastings June 19, 1895. See description in [1907] 4 AJHR G5.

G10 The rights of adopted children, as above set out, might be modified if the adopting parent made an “ōhākī” (or verbal Māori will).

APPENDIX H

Recognition of indigenous adoption practices in other jurisdictions

UNITED STATES

- H1 **T**HE UNITED STATES Indian Child Welfare Act 1978 recognises Indian sovereignty over children living within an Indian sovereign nation (that is a particular reservation). Tribes have significant input into decision-making with respect to the children within their domain. The Act applies largely to Indians resident on the reservations preserved for Indian use. The statute does not state how conflicts can be resolved where the child is born of an Indian and a non-Indian parent. In such instances jurisdictional disputes arise where the tribes and the State each claim superior legal or cultural authority to determine the best interests of the child.⁶⁰⁴

CANADA

British Columbia

- H2 The British Columbia Adoption Act 1996 applies special rules when an Indian child is placed for adoption. Before an Indian, or a child who identifies as being Indian, is placed for adoption there must be consultation about the adoption within that child's band. This requirement can be waived where the child or birth parent objects to band consultation.⁶⁰⁵
- H3 The Act favours the adoption of Indian children by persons from their own family. Where this is not possible, adoption by other

⁶⁰⁴ BA Atwood "Identity and Assimilation: Changing Definitions of Tribal Power Over Children" (1999) 83 Minnesota Law Review 927, 929.

⁶⁰⁵ Section 7 Adoption Act 1996.

Indian persons will be considered. An Indian child will only be placed with a non-Indian family as a last resort.

- H4 Upon an application by an Indian person, the court may recognise that an adoption in accordance with Indian custom has the effect of an adoption order under the Adoption Act.⁶⁰⁶ This provision expressly preserves aboriginal rights in respect of children, but gives Indians the choice of adopting the legal consequences of adoption embodied in the British Columbia Adoption Act 1996.

Nova Scotia

- H5 The Nova Scotia Children and Family Services Act 1990 requires the Nova Scotia Children and Family Service to notify the Mikmaq Family and Children's Services when it believes that an Indian child is being freed for adoption. Once notice has been given, an adoption agreement cannot be made for 15 days. This time allows the Mikmaq Services to consider and suggest placement options for the child.⁶⁰⁷

Alberta

- H6 Similarly the Alberta Child Welfare Act 1984 requires the Director of the Child Welfare Agency, or any agent of a private adoption agency to consult with the chief or the council of the relevant band before allowing an adoption order in respect of an Indian child to proceed. If the birth parent/guardian surrendering the child does not come from a reserve, the person seeking to free the child for adoption must request that the parent/guardian consent to the proposed adoption.⁶⁰⁸

AUSTRALIA

- H7 Aboriginal customary adoption consists of placement of a child within the extended family group. The birth parents maintain contact with the child and the adoptive parents. Similar to Māori customary placement, the adoptive parents are almost never strangers to the biological parents. The adoption is often seen as

⁶⁰⁶ Section 46(1) Adoption Act 1996.

⁶⁰⁷ Section 68(11) Children and Family Services Act 1990.

⁶⁰⁸ Section 62 Child Welfare Act 1984.

a way in which kinship structures can be strengthened; the process leaves the adoptive parents indebted to the biological parents.⁶⁰⁹ Torres Strait Islanders have a form of customary adoption, which more closely resembles the European concept of foster care. A child is placed with other parents for a short period of time, which either comes to an end and the child is returned, or is extended into an arrangement more closely resembling adoption.

New South Wales

- H8 The New South Wales Adoption Act 1965 allows Aboriginal children to be adopted by Aboriginal couples living in a customary marriage.⁶¹⁰ Otherwise, there is no specific provision relating to adoptive placement of Aboriginal children.
- H9 In 1997 the New South Wales Law Reform Commission released a research report entitled *The Aboriginal Child Placement Principle*.⁶¹¹ The report recommended that the adoption legislation should contain guiding principles governing the placement of Aboriginal children. The “Aboriginal child placement principle” creates a hierarchy of preference for the placement of Aboriginal (this term includes Torres Strait Islanders) children. Where possible Aboriginal children should be cared for by family members. Where this is not possible they should be placed with other Aboriginal people.

Victoria

- H10 Section 50 of the Victorian Adoption Act 1984 notes that adoption is absent in customary Aboriginal child care arrangements, but the section states that it recognises Aboriginal rights to self-management and self-determination. A parent may state in the instrument of consent to the adoption that he or she wishes the child to be adopted within the Aboriginal community. Where the parents’ consent has been dispensed with, but the Director-General or other officer believes that the child is Aboriginal, the court must apply the provisions contained in section 50.

⁶⁰⁹ New South Wales Law Reform Commission *The Aboriginal Child Placement Principles* (NSWLRC Research Report 7, Sydney, 1997).

⁶¹⁰ Section 19(1A)(c)(i) and (ii).

⁶¹¹ NSWLRC RR7, above n 609.

- H11 The court may not make an adoption order unless the parent(s) have received counselling from an Aboriginal agency,⁶¹² or have expressed a wish not to be counselled.
- H12 Section 50 of the Victorian Adoption Act 1984 contains a scale of preferences for prospective adopters. The first preference is for placement with adoptive parents from members of the same community as the birth parents. Where such persons are not available, at least one of the adoptive parents should be a member of an Aboriginal community. Only where neither type of parent is available should the court consider making an adoption order in favour of a person approved by the Director-General and by an Aboriginal agency.

South Australia

- H13 In South Australia the court may not make an adoption order in respect of an Aboriginal child unless adoption is clearly preferable to any other order that the court could make.⁶¹³
- H14 The statute favours adoption by a member of that child's Aboriginal community. The adopter must have a type of relationship with the child that would be recognised as appropriate in Aboriginal customary law. If no such applicant is available, adoption by any other Aboriginal person is deemed acceptable. The statute only permits a non-Aboriginal to adopt where there are special circumstances justifying making such an order, and where the court is satisfied that the child will not lose its cultural identity as a result of the adoption order.

Australian Capital Territory

- H15 The Australian Capital Territory Adoption Act 1993 provides that the court may not make an adoption order in respect of an Aboriginal child, unless it is satisfied that the choice of adoptive parents has been made having regard to the desirability of the child being placed with a person from an Aboriginal community and whether the child will be able to maintain contact with its parents.⁶¹⁴

⁶¹² Aboriginal agencies are run by Aborigines, for the benefit of Aborigines, and have experience in child and family welfare matters.

⁶¹³ Section 11 Adoption Act 1988 (SA).

⁶¹⁴ Section 21 Adoption Act 1993 (ACT).

Northern Territory

- H16 The Adoption of Children Act 1995 allows couples who have been living in an Aboriginal customary marriage for more than two years to adopt a child.⁶¹⁵
- H17 Section 11 sets out the rules that apply when an Aboriginal child is available for adoption. Before an adoption order may be made the court must satisfy itself that every effort has been made to arrange custody within the child's extended family or with other Aboriginal people who would be considered appropriate caregivers in accordance with custom. The court may consult with the child's parents, Aboriginal welfare agencies, and other persons who would customarily have responsibility for the child.
- H18 Where such placement is not possible, or is not in the best interests of the child, the legislation favours adoption of the child by prospective adopters, at least one of whom should be Aboriginal. Where possible the child should be placed in an adoptive family within geographic proximity to the natural family of the child. The court takes into account any undertakings made by the adoptive parents in relation to encouraging and facilitating contact between the child, its extended natural family, and culture.
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⁶¹⁵ Section 13 Adoption of Children Act 1995 (NT).

APPENDIX I

Children (Scotland) Act 1995

Parental responsibilities and parental rights

1. (1) Subject to section 3(1)(b) and (3) of this Act, a parent has in relation to his child the responsibility –
 - (a) to safeguard and promote the child's health, development and welfare;
 - (b) to provide, in a manner appropriate to the stage of development of the child –
 - (i) *direction*;
 - (ii) *guidance*,to the child
 - (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
 - (d) to act as the child's legal representative,but only in so far as compliance with this section is practicable and in the interests of the child.
- (2) "Child" means for the purposes of –
 - (a) paragraphs (a), (b)(i), (c) and (d) of subsection (1) above, a person under the age of sixteen years;
 - (b) paragraph (b)(ii) of that subsection, a person under the age of eighteen years.
- (3) The responsibilities mentioned in paragraphs (a) to (d) of subsection (1) above are in this Act referred to as "parental responsibilities"; and the child, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects those responsibilities.
- (4) The parental responsibilities supersede any analogous duties imposed on a parent at common law; but this section is without prejudice to any other duty so imposed on him or to any duty imposed on him by, under or by virtue of any other provision of this Act or of any other enactment.
2. (1) Subject to section 3(1)(b) and (3) of this Act, a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right –
 - (a) to have the child living with him or otherwise to regulate the child's residence;

- (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;
 - (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and
 - (d) to act as the child's legal representative.
- (2) Subject to subsection (3) below, where two or more persons have a parental right as respects a child, each of them may exercise that right without the consent of the other or, as the case may be, of any of the others, unless any decree or deed conferring the right, or regulating its exercise, otherwise provides.
 - (3) Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in subsection (6) below.
 - (4) The rights mentioned in paragraphs (a) to (d) of subsection (1) above are in this Act referred to as "parental rights"; and a parent, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects those rights.
 - (5) The parental rights supersede any analogous rights enjoyed by a parent at common law; but this section is without prejudice to any other right so enjoyed by him or to any right enjoyed by him by, under or by virtue of any other provision of this Act or any other enactment.
 - (6) The description of a person referred to in subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right mentioned in paragraph (a) or (c) of subsection (1) above; except that, where both the child's parents are persons so described, the consent required for his removal or retention shall be that of them both.
 - (7) In this section, "child" means a person under the age of sixteen years.
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APPENDIX J

Tables

TABLE 1: ADOPTIONS TO STRANGERS AND NON-STRANGERS

Year	A		B		C		D		E		F		G		H		I		
	Adopted by strangers	Adopted by strangers	Adopted by birth parents	Adopted by birth parents	Non-stranger or relative	Total non- strangers	Total non- strangers	Total known	Unkn data	Total adopt	Adoption to strangers	Adoption to non-stranger	Adoption to strangers	Adoption to non-stranger	Adoption to strangers	Adoption to non-stranger	Adoption to strangers	Adoption to non-stranger	
1955	984	72.0%	275	20.1%	107	7.8%	382	28.0%	1366	89	1455	984	67.6%	471	32.4%	984	67.6%	471	32.4%
1956	424	59.5%	219	30.8%	69	9.7%	288	40.5%	712	175	887	424	47.8%	463	52.2%	424	47.8%	463	52.2%
1957	1161	71.1%	311	19.1%	160	9.8%	471	28.9%	1632	59	1691	1161	68.7%	530	31.3%	1161	68.7%	530	31.3%
1958	1140	66.3%	393	22.9%	186	10.8%	579	33.7%	1719	48	1671	1140	68.2%	531	31.8%	1140	68.2%	531	31.8%
1959	1248	69.0%	359	19.9%	202	11.2%	561	31.0%	1809	160	1969	1248	63.4%	721	36.6%	1248	63.4%	721	36.6%
1960	1327	73.9%	347	19.3%	122	6.8%	469	26.1%	1796	84	1880	1327	70.6%	553	29.4%	1327	70.6%	553	29.4%
1961	1613	76.3%	393	18.6%	108	5.1%	501	23.7%	2114	465	2579	1613	62.5%	966	37.5%	1613	62.5%	966	37.5%
1962	1635	77.9%	368	17.5%	96	4.6%	464	22.1%	2099	546	2645	1635	61.8%	1010	38.2%	1635	61.8%	1010	38.2%
1963	1775	76.0%	382	16.3%	179	7.7%	561	24.0%	2336	507	2843	1775	62.4%	1068	37.6%	1775	62.4%	1068	37.6%
1964	1941	74.8%	418	16.1%	236	9.1%	654	25.2%	2595	290	2885	1941	67.3%	944	32.7%	1941	67.3%	944	32.7%
1965	2162	76.2%	447	15.8%	228	8.0%	675	23.8%	2837	251	3088	2162	70.0%	926	30.0%	2162	70.0%	926	30.0%
1966	2230	74.4%	504	16.8%	263	8.8%	767	25.6%	2997	465	3462	2230	64.4%	1232	35.6%	2230	64.4%	1232	35.6%
1967	2409	75.7%	492	15.5%	280	8.8%	772	24.3%	3181	332	3513	2409	68.6%	1104	31.4%	2409	68.6%	1104	31.4%
1968	2617	75.3%	502	14.4%	358	10.3%	860	24.7%	3477	303	3780	2617	69.2%	1163	30.8%	2617	69.2%	1163	30.8%
1969	2499	71.4%	652	18.6%	349	10.0%	1001	28.6%	3500	388	3888	2499	64.3%	1389	35.7%	2499	64.3%	1389	35.7%
1970	2286	68.0%	739	22.0%	337	10.0%	1076	32.0%	3362	475	3837	2286	59.6%	1551	40.4%	2286	59.6%	1551	40.4%
1971	2176	67.4%	738	22.8%	317	9.8%	1055	32.7%	3231	736	3967	2176	54.8%	1791	45.2%	2176	54.8%	1791	45.2%
1972	2136	65.1%	801	24.4%	343	10.5%	1144	34.9%	3280	362	3642	2136	58.6%	1506	41.1%	2136	58.6%	1506	41.1%
1973	2000	64.8%	770	24.9%	318	10.3%	1088	35.3%	3088	436	3524	2000	56.7%	1524	43.3%	2000	56.7%	1524	43.3%
1974	1821	61.2%	903	30.3%	252	8.5%	1155	38.8%	2976	390	3366	1821	54.1%	1545	45.9%	1821	54.1%	1545	45.9%
1975	1581	57.5%	877	31.9%	293	10.7%	1170	42.5%	2751	571	3322	1581	47.6%	1741	52.4%	1581	47.6%	1741	52.4%
1976	1347	52.7%	913	35.8%	294	11.5%	1207	47.3%	2554	388	2942	1347	45.8%	1595	54.2%	1347	45.8%	1595	54.2%
1977	1052	49.7%	792	37.4%	272	12.9%	1064	50.3%	2116	434	2550	1052	41.2%	1498	58.8%	1052	41.2%	1498	58.8%
1978	1067	50.1%	782	36.7%	281	13.2%	1063	49.9%	2130	322	2452	1067	43.5%	1385	56.5%	1067	43.5%	1385	56.5%

TABLE 1 CONTINUED

Year	A		B		C		D		E		F		G		H		I	
	Adopted by strangers	Adopted by birth parents	Non-stranger or relative	Total non-strangers	Total known	Unkn data	Total adopt	Adoption to strangers	Adoption to non-stranger									
1979	845	43.2%	773	39.6%	336	17.2%	1109	56.8%	1954	246	2200	845	38.4%	1355	61.6%			
1980	715	36.5%	894	45.7%	348	17.8%	1242	63.5%	1957	196	2153	715	33.2%	1438	66.8%			
1981	556	33.8%	763	46.3%	328	19.9%	1091	66.2%	1647	217	1864	556	29.8%	1308	70.2%			
1982	478	30.2%	782	49.4%	322	20.3%	1104	69.8%	1582	764	2346	478	20.4%	1868	79.6%			
1983	462	29.9%	670	33.4%	412	26.7%	1082	70.0%	1544	301	1845	462	25.0%	1383	75.0%			
1984	399	27.3%	688	47.1%	373	25.5%	1061	72.7%	1460	210	1670	399	23.9%	1271	76.1%			
1985	331	26.3%	600	47.7%	327	26.0%	927	73.7%	1258	180	1438	331	23.0%	1107	77.0%			
1986	322	31.0%	481	46.3%	235	22.6%	716	69.0%	1038	192	1230	322	26.2%	908	73.8%			
1987	289	28.5%	437	43.0%	289	28.5%	726	71.5%	1015	196	1211	289	23.9%	922	76.1%			
1988	254	29.3%	372	42.9%	241	27.8%	613	70.7%	867	138	1005	254	25.3%	751	74.7%			
1989	191	28.8%	285	43.0%	187	28.2%	472	71.2%	663	226	889	191	21.5%	698	78.5%			
1990	223	31.4%	299	42.2%	187	26.4%	486	68.5%	709	197	906	223	24.6%	683	75.4%			
1991	198	28.4%	319	45.8%	180	25.8%	499	71.6%	697	109	806	198	24.6%	608	75.4%			
1992	196	28.2%	280	40.3%	218	31.4%	498	71.8%	694	100	794	196	24.7%	598	75.3%			
1993	113	33.0%	129	37.7%	100	29.2%	229	66.9%	342	397*	739	113*	15.3%	626*	84.7%*			
1994	183	31.2%	221	37.6%	183	31.2%	404	68.8%	587	96	683	183	26.8%	500	59.1%			
1995	124	22.7%	240	43.9%	183	33.5%	423	77.3%	547	93	640	124	19.4%	516	73.2%			
1996	114	23.5%	169	34.9%	201	41.5%	370	76.4%	484	56	540	114	21.1%	426	78.9%			
Total	46624	59.2%	21779	27.7%	10300	13.0%	32079	40.7%	78703	12188	90797	46814	51.4%	45071	49.6%			

Source: K Griffith, *New Zealand Adoption: History and Practice* (Wellington, 1998).

Notes: A limitation of the Table 1 is the unknown data Column F. These consist mainly of adoptions not processed by the Department of Social Welfare. The majority of these are step-parent adoptions by a birth parent of the child and their partner, in which case the Court does not normally refer the case to the Department of Social Welfare, for a Social Worker Report. It also includes a number of Māori adoptions. In both cases, adoption to strangers is very unlikely. A more accurate picture of total adoption practice can be obtained by adding the unknown data adoptions in Column F to the totals in Column D. This resulting processed data is shown in Columns H and I. The percentages in Columns A, B, C, D are the percentage of total known data adoptions in Column E.

Data source: Columns A, B, C, D, E = Department of Social Welfare Annual Reports – adoptions processed by DSW. Column G = NZ Year Book but commencing 1980 source is Department of Social Welfare Annual Reports – adoption orders issued by Courts. Column F = Difference between E and G. The data is processed into percentages of total known data adoption as in Column E.

* Glitch due to change in statistical year. In 1993 the statistical reporting year changed from a calendar year 1st Jan to 31st Dec to the fiscal year 1st July to 30th June of following year.

TABLE 2: ADULT ADOPTION INFORMATION ACT STATISTICS

Year	OBC issue*	Veto placed			Veto renewed			Veto cancelled** or expired by death		
		Mother	Adoptee	Father	Mother	Adoptee	Father	Mother	Adoptee	Father
1986	4141	2771	898	61						
1987	2771	140	86	2						
1988	2285	85	54	0						
1989	1967	56	49	0						
1990	1878	41	38	0						
1991	1803	48	40	1						
1992	1709	34	23	3						
1993	1806	21	26	1						
1994	1928	21	24	0						
1995	1832	16	17	0						
1996	1977	85	36	2	423	63	3	2	3	0
1997	1696	29	22	1	15	4	0	3	2	1
1998	1442	15	15	1	15	7	0	3	2	0
1999										
(below)	653	8	2	0	5	3	0	0	1	0
1999										
Jan	78	1				1				
Feb	116					2			1	
Mar	153	4	1		1					
Apr	76	3	1		1					
May	126									
Jun	104				3					
Jul										
Aug										
Sep										
Oct										
Nov										
Dec										

Source: Births, Deaths and Marriages, Department of Internal Affairs.

* Original birth certificate.

** Onus is on the applicant to show the person is dead. This is therefore artificially low as usually applicant will not know the person's identity.

TABLE 3: 1996 CENSUS OF POPULATION AND DWELLINGS – FAMILY INDICATOR BY NUMBER OF CHILDREN IN FAMILY FOR FAMILIES IN PRIVATE DWELLINGS

Family indicator, all families	No children	One child	Two children	Three children	Four children	Five or more	Total
Couple only	354,588	0	0	0	0	0	354,588
Married couple with children	0	123,564	146,814	71,205	22,767	8,910	373,263
Opposite-sex defacto couple with children	0	21,651	16,293	6,990	2,556	1,104	48,597
Same-sex defacto couple with children	0	222	105	42	12	9	396
Not specified/not able to determine ¹	0	1,998	1,356	639	207	111	4,314
Total two parent families	0	147,435	164,568	78,876	25,548	10,134	426,567
One parent family	0	91,437	48,789	18,936	6,186	2,910	168,258
Family not classifiable	69	6	6	3	0	3	87
Total all families	354,657	238,878	213,366	97,815	31,734	13,047	949,497

Source: Statistics New Zealand.

All cells in this table have been randomly rounded to base 3.

* The marital status of couples was not always able to be determined. Some people who we classified as being in a parental role and part of a couple, specified that they were non-partnered when asked about their marital status. These and other couples with inconsistent responses have been categorised as “Not able to determine” in the above table.

Bibliography

REPORTS

New Zealand

Department of Justice *Adoption Act 1955: A Review by an Interdepartmental Working Party: Proposals for Discussion* (Wellington, 1987)

Department of Justice *New Birth Technologies: An Issues Paper on AID, IVF, and Surrogate Motherhood* (Wellington, 1985)

Department of Justice *New Birth Technologies: A Summary of Submissions Received on the Issues Paper* (Wellington, 1986)

Department of Social Welfare *Review of Adoption Law: Adoption by Māori: A Consultation Document* (Social Policy Agency, Department of Social Welfare, Wellington, 1993)

Law Commission *Justice: The Experiences of Māori Women Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori o pa ana ki tēnei* (NZLC R53, Wellington, 1999)

Law Commission *Legislation Manual: Structure and Style* (NZLC R35, Wellington, 1996)

Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, Wellington, 1997)

Law Commission *Adoption: Options for Reform* (NZLC PP38, Wellington, 1999)

Law Commission *Recognising Same-Sex Relationships* (NZLC SP4, Wellington, 1999)

New Zealand Adoption Practices Review Committee Report to the Minister of Social Welfare (Wellington, 1990)

Webb P A *Review of the Law on Adoption* (Department of Justice, Wellington, 1979)

Australia

New South Wales Law Reform Commission *Review of the Adoption Information Act 1990* (NSWLRC R69, Sydney, 1992)

New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965* (NSW) (NSWLRC Issues Paper 9, Sydney, 1993)

New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965* (NSW) (NSWLRC DP34, Sydney, 1994)

New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965* (NSW) (NSWLRC R81, Sydney, 1997)

New South Wales Law Reform Commission *The Aboriginal Child Placement Principle* (NSWLRC Research Report 7, Sydney, 1997)

New South Wales Law Reform Commission *Surrogate Motherhood* (NSWLRC DP18, Sydney, 1988)

Victorian Adoption Legislation Committee *Report of the Adoption Legislation Review Committee* (Department of Community Welfare Services, Melbourne, 1983)

Western Australia Law Reform
Committee *Succession Rights of Adopted
Children Report* (Project No 24, 1971)

England

M Brazier, A Campbell and S
Golombok *Surrogacy: Review for Health
Ministers of Current Arrangements for
Payments and Regulation – Report of the
Review Team* (London, October 1998)

*Report of the Committee on Homosexual
Offences and Prostitution* (HMSO,
London, 1957)

Home Office and Scottish Education
Department *Report of the Departmental
Committee on the Adoption of Children*
(HMSO, London, 1976)

Scotland

Law Commission (Scotland) *The Law
of Incest in Scotland* (Scot Law Com 69,
Edinburgh, 1981)

TEXTS

J Bowlby *Attachment and Loss: Volume
2. Separation: Anxiety and Anger*
(Penguin Books, London, originally
published 1973, Reprint 1991)

FW Bowzett (ed) *Gay and Lesbian
Parents* (Praeger, New York, 1987)

I Brady *Transactions in Kinship:
Adoption and Fostering in Oceania*
(University Press of Hawaii, Honolulu,
1976)

WW Buckland *A Manual of Roman
Private Law* (2 ed, Cambridge
University Press, Cambridge, 1953)

C Burr *A Separate Creation: How
Biology Makes Us Gay* (Bantam Books,
London, 1997)

Butterworths *Family Law in New
Zealand* (8 ed, Butterworths,
Wellington, 1997)

I Campbell *A Compendium of Roman
Law* (Stevens & Haynes, London,
1892)

ID Campbell *Law of Adoption in New
Zealand* (2 ed, Butterworth & Co Ltd,
Wellington, 1957)

Chisholm J “The Directions of
Legislative Reform in Adoption” in
Post Adoption Resource Centre (ed)
*Has Adoption a Future? Proceedings of
the Fifth Australian Adoption Conference*
(NSW, 1995)

L Collins (ed) *Dacey and Morris The
Conflict of Laws* (12 ed, Stevens and
Sons Ltd, London, 1992)

S Coney and A Else (eds) *Protecting
Our Future: The Case for Greater
Regulation of Assisted Reproductive
Technology* (Women’s Health Action
Trust, Auckland, 1999)

G Coppentrath *La Délégation d’Autorité
Parentale: Prélude à l’Adoption en
Polynésie Française* (2 ed, Haere po no
Tahiti, 1990)

S Cretney *Principles of Family Law* (4
ed, Sweet & Maxwell, London, 1984)

B Dalley *Family Matters: Child Welfare
in Twentieth-Century New Zealand*
(Auckland University Press, Auckland,
1998)

AR D’Augelli and CJ Patterson (eds)
*Lesbian, Gay and Bisexual Identities over
the Lifespan: Psychological Perspectives*
(Oxford University Press, New York,
1995)

A Dickey *Family Law* (3 ed, Law Book
Company, Sydney, 1997)

I Eagles, M Taggart and G Liddell
Freedom of Information (Oxford
University Press, Auckland, 1992)

J Eekelaar and T Nhlapo (eds) *The
Changing Family: International
Perspectives on the Family and Family
Law* (Hart Publishing, Oxford, 1998)

- A Else *A Question of Adoption* (Bridget Williams Books, Wellington, 1991)
- R Firth *Economics of the New Zealand Māori* (2 ed, Government Print, Wellington, 1959)
- R Firth *We, the Tikopia: a Sociological Study of Kinship in Primitive Polynesia* (Beacon Press, Boston, 1963)
- RH Graveson and FR Crane *A Century of Family Law* (Sweet & Maxwell, London, 1957)
- K Griffith *New Zealand Adoption: History and Practice* (Wellington, 1998)
- HD Grotevant and KM McRoy *Openness in Adoption: Exploring Family Connections* (Sage Publications, California, 1998)
- V Groza and KF Rosenberg *Clinical and Practice Issues in Adoption* (Praeger, Westport, 1998)
- M Henaghan and WR Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Oxford, 1992)
- E Hibbs (ed) *Adoption: International Perspectives* (International Universities Press, Connecticut, 1991)
- M Iwanek "Open Adoption: An Evolving Practice", in Post Adoption Resource Centre *Has Adoption a Future* (Proceedings of the Fifth Australian Adoption Conference, Post Adoption Resource Centre, Sydney, 1994)
- S Kitzinger *The Complete Book of Pregnancy and Childbirth* (Alfred A Knopf, New York, 1996)
- Lamda *Adoption by Lesbians and Gay Men: An Overview of the Law in the 50 States* (Lamda Legal Defence and Education Fund, New York, 1996)
- NV Lowe "The Gift/Donation Model versus the Contract/Services Model – The Changing Face of Adoption in England and Wales" in J Eekelaar and T Nhlapo (eds) *The Changing Family* (Hart Publishers, Oxford, 1998)
- GN Marsh (ed) *Modern Obstetrics in General Practice* (Oxford University Press, Oxford, 1985)
- J Metge *New Growth from Old* (Victoria University Press, Wellington, 1995)
- A Mullender (ed) *Open Adoption: The Philosophy and the Practice* (British Agencies for Adoption and Fostering, London, 1991)
- PM North and JJ Fawcett *Cheshire and North's Private International Law* (Butterworths, London, 1992)
- JB Prichard *The Ancient Near East* (Oxford University Press, London, 1958)
- S Pullon *The New Zealand Pregnancy Book* (Bridget Williams Books, Wellington, 1996)
- A Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University of Wellington, 1998)
- J Rockel and M Ryburn *Adoption Today: Change and Choice in New Zealand* (Heinemann Reed, Auckland, 1988)
- M Ryburn *Open Adoption: Research, Theory and Practice* (Avebury, Sydney, 1994)
- M Ryburn "Openness and Adoptive Parents" in A Mullender (ed) *Open Adoption: The Philosophy and the Practice* (British Agencies for Adoption and Fostering, London, 1991)
- C Smart "Law and the Problem of Paternity" in M Stanworth (ed) *Reproductive Technologies: Gender, Motherhood and Medicine* (Polity Press, Cambridge, 1987)
- M Stanworth (ed) *Reproductive Technologies: Gender, Motherhood and Medicine* (Polity Press, Cambridge, 1987)

Statistics New Zealand 1996 Census: *Families and Households* (GP Publications, Wellington, 1998)

Statistics New Zealand *New Zealand Now: Women* (GP Publications, Wellington, 1998)

Statistics New Zealand *New Zealand Official Yearbook 1998* (GP Publications, Wellington, 1998)

Statistics New Zealand *New Zealand Official Yearbook on the Web* (1999) (<http://www.stats.govt.nz>)

F Tasker and S Golombok *Growing Up in a Lesbian Family: Effects on Child Development* (The Guilford Press, New York, 1997)

P Trapski (ed) *Trapski's Family Law* (Brookers, Wellington, 1999)

J Triseliotis "Identity and Genealogy in Adopted People" in E Hibbs (ed) *Adoption: International Perspectives* (International Universities Press, Connecticut, 1991)

J Triseliotis *In Search of Origins: The Experiences of Adopted People* (Routledge & Kegan Paul, London, 1973)

D Webb et al *Family Law in New Zealand* (8 ed, Butterworths, Wellington, 1997)

D Webb et al *Family Law Service* (Butterworths, Wellington, 1999)

R Winkler and M van Keppel *Relinquishing Mothers in Adoption: Their Long-term Adjustment* (Institute of Family Studies Monograph No 3, Melbourne, 1984)

J Zipper and S Sevenhuijsen "Surrogacy: Feminist Notions of Motherhood Reconsidered" in M Stanworth (ed) *Reproductive Technologies: Gender, Motherhood and Medicine* (Polity Press, Cambridge, 1987)

ARTICLES AND PAPERS

F Acheson "Adoption Amongst the Māoris of New Zealand" (1922) 4 *Journal of Comparative Legislation and International Law* (3rd) 60

S Ali "Homosexual Parenting: Child Custody and Adoption" (1989) 22 *University of California Davis Law Review* 1009

MG Areias, R Kumar, H Barros and E Figueiredo "Comparative Incidence of Depression in Women and Men, During Pregnancy and after Childbirth" (1996) *British Journal of Psychology* 169

WR Atkin "Open Adoption and the Law" (1996) 2 *Butterworths Family Law Journal* 44

B Atwell "Surrogacy and Adoption: A Case of Incompatibility" (1988) 20 *Columbia Human Rights Law Review* 1

BA Atwood "Identity and Assimilation: Changing Definitions of Tribal Power Over Children" (1999) 83 *Minnesota Law Review* 927

JP Auld "Racial Matching vs. Transracial Adoption: Proposing a Compromise in the Best Interests of Minority Children" (1993) 27 *Family Law Quarterly* 447

CA Bacharach, KS Stolley and KA London "Relinquishment of Premarital Births: Evidence from National Survey Data" (1992) 24 *Family Planning Perspectives* 27

J Bailey, D Bobrow, M Wolfe and S Mikach "Sexual Orientation of Adult Sons of Gay Fathers" (1995) 31 *Developmental Psychology* 124

R Bailey-Harris "Third Stonewall Lecture – Lesbian and Gay Family Values and the Law" [1999] *Family Law* 560

- A Bainham "Gay Survivors and Lesbian Parents: Sexual Orientation in Family Law" (1998) 57 *Cambridge Law Journal* 42
- C Ball and J Pea "Warring with Wardle: Morality, Social Science and Gay and Lesbian Parents" [1998] *University of Illinois Law Review* 253
- KT Bartlett "Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family has Failed" (1984) 70 *Virginia Law Review* 879
- F Bates "Child Custody and the Homosexual Parent: Some Further Developments in Australia and the United States" (1992) 2 *Australian Gay and Lesbian Law Journal* 1
- PA Belcastro, T Gramlich, T Nicholson, J Prince and R Wilson "A Review of Data Based Studies Addressing the Affects of Homosexual Parenting on Children's Sexual and Social Functioning" (1993) 20 *Journal of Divorce and Remarriage* 105
- M Berry "Adoptive Parents' Perspectives of, and Comfort with, Open Adoption" (1993) 72 *Child Welfare* 231
- DL Beschle "God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings" (1989) 58 *Fordham Law Review* 383
- E Blyth "I Wanted to Be Interesting. I Wanted to Be Able to Say 'I've Done Something Interesting with my Life': Interviews with Surrogate Mothers in Britain" (1994) 12 *Journal of Reproductive and Infant Psychology* 189
- E Blyth "'Not a Primrose Path': Commissioning Parents' Experiences of Surrogacy Arrangements in Britain" (1995) 13 *Journal of Reproductive and Infant Psychology* 185
- SB Boyd "What is a 'Normal' Family? C v C (A Minor) (Custody: Appeal)" (1992) 55 *Modern Law Review* 269
- E Branham "One-Parent Adoptions" (1970) 17 *Children* 103
- M Brazier "Regulating the Reproduction Business?" (1999) 7 *Medical Law Review* 166
- J Caldwell "Adoption: Keeping the Options Open" (1994) 1 *Butterworths Family Law Journal* 86
- J Caldwell "Grandparents: Access, Custody and Adoption" (1994) 1 *Butterworths Family Law Journal* 69
- K Chisholm "A Three Year Follow-Up of Attachment and Indiscriminate Friendliness in Children Adopted From Romanian Orphanages" (1998) 69 *Child Development* 1092
- N Collins "Adoption" (1966) 2(2) *NZ Social Worker*, 71
- L Cook "Open Adoption: Can Visitation with Natural Family Members Be in the Child's Best Interests?" (1991-92) 30 *Journal of Family Law* 471
- J Couchman "Intercountry Adoption in New Zealand - A Child Rights Perspective" (1997) 27 *Victoria University of Wellington Law Review* 421
- CH Covington "Incest: the Psychological Problem and the Biological Contradiction" (1989) 10 *Issues in Mental Health Nursing* 69
- K Daniels and K Hargreaves "The Policy and Ethics of Surrogacy in New Zealand: Who is Left Holding the Baby?" (1997) 6(2) *Otago Bioethics Report* 1
- RJ De Luca "Issues for the National Ethics Committee on Assisted Human Reproduction in its Review of Medically Assisted Surrogacy, with Wider Implications for Ethical Review" (2000) 9 *Otago Bioethics Report* 8.

- SY Ely "Natural Parents' Right to Withdraw Consent to Adoption: How Far Should the Right Extend?" (1992-93) 31 *University of Louisville Journal of Family Law* 685
- J Evall "Sexual Orientation and Adoptive Matching" (1991) 25 *Family Law Quarterly* 347
- D Fergusson and LJ Horwood "Adoption and Adjustment in Adolescence" (1998) 2 *Adoption and Fostering* 24
- D Fergusson, M Lynskey and LJ Horwood "The Adolescent Outcomes of Adoption: A 16-Year Longitudinal Study" (1995) 36 *Journal of Child Psychology and Psychiatry* 597
- S Fischer and I Gillman "Surrogate Motherhood: Attachment, Attitudes and Social Support" (1991) 54 *Psychiatry* 13
- V Frances and A Frances "The Incest Taboo and Family Structure" (1976) 15 *Family Process* 235
- M Freeman "The Importance of a Children's Rights Perspective in Litigation" (1996) 2 *Butterworths Family Law Journal* 84
- M Freeman "Does Surrogacy Have a Future After Brazier?" (1999) 7 *Medical Law Review* 1
- AW French "When Blood Isn't Thicker than Water: The Inheritance Rights of Adopted-Out Children in New York" (1988) 53 *Brooklyn Law Review* 1007
- M Freundlich "Supply and Demand: The Forces Shaping the Future of Infant Adoption" (1998) 2 *Adoption Quarterly* 13
- M Garrison "Why Terminate Parental Rights?" (1983) 35 *Stanford Law Review* 423
- M Gold, E Perrin, D Futterman and S Friedman "Children of Gay or Lesbian Parents" (1994) 15 *Pediatrics in Review* 354
- S Golombok, A Spencer and M Rutter "Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal" (1983) 24 *Journal of Child Psychology and Psychiatry* 551
- S Golombok and F Tasker "Do Parents Influence the Sexual Orientation of Their Children? Findings From a Longitudinal Study of Lesbian Families" (1996) 32 *Developmental Psychology* 3
- S Golombok and F Tasker "Children in Lesbian and Gay Families: Theories and Evidence" (1994) 5 *Annual Review of Sex Research* 73
- S Golombok, F Tasker and C Murray "Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers" (1997) 38 *Journal of Child Psychology and Psychiatry* 783
- JM Green, VA Coupland and JV Kitzinger "Expectations, Experiences and Psychological Outcomes of Childbirth: A Prospective Study of 825 Women" (1990) 17 *Birth* 1
- R Green, J Mandel, J Grey and L Smith "Lesbian Mothers and Their Children: A Comparison with Solo-Parent Heterosexual Mothers and Their Children" (1986) 15 *Archives of Sexual Behaviour* 167
- R Green "Gender Identity in Childhood and Later Sexual Orientation: Follow up of 78 Males" (1985) 142 *American Journal of Psychiatry* 339
- WL Gross "Judging the Best Interests of the Child: Child Custody and the Homosexual Parent" (1985) 1 *Canadian Journal of Women and the Law* 505

- V Groze "Adoption and Single Parents: A Review" (1991) 70 *Child Welfare* 321
- D Hamer, S Hu, V Magnuson, N Hu and A Pattatucci "A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation" (1993) 261 *Science* 321
- C Hapgood, GS Elkind and JJ Wright "Maternity Blues and Post Partum Depression" (1988) 22 *Australia and New Zealand Journal of Psychiatry* 299
- RM Henaghan "Custody Decisions – Discretion Gone too Far?" (2000) 9 *Otago Law Review* 731
- J Henderson "Is Incest Harmful?" (1983) 28 *Canadian Journal of Psychiatry* 34
- A Hendra "Stepfamilies: A Fresh Approach" (1993) 1 *Butterworths Family Law Journal* 26
- GC Hewitt "Inbreeding, Incest and Marriage in New Zealand Law" [1976] *New Zealand Law Journal* 12
- M Hibbs "Surrogacy Legislation – Time for Change?" [1997] *Family Law* 564
- S Hoelgaard "Cultural Determinants of Adoption Policy: A Columbian Case Study" (1998) 12 *International Journal of Law, Policy and the Family* 202
- JH Hollinger "Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children" (1989) 66 *University of Detroit Law Review* 451
- AJ Horne "Consanguinity and the Marriage of Adopted Relatives: Observations on the Problems of Certainty and Direction in New Zealand Law" (1992) 3 *Family Law Bulletin* 67
- AJ Horne "Consanguinity and the Marriage of Adopted Relatives: Observations on the Problems of
- Certainty and Direction in New Zealand Law – Part II" (1992) 3 *Family Law Bulletin* 80
- T Hughes "Intestate Succession and Stepparent Adoptions: Should Inheritance Rights of an Adopted Child Be Determined by Blood or by Law?" [1988] *Wisconsin Law Review* 321
- MS Hussaini "Incorporating Thwarted Putative Fathers into the Adoption Scheme" [1996] *University of Illinois Law Review* 189
- O Jessep and R Chisholm "Step-parent Adoptions and the Family Law Act" (1992) 6 *Australian Journal of Family Law* 179
- I Johnston "Is Adoption Outmoded?" (1985) 6 *Otago Law Review* 14
- M Kirkpatrick "Clinical Implications of Lesbian Mother Studies" (1987) 14 *Journal of Homosexuality* 201
- M Kirkpatrick, A Smith and R Roy "Lesbian Mothers and Their Children: A Comparative Study" (1981) 51 *American Journal of Orthopsychiatry* 545
- L Kirsch "Unwed Fathers and Their Newborn Children Placed for Adoption: Protecting the Rights of Both in Custody Disputes" (1994) 36 *Arizona Law Review* 1011
- J Klauer "Open Adoption Records: A Question of Empowerment" (1993) 57 *Saskatchewan Law Review* 415
- RG Knight "Female Homosexuality and the Custody of Children" (1983) 12 *New Zealand Journal of Psychology* 23
- K Korn "The Struggle for the Child: Preserving the Family in Adoption Disputes between Biological Parents and Third Parties" (1994) 72 *North Carolina Law Review* 1279
- D Krugman "Working with Separation" (1971) 50 *Child Welfare* 528

- EM Landes and RA Posner "The Economics of the Baby Shortage" (1978) 7 *Journal of Legal Studies* 323
- G Larsson, A-B Bohin and M Stenbacka "Prognosis of Children Admitted into Institutional Care During Infancy" (1986) 10 *Journal of Abuse and Neglect* 361
- S LeVay and D Hamer "Evidence for a Biological Influence in Male Homosexuality" [May 1994] *Scientific American* 20
- R Ludbrook "Adoption Consents – Negotiating the Sliding Doors" (1998) 2 *Butterworths Family Law Journal* 320
- RF Marcus "The Attachments of Children in Foster Care" (1991) 117 *Genetic, Social and General Psychology Monographs* 365
- MR Mellow "An Incomplete Picture: The Debate about Surrogate Motherhood" (1985) 8 *Harvard Women's Law Journal* 231
- A Mikaere "Māori Women: Caught in the Contradiction of a Colonised Reality" (1994) 1 *Waikato Law Review* 125
- J Millbank "Lesbian Mothers and Gay Fathers: Sameness and Difference" (1992) 2 *Australian Gay and Lesbian Law Journal* 21
- SL Miller "Surrogate Parenthood and Adoption Statutes: Can a Square Peg Fit into a Round Hole?" (1988) 22 *Family Law Quarterly* 199
- J Montgomery "Constructing a Family – After a Surrogate Birth" (1986) 49 *Modern Law Review* 635
- D Morgan "Who to Be or Not to Be: The Surrogacy Story" (1986) 49 *Modern Law Review* 358
- R-L Mounoud, D Klein, W Bettschart and C Cabrol "A Clinical and Cytogenetic Investigation Carried Out in a Special Institution for Mentally Retarded Patients: Preliminary Results Concerning 82 Cases of Oligophrenia" (1976) 24 *Journal de Genetique Humaine* 297
- T Mulgan and A Moore "Surrogacy, Non-existence, and Harm" (1997) 2 *Butterworths Family Law Journal* 165
- T Nielsen "Family Rights and 'Registered Partnership' in Denmark" (1990) *International Journal of Law and the Family* 297
- CHCJ van Nijnatten "Sexual Orientation of Parents and Dutch Family Law" (1995) 14 *Medical Law* 359
- Notes "Joint Adoption: A Queer Option?" (1990) 15 *Vermont Law Review* 197
- M Otlowski "Re Evelyn – Reflections on Australia's First Litigated Surrogacy Case" (1999) 7 *Medical Law Review* 38
- PJ Parker "Surrogate Motherhood, Psychiatric Screening and Informed Consent, Baby Selling and Public Policy" (1984) 12 *Bulletin of American Academy of Psychiatry and Law* 21
- PJ Parker "Motivation of Surrogate Mothers: Initial Findings" (1983) 140 *American Journal of Psychiatry* 117
- EC Patt "Second Parent Adoption: When Crossing the Marital Barrier Is in a Child's Best Interests" (1987) 3 *Berkeley Women's Law Journal* 96
- CJ Patterson "Children of Lesbian and Gay Parents" (1992) 63 *Child Development* 1025
- CJ Patterson "Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective" (1995) 2 *Duke Journal of Gender Law and Policy* 191
- M Pedersen "Denmark: Homosexual Marriages and New Rules Regarding

- Separation and Divorce" (1991–1992) 30 *Journal of Family Law* 289
- AT Perez "Transracial Adoption and the Federal Adoption Subsidy" (1998) 17 *Yale Law Review* 201
- N Polikoff "This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families" (1990) 78 *Georgetown Law Journal* 459
- RA Posner "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood" [1989] *Journal of Contemporary Health Law and Policy* 21
- RA Posner "The Regulation of the Market in Adoptions" [1987] 67 *Boston University Law Review* 59
- KD Pruett "The Paternal Presence" (1993) 74 *Journal of Contemporary Human Services* 46
- Lady Jansen Rhyl "Building the Smallest Democracy at the Heart of Society" (1995) 1 *Butterworths Family Law Journal* 160
- G Rice, C Anderson, N Risch and G Ebers "Male Homosexuality: Absence of Linkage to Microsatellite Markers at Xq28" (1999) 284 *Science* 665
- P Ringwood "Adoption Procedures in Cook Islands and New Zealand" [1975] *New Zealand Law Journal* 677
- N Risch "Male Sexual Orientation and Genetic Evidence" (1993) 262 *Science* 2063
- SL Roach Anleu "Reinforcing Gender Norms: Commercial and Altruistic Surrogacy" (1990) 33 *Acta Sociologica* 63
- SL Roache Anleu "Surrogacy: For Love but Not for Money?" (1992) 6 *Gender and Society* 30
- C Rotherham " 'Baby C': An Adoption Following a Surrogacy Arrangement" [1991] *New Zealand Law Journal* 17
- C Rotherham "Surrogate Motherhood in New Zealand: A Survey of Existing Law and an Examination of Options for Reform" (1991) 7 *Otago Law Review* 426
- D Salmon "In Response to a Freeman: Surrogate Motherhood and the Feminist Perspective" (1995) 1 *Butterworths Family Law Journal* 276
- G Sarantakos "Cohabitation, Marriage and Delinquency: The Significance of Family Environment" (1997) 30 *Australian and New Zealand Journal of Criminology* 187
- AL Schultz "Medical Genetics and Adoption" (1971) *Child Welfare* 4
- SJ Shapiro "A Lesbian-Centered Critique of Second-Parent Adoptions" [1999] *Berkeley Women's Law Journal* 17
- AJ Solnit "Child Placement – On Whose Time?" (1973) *Journal of the American Academy of Child Psychiatry* 385
- TM Somogye "Opening Minds to Open Adoption" (1997) 45 *Kansas Law Review* 619
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- M Steiner "Perinatal Mood Disorders: Position Paper" (1998) 34 *Psychopharmacology Bulletin* 301
- G Stewart "Adoption and Surrogacy in New Zealand" (1991) 21 *Victoria University of Wellington Law Review* 131
- G Stewart "Adoption and Surrogacy" [1994] *New Zealand Law Journal* 384

F Tasker and S Golombok "Children Raised by Lesbian Mothers: The Empirical Evidence" [1991] *Family Law* 184

F Tasker and S Golombok "The Role of Co-Mothers in Planned Lesbian-Led Families" (1998) 2(4) *Journal of Lesbian Studies* 49

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G Weiss "Revocation of Mother's Consent to Adoption – Some Proposals for Reform" [1976] *New Zealand Law Journal* 497

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UNPUBLISHED MATERIAL

V Adair "Redefining Family: Issues in Parenting Assisted by Reproductive Technology" (6th Australian Institute of Family Studies Conference, Melbourne, 1998)

Children, Young Persons, and Their Families Service "Local Adoptions Placements Manual" (1996)

Department of Child, Youth and Family "Role of the State and Others in Care Services Provision" (Wellington, 1999)

D Fergusson, LJ Horwood and M Lloyd "The Outcomes of Adoption: A 12 Year Longitudinal Study" (Prepared for the Adoption Practices Review Committee, Christchurch, 1990)

M Fowler "Open Adoption in New Zealand: Issues for Adoptive Parents" (MA thesis, University of Auckland, 1995)

Sir Douglas Graham "Opening and Address" (Medically Assisted Surrogacy Symposium, University of Auckland, 20–22 August 1999)

DWT Goodwin "He Tapu te Whate Tangata: Support for Young Māori Mothers During Pregnancy, Birth and Motherhood" (Masters of Social Work, Massey University, 1996)

C Hadfield "Adoptions 1963 to 73" (DSW Conference, Department of Social Welfare, Wellington, 1973)

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L Langridge "Adoption: The Birth Mother's Experience" (MA thesis, University of Auckland, 1984)

Law Commission Draft Preliminary Paper on Māori Succession Law (NZLC Draft, Wellington, 1997)

Law Commission The Law of Succession – hui notes (unpublished, Wellington, 1997)

A McDonald “Adoptions amongst Māori and the Adoption Act 1955” (LLB (Hons) legal writing paper, Victoria University of Wellington, 1978)

HM Mead “Tamaiti Whāngai: The Adopted Child: Māori Customary Practices” (Paper delivered at the Adoption Conference, Victoria University of Wellington, 1990)

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