INTERCOUNTRY ADOPTION IN NEW ZEALAND - A CHILD RIGHTS PERSPECTIVE

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In 1996 the Adoption Amendment Bill (No 2) was introduced into Parliament. The aim of the Bill is to implement in New Zealand the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. New Zealand's accession to the Hague Convention would provide significantly improved protection for some children who come to New Zealand as a result of intercountry adoption. This paper provides information on intercountry adoption in New Zealand, the background to the Bill, and concludes that the Bill, if passed in its current form, will fail to provide protection for the majority of children who come to New Zealand as a result of intercountry adoption, and would not fulfil New Zealand's obligations concerning adoption under the United Nations Convention on the Rights of the Child.

I INTRODUCTION

Adoption is a complex social transaction where existing relationships are irrevocably altered, and new relationships are formed. The complexity of the transaction is heightened in the case of cross-cultural adoption. There, questions concerning the personal and national identity of the child may arise, and further, in the case of intercountry adoption, the legal and social systems of two different states come into the equation.

The topic of this paper is intercountry adoption as it is carried on by New Zealand citizens or New Zealand residents who adopt a child from another state. The paper examines the New Zealand legal framework in which this process occurs, and the shortcomings of that framework. It also investigates options for improving the quality of the legal transaction, for parents and children alike. The paper does not attempt to address the social impacts of intercountry adoption.

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II WHAT IS INTERCOUNTRY ADOPTION?

The term "intercountry adoption" is used in the Convention on the Rights of the Child but has not been defined in that Convention or in international law generally. However, the principal international instrument dealing with this topic, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Convention) which takes into account the principles of the Convention on the Rights of the Child, applies[1] -

> .. 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 the State of origin.

This definition outlines the main themes in intercountry adoption -

1 The child and adoptive parent/s are habitually resident in different states before the adoption;

2 The adoption takes place in either state; and

3 The child has been, or is to be moved to the state where his or her adoptive parents are habitually resident.

Thus, an intercountry adoption may occur in either the child's state of origin, under the laws of that state; or in the state where the adoptive parents are habitually resident, under that state's laws.

Since 1956 when intercountry adoption was first recorded on a large scale, over 200,000 children have been placed with adoptive parents through intercountry adoptions.[2] Each year, between 15,000 and 20,000 children are adopted intercountry.[3]

States which deal with intercountry adoption are usually described as either "sending" states or "receiving" states (that is, they tend to either "supply" children for adoption, or "receive" children "supplied" by other states). There is no state in the world which deals on a large scale with both sides of the equation.

"Sending" states are often characterised by a number of similar circumstances, including poor economic climate, political instability and poor protection of child rights. Examples

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1 Article 2, Hague Convention.

2 Holt International Children's Services; *Conference on Intercountry Adoption*; May 1996.

3 P H Pfund (Assistant Legal Adviser for Private International Law) *1993 Hague Convention on Intercountry Adoption; Briefing Paper*; United States Department of State, 1994.

are India, Thailand, the Philippines, Sri Lanka, Chile, Ecuador, Paraguay, Honduras, Thailand, Portugal, Mexico, Peru, Romania, Russia and China.

In comparison, "receiving" states are predominantly characterised by good economic climate and political stability. Examples are Sweden, Britain and the United States.[4]

New Zealand residents and citizens are involved in between 500 and 700 adoptions each year of children from other states. In 1996, there were 531 such adoptions; 71 took place in New Zealand, and 460 took place in the child's state of origin under that state's adoption legislation.[5]

New Zealand is recognised as a "receiving" state. The Department of Social Welfare does not keep statistics on how many children leave New Zealand each year for the purposes of intercountry adoption overseas,[6] but it may be assumed that the number of involved is very low.

III INTERCOUNTRY ADOPTION IN NEW ZEALAND

Adoption was unknown in the common law.[7] New Zealand was the first Commonwealth country to introduce a system of adoption of children, with the Adoption of Children Act 1881.[8] The 1881 Act was superseded by adoption legislation along similar line: the Adoption of Children Act 1895, and the Infants Act 1908. None of the three Acts stipulated that the adopting parents, natural parents, or child to be adopted have any particular domicile, country of residence, or citizenship, although at least one Judge was of opinion that the 1908 Act did not allow for recognition of adoptions concluded overseas.[9]

In 1955 the New Zealand Parliament passed the Adoption Act 1955. This was New Zealand's first comprehensive adoption statute, replacing the much outdated Infants Act 1908.

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4 In 1994, there were over 8,000 adoptions of children from other countries to the US; information from P H Pfund (Assistant Adviser for Private International Law) *Intercountry Adoption - Briefing (Revised)*; US Department of State, 1995.

5 Information from Department of Internal Affairs (Special Operations Unit) and Department of Social Welfare (Adoption Information and Services Unit) September 1997.

6 Ministry of Youth Affairs *New Zealand's Initial Report on the Convention on the Rights of the Child*, November 1995.

7 Collins L (ed) *Dicey & Morris - The Conflict of Laws* (12 ed, Sweet & Maxwell, London, 1993) 886.

8 Ludbrook (ed) *Trapski's Family Law* (Brookers, Wellington, 1996) 1-111.

9 Chapman J in *Masemann v Masemann* [1917] NZLR 769.

The Act provides a regime for the adoption of children in New Zealand. It is a court controlled process, again, without the jurisdiction of the New Zealand courts being restricted by the domicile, residency or citizenship of any of the parties to the adoption. Section 3 of the Act provides:

> **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.

Section 17 of the Adoption Act 1955 provided, for the first time, specific recognition of adoptions concluded overseas. It was enacted in response to the concern that immigrants to New Zealand who had adopted children in their state of origin should have those adoptions recognised in New Zealand. These are not "intercountry adoptions", as defined in this paper, but domestic adoptions in overseas states. Section 17 currently provides:

> **17 Effect of overseas adoption—**
>
> (1) Where a person has been adopted ... 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 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.[10]

...

Section 17 of the Adoption Act 1955 thus provides for the recognition in New Zealand of an adoption made overseas where:

a) The adoption is legally valid in the state where it took place;

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[10] Section 17(3) preserves in New Zealand the common law relating to recognition of overseas adoptions. The common law is far from settled. In the leading common law case *In re Valentine's Settlement* [1965] 1 Ch 831 (CA), Lord Denning MR and Danckwerts LJ agreed that for recognition at common law to be accorded to a foreign adoption, the adoptive parents had to have been domiciled in the state where the adoption took place, at the time of adoption. This decision was based on the traditional view that the law of domicile had a paramount controlling influence over the creation of status.

Whether or not the adopted child also had to have been ordinarily resident in the state where the adoption took place was not agreed. Moreover, Salmon LJ disagreed with the majority reasoning, stating that the English courts should recognise the adoptions concerned, as they had been legally carried out, in a state which provided "proper" safeguards, and in which the adoptive children and natural parents were domiciled.

This and other cases in the area indicate that the common law concerning overseas adoption is far from settled - and probably does not provide for recognition of intercountry adoption as it is defined in this paper, and in the Hague Convention on the topic. Section 17 thus provides some certainty that the interests of those concerned with overseas adoption will be protected.

b) The adoptive parents acquire, under the law of the state where the adoption took place, a right to custody of the child superior to that of any natural parent; and

c) *Either* the adoption took place in a particular (named) state; *or* the adoptive parents acquire (specified) rights in respect of any property of the adopted child.

The original purpose of s 17 was to recognise overseas adoptions, for the purposes of New Zealand law. This is particularly important in relation to succession and guardianship. Section 17 was intended to provide for the adopted children of immigrants to New Zealand.

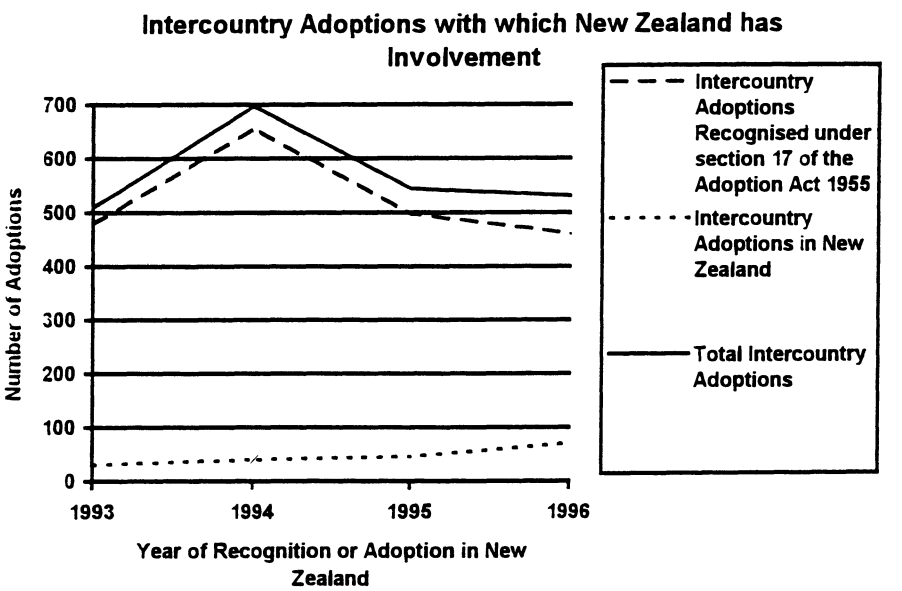
However, over the past two decades, s 17 has increasingly been used for the recognition of intercountry adoptions - where people who are habitually resident in New Zealand adopt a child who is habitually resident overseas. It is unlikely that the legislature, in 1955, anticipated the phenomenon of today's "intercountry adoption".

Thus, if a person resident in New Zealand is interested in adopting a child from overseas, there are two methods of achieving this -

By bringing the child to New Zealand to be adopted under the Adoption Act 1955 (a normal domestic adoption); or

By adopting the child overseas, and seeking recognition of the adoption under s 17 of the Adoption Act 1955.

The second method is more popular as is indicated by the following graph. There are difficulties in law and practice with both methods of intercountry adoption. These will be explored further below.



A Where Intercountry Adoption occurs in New Zealand

The New Zealand courts have the power, under s 3 of the Adoption Act 1955, to make an adoption order whether or not the adoptive parents or adoptive child are domiciled or resident in New Zealand.

The adoption in New Zealand of a child from another state involves a complex set of formalities, to enable the child concerned to be released from its country of origin and brought into New Zealand. Prior to this occurring the parent/s must have been approved for adoption by the New Zealand Department of Social Welfare, under the same conditions as all people adopting in New Zealand; these include character checks, counselling and interviews as well as a check concerning ability to provide financially for the child.[11]

Where such adoptions are anticipated, important areas of concern are those regarding the adoptability of the child. The Department of Social Welfare has to be satisfied that the child is free for adoption and that adoption would be in the child's best interests, based on papers sent from the child's country of origin.

Prospective New Zealand adopters of a child from overseas must also demonstrate that they will be able to provide continuity in respect of racial, cultural and religious attachments. What this means is that those who want to be considered must show that they have the intention and capacity to foster ongoing links with the child's birth country, race and culture.[12]

1 Intercountry adoption in New Zealand and citizenship

A child who is adopted in New Zealand by a New Zealand citizen is deemed to be a New Zealand citizen by birth, by virtue of ss 3(2) and 6 of the Citizenship Act 1977. These provide -

> 3 **Special provisions relating to parentage-**
>
> ...
>
> (2) For the purposes of this Act a person shall be deemed to be the child of a New Zealand citizen if -
>
> (a) He or she has been adopted by that citizen, in New Zealand, by an adoption order within the meaning of and made under the Adoption Act 1955 ...

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[11] Information on domestic adoption supplied by the Adoption Information and Services Unit, New Zealand Department of Social Welfare, and Ministry of Youth Affairs *New Zealand's Initial Report on the Convention on the Rights of the Child*, (November 1995) 36.

[12] Griffith K *New Zealand Adoption Handbook* (Wellington, 1997).

and in any such case -

(b) the person shall be deemed to have been born when and where the adoption order was made:

Provided that, on the discharge for any reason of the adoption order in accordance with section 20 of the Adoption Act 1955, the person shall cease to be deemed to be the child of that citizen...

6 Citizenship by birth—

(1) Subject to subssection (2) of this section, every person born in New Zealand on or after the 1st day of January 1949 shall be a New Zealand citizen by birth...

Due to the "birth fiction" created by s 3 - which deems particular children to have been born where and when they were adopted, children adopted by New Zealand citizens in New Zealand after 1 January 1949 (when New Zealand citizenship came into existence), are deemed to be New Zealand citizens by birth.

Where a foreign child is adopted in New Zealand, and neither adopting parent is a New Zealand citizen, the child will not gain New Zealand citizenship; although a grant of citizenship may later be applied for. Any citizenship by descent which may be passed to the child will be dependent on the laws of its parents' state/s of origin.

2 *Intercountry adoption in New Zealand, and immigration issues*

In providing citizenship for children adopted by New Zealand citizens in New Zealand, the New Zealand legislature attempted to prevent differentiation between natural and adopted children, as far as citizenship and rights and obligations attaching to that citizenship were concerned. In doing so, however, they opened up the potential for abuse of adoption and citizenship laws to provide privileges other than those which adoption naturally provides via a family.

Difficulties have arisen due to the ability of the Family Court to approve the adoption of a child who has no immigration status in New Zealand. Cases have appeared where the adoption process was clearly being used in an attempt to circumvent immigration requirements. It is not the responsibility of the Family Court to restrict immigration. The court deals with adoption applications within the context of the Adoption Act, and on their individual circumstances. The court has, however, indicated that where an adoption is being sought solely to procure immigration status or citizenship that it will not be granted.[13]

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[13] See for example the approach of Judge Mahony in *Re An Adoption by L and L* (1984) 1 FRNZ 144.

Another potential difficulty with the ability of New Zealand courts to approve adoptions involving those not domiciled in New Zealand is the ability of adopting parents to use adoption in New Zealand to circumvent more restrictive adoption laws in either their own or the child's state of domicile or residence. In such cases the New Zealand courts make a decision which affects the life of a citizen or citizens of another state. In addition, the child's previous citizenship status may be affected by gaining New Zealand citizenship by adoption, as some states do not recognise dual citizenship, even for minors.

However, it is worth noting here that there is no general onus on any state to recognise an adoption concluded in another state, unless their domestic legislation requires this, or they are a party to the Hague Convention. Other than this, if a New Zealand court approves an adoption involving nationals of another state, that state could simply refuse to recognise the adoption. This would cause particular difficulty where the adopted child was domiciled in a state which refused to recognise the adoption, and so, to release the child for removal by the adopting parents.

B Intercountry Adoption by Adoption Overseas

New Zealand's laws governing domestic adoption provide that the courts must be satisfied that the welfare and interests of the child will be promoted by the adoption.[14] They also provide protection for parents and children through education, counselling and the overall selection process.

In comparison, s 17 of the Adoption Act,[15] which provides for the recognition in New Zealand of an adoption concluded overseas, is a purely formal test of the legal consequences

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[14] Adoption Act 1955, s 11.

[15] The following countries, at the last time that their adoption legislation was assessed, were found to have legislation which fulfils the requirements of s 17; Australia, Austria, 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 (American and Western), Scotland, Saint Lucia, Sierra Leone, Singapore, South Africa, Sri Lanka, Tahiti, Tonga, Trinidad & Tobago, Tuvalu, Ukraine, (13 States of) the United States of America, Vanuatu, Venezuela, Zimbabwe, Zambia.

The following countries, at the last time their adoption legislation was assessed, were found to have legislation incompatible with s 17; Chile, Colombia, Dominican Republic, Ecuador, Indonesia, Korea, Sarawak, Taiwan, Thailand, the Philippines.

The legislation of other countries has either not been assessed, or has undergone change since last assessed (ie- compatibility has not yet been assessed under new provisions).

Information supplied by Special Operations, Citizenship Office, Department of Internal Affairs, 5 September 1997.

of the adoption under the laws of the state where it took place. It is not a test of the quality of the adoption process from a welfare perspective.

Section 17 allows no discretion for the New Zealand government to refuse to recognise an adoption. If the requirements of the section are met, recognition must be made. Moreover, if one adopting parent is a New Zealand citizen otherwise than by descent, New Zealand citizenship is also passed to the adopted child, on adoption.

The s 17 option is predominantly used by New Zealand citizen. Of 531 intercountry adoptions involving New Zealand residents or citizens in 1996, 460 involved New Zealand citizens using s 17 and the citizenship by descent provisions.

In cases where intercountry adoptions are concluded overseas by people resident in New Zealand, the Department of Social Welfare is unlikely to have involvement unless the child's state of origin requires a "home study"[16] to be prepared by the Department (some countries do not require home studies, and others will accept home studies prepared by private agencies; in either case the Department will have no involvement).[17] A number of private agencies currently provide services to people who wish to adopt overseas unrestricted by legislation limiting profiteering or requiring their activities to take into account the interests of the child.

In cases where the Department of Social Welfare (DSW) is not involved in overseas adoptions involving New Zealand residents or citizens, the protection afforded to the child who is the subject of the adoption is completely dependent on the law of the state of origin of the child. In some cases, this will mean that no checks are made on the suitability of the adopting parents - their character, emotional and financial stability or health. In other cases, there may be no limit on the number of children who may be adopted. In many cases, attempts will not have been made to place the child with a family in the state of origin, and the child will not be an orphan. In some cases, impoverished parents will have sold their children for adoption by foreigners.[18]

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[16] This is an assessment of the prospective adoptive parent/s circumstances and suitability as adopters.

[17] Of the 531 intercountry adoptions made by New Zealand citizens and residents in 1996, 356 were made under Samoan law. DSW had no involvement in any of these adoptions in terms of assessment of suitability of parents etc. They did have involvement with approximately 75% of the other 104 intercountry adoptions made under adoption laws of other countries, and with all of the 71 domestic adoptions involving children from overseas.

[18] It has been recognised by the governments of a number of states that child trafficking occurs within their borders - for instance, in Poland, Honduras, Paraguay, Morocco, Thailand, Nepal, Argentina, Peru and Albania (source - *International Children's Rights Monitor*, 1992 vol 9/1, 21-22; vol 9/2, 23-24; vol 9/ 3-4, 22-24; 1993 vol 10/1-2 p 6; vol 10/3 26; 1994 vol 11/ 2-3 12 and 15.)

Where there is no DSW involvement in an adoption, there is also unlikely to be pre or post-adoption counselling or support provided to the adoptive parents, and the New Zealand government will not have information concerning the child's natural parents for the child to access later in life.

In other cases, it may be the adoptive parents who are at risk. For example, they may be charged to adopt a child, or they may be deceived into believing that the child they have chosen is healthy, when in fact the child is suffering from a severe disability.[19]

Section 17, therefore, may permit the recognition in New Zealand, of adoptions made in states which either overtly, or by omission, permit:

- abduction of children for adoption
- adoption without consent of natural parents
- payment for adoption
- adoption by persons with serious criminal records
- adoption by the very elderly or the very young
- adoption by those with serious mental incapacity
- adoption by those with no means of financial support
- adoption of a large number of children by the same person / couple
- adoption by a parent with a terminal illness.

All of these are things which New Zealand's domestic adoption practices have sought to prevent through law and policy. New Zealand law governing domestic adoption requires that the welfare and interests of the child be promoted by the adoption,[20] and also provide protection for parents through education, counselling and the overall selection process. The prohibitions on most forms of advertising to do with adoption,[21] and on exchange of money

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[19] Until 1995 Russia did not allow intercountry adoption of healthy children. Many adoptive parents found, on return to their home country, that the child they had adopted was, in fact, much more seriously ill than had been indicated in Russia. In 1992 Romania resumed involvement in intercountry adoption but Romanian officials confirmed that they would give priority to finding homes for older children and those who were seriously handicapped (source - *Intercountry Adoption from Romania, the Big Test* International Children's Rights Monitor, Vol 9, No 1, 1992, 23.)

[20] Adoption Act 1955, s 11(b).

[21] Adoption Act 1955, s 26.

during the adoption process (apart from certain, specified hospital expenses),[22] is a protection both for children (against being sold), and against the exploitation of natural and adoptive parents.

None of these safeguards may exist in the case of an intercountry adoption recognised under s 17.

Over the past four decades, the existence of this provision has allowed many people to provide stable and loving homes in New Zealand for children from other states. For some of these children, intercountry adoption was the only hope for survival.

The provision has also enabled paedophiles,[23] and people who are otherwise unfit to be parents, to bring to New Zealand children adopted under regimes which do not protect the rights of children. Some of these children may have been abducted or sold into adoption.

1 *Intercountry adoption overseas, New Zealand citizenship, and immigration issues*

If an adoption concluded overseas meets the requirements of s 17, the child may be registered as a New Zealand citizen by descent if:[24]

> At least one adopting parent is a New Zealand citizen otherwise than by descent (for example, they are a citizen by birth, or have been granted citizenship); *and*
>
> Either -
>
> a) the adoption took place before 18 November 1992; or
>
> b) at the time the adoption order was made, the adopted person had not attained the age of 14 years.

The registration requires production of the papers issued by the authorities of the country where the adoption took place, as evidence of the adoption. This registration then enables a New Zealand passport to be issued for the child, which can be used for the child

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22 Adoption Act 1955, s 25.

23 One example came to light late in 1996. Mr T, a prominent Hawkes Bay Protestant Minister, was found guilty of sexual offences relating to 3 of his adopted children. Sixteen of his adopted children had complained of sexual or physical abuse. Mr T had adopted 19 children from overseas, in groups of up to 6, over a five year period. All of these adoptions were recognised under section 17 of the Adoption Act, and all of the adopted children recognised as New Zealand citizens by descent. (Source: *Adoption law abuse causes concern*, Evening Post, 9 September 1995; detail confirmed by Citizenship Office Special Operations Unit, Department of Internal Affairs, 5 September 1997).

24 These requirements come from the ss 3(2)(b) and 7 of the Citizenship Act 1977.

to enter New Zealand, without the necessity for New Zealand immigration requirements to be fulfilled.

The current linkage between overseas adoption and citizenship through s 17 of the Adoption Act raises concerns both of principle, and at a practical level.

At the level of principle, the issue is whether it is appropriate to allow the decisions of overseas adoption authorities to effectively confer New Zealand citizenship. On a more practical level, the administration of the current provisions has given rise to ongoing difficulties. The linkage between s 17 and New Zealand citizenship clearly makes it a viable option for those who wish to bring children (particularly other family members) into New Zealand when they cannot get approval from the New Zealand Immigration Service to do so.

The present age limit for the purpose of recognition of overseas adoptions was inserted into the Citizenship Act in 1992. This change was made with the aim of combating the misuse of s 17 and the Citizenship Act to enable young adults to come to New Zealand to live, in circumvention of immigration requirements. Prior to that time, there was widespread use of these provisions to bring 18 and 19-year olds into New Zealand to live.[25]

Following the introduction of the age limit the New Zealand Government became concerned that the number of adoptions in Western Samoa involving children immediately under the age limit seemed very high. Investigations carried out during 1994 and 1995 revealed that the Western Samoan Registrar General's Office was issuing birth certificates containing false dates of birth to facilitate the adoption of over-age children into New Zealand.[26] These investigations led to the suspension of staff of the Western Samoan Registrar-General's Office. There is no guarantee that this situation will not recur in Samoa or in any other state.

Another difficulty with s 17 and the recognition of adopted children as citizens by descent is that this enables New Zealand citizens resident in states other than New Zealand to go overseas, adopt a child, and have that child recognised by New Zealand law as their own, and a thus, as a New Zealand citizen. They may then take the child back to their state of residence to live. For example, as Australia has few limitations on the entry of New Zealanders, a child adopted in another state and recognised as a New Zealand citizen by descent will be able to enter Australia. This gives New Zealand citizens resident in Australia the ability to circumvent Australian requirements for both intercountry adoption and immigration.

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[25] Information from statistics compiled by the Department of Internal Affairs, June 1996.

[26] Information from the Department of Internal Affairs, June 1996.

IV NEW ZEALAND'S INTERNATIONAL OBLIGATIONS CONCERNING INTERCOUNTRY ADOPTION

A The UN Convention on the Rights of the Child

The only international instrument to which New Zealand is a party which concerns intercountry adoption, is the United Nations Convention on the Rights of the Child. The relevant provisions of this Convention are articles 21 and 35. These provide:

> *Article 21*
>
> State 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 parents 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 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 intercountry 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,
>
> and
>
> *Article 35*
>
> States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale or traffic in children for any purpose or in any form.

The scope of article 21 is slightly ambiguous. For example, it may be argued that article 21(a) only relates to domestic adoptions. Equally, it may be argued that it is broad enough to cover both domestic and intercountry adoptions, and that paragraphs (b) to (e) do not

restrict 21(a), but rather provide additional requirements in the case of intercountry adoption.[27]

It is also arguable that New Zealand's only responsibility under article 21 is to children taken from New Zealand for the purposes of intercountry adoption. Article 2(1) of the Convention provides that:[28]

> States Parties shall respect and ensure the rights set forth in the present Convention to each child within their *jurisdiction*.

However, New Zealand's recognition of adoptions concluded overseas enables children to come to New Zealand (whereas many other states only recognise adoptions concluded in their own state - at which point the children concerned are within the state's jurisdiction). The fact that New Zealand deals differently with children who are the subject of intercountry adoption should not lessen the obligations owed to those children under the Convention.

In addition, for article 21 to have effect, it must impose obligations on states which are involved in either the sending or receiving end of intercountry adoption. A state should not be able to sanction breach of the article by another state, by receiving children adopted in breach of the article 21 requirements.

1 *Examination of Provisions of the Convention*

It is submitted that New Zealand is in breach of article 21 of the Convention on the Rights of the Child, due particularly to use of s 17 of the Adoption Act 1955.

(i) Preamble to article 21

The preamble to article 21 requires that States which permit adoption ensure that the best interests of the child are the paramount consideration in adoption.

The Adoption Act 1955 does not actually require that this be the case. The closest the Act comes is s 11(b), which requires that the welfare and interests of the child be "promoted" by the adoption. The standard required by the Convention is arguably not met in the case of adoptions concluded in New Zealand.

Moreover, the standard is most certainly not met in the case of intercountry adoptions recognised under s 17 of the Adoption Act. Section 17 sets up a definitive regime for

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[27] The commentary and preparatory materials to the Convention do not throw any light on this issue; Detrick S (ed) *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (United Nations, 1992).

[28] Author's emphasis.

recognition of overseas adoptions and does not require that the interests of the child concerned be the paramount consideration.

(ii) Article 21(a)

Intercountry adoptions concluded in New Zealand are subject to the same requirements as domestic adoptions, and are authorised by the New Zealand Family Court. Before the Family Court makes an adoption order, the Adoption Act requires that consent from the child's natural parents or guardians be filed in Court.[29] It appears, therefore, that the requirements of article 21(a) are met in the case of intercountry adoptions concluded in New Zealand.

In the case of intercountry adoptions recognised under s 17 of the Adoption Act, however, the requirement is simply that the adoption be legally valid, and have certain effects. There is no requirement that the adoption be "on the basis of all pertinent and reliable information", or "permissible in view of the child's status concerning parents, relatives and legal guardians". There are also no provisions relating to the article 21(a) requirement that consent to the adoption have been given by the child's natural parents or guardians.

(iii) Article 21(b)

Section 17 does not require that the child concerned be unable to be cared for in any suitable manner in the child's country of origin. If adoption legislation or practice in the child's country of origin allowed the adoption of abducted children, children who had been sold by their parents, or had state-encouraged abandonment of children (for example, where parents were punished for having more than one child in their family), the adoption could still be recognised in New Zealand if the s 17 requirements were met.

(iv) Article 21(c)

Article 21(c) requires that children concerned by intercountry adoption enjoy safeguards and standards equivalent to those existing in the case of domestic adoption. In the case of intercountry adoptions concluded in New Zealand, these requirements are met.

However, where adoptions are recognised under s 17, New Zealand does not ensure that children involved in overseas adoptions which lead to either their movement to New Zealand and / or recognition as New Zealand citizens, enjoy safeguards and standards equivalent to those of children adopted domestically.

Apart from the basic s 17 requirements, the only safeguards such children enjoy are those embodied in the adoption law of their state of origin. In some cases, these requirements are

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[29] Adoption Act 1955, s 7.

stringent, requiring the New Zealand government to certify that prospective adoptive parents are of good character etc, or requiring the parents to meet other suitability tests. However, this is not always the case. Most countries which are "sending" countries are not countries with a stable political infrastructure. In some cases, there is evidence of corruption in government. In such states the rights of children often receive little respect.

(v) Article 21(d)

The Adoption Act contains provisions prohibiting most forms of advertising to do with adoption, and on exchange of money during the adoption process (apart from certain, specified expenses).[30] These provisions are probably sufficient to fulfil this Convention requirement in the case of intercountry adoptions which occur in New Zealand.

However, New Zealand does not have the power to ensure that where adoptions are recognised under s 17, the adoption did not result in improper financial gain to any of the parties. This is not a s 17 requirement. Where a child is adopted in New Zealand, adoptive parents are required to submit a statutory declaration to the effect that there was no illegitimate exchange of money to procure the adoption. Once again, in the case of intercountry adoption overseas, this is a matter for the law or practice of the state of adoption.

It is well known that bribery is a frequent occurrence in the intercountry adoption sphere. Due to the poor economic conditions in many sending states, there are incentives for government authorities, adoption agencies, orphanages, natural parents and border control officials to try to procure money from prospective adoptive parents. The fact is that intercountry adoption is often a last resort for people who want a child at any cost.

(vi) Article 21(e)

New Zealand does not have bilateral or multilateral agreements on the topic of intercountry adoption with any other state. The Departments of Social Welfare and Internal Affairs are aware of the legislative and administrative requirements of some states, and of the officials and other organisations who deal with intercountry adoption there. In some cases, DSW will make reports on prospective parents because this is a requirement of the sending state. In other cases, the legality of the overseas adoption order has been questioned, as it is a s 17 requirement that the adoption be legally valid in the state of adoption. However, the situation is largely one of "non-intervention", because s 17 does not provide power for intervention.

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30 Adoption Act 1955, ss 25-26.

(vi) Article 35

New Zealand does not currently have either bilateral or multilateral measures in place to prevent the abduction of, sale of, or traffic in, children.

The only provisions in domestic law to address the issue of child trafficking are in the Crimes Act 1961, which relate to kidnapping.[31] Jurisdiction under the Crimes Act for prosecution for these offences does not extend past New Zealand borders,[32] however, the Act does provide for prosecution of any person in New Zealand who aids, incites, counsels or procures a Crimes Act offence outside of New Zealand.[33] This could be applied to persons in New Zealand organising child trafficking for adoption purposes overseas. A defence is available, however, if that person is able to prove that the acts concerned were not an offence under the law of the place where they were committed.

Clearly, these provisions will have limited application in the case of intercountry adoptions, where privately organised adoptions are the risk area. There is unlikely to be a complaint made in cases involving child trafficking (the child being the main victim) and, in any case, it would be very difficult to prove that the child concerned had been abducted or sold.

There has never been a prosecution under the Crimes Act for activity relating to intercountry adoption, although at the time of writing a case before the High Court in Auckland which concerns the alleged abduction and sale of a child who was brought to New Zealand from an unknown overseas state. This case is likely to be hampered by difficulties in assembling proof from overseas, especially as the identity of the baby concerned is not currently known.[34]

In conclusion, it is submitted that the current s 17 method of recognition for intercountry adoptions provides no safeguards which could fulfil the requirements of article 35.

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31 Crimes Act 1961, ss 209 and 210.

32 Crimes Act 1961, s 6.

33 Crimes Act 1961, s 69(3).

34 The charges which have been laid in this case are for kidnapping, forgery, and uttering forged documents. The case, in which the defendants have been granted interim name suppression, has been set down for depositions in the High Court in Auckland, on 17 November 1997.

2 *Reporting on Compliance with the Convention*

New Zealand, as a party to the Convention on the Rights of the Child, is required to submit reports to the Committee on the Rights of the Child within two years of the entry into force of the Convention for New Zealand, and every five years thereafter.[35]

Article 44 requires reports to detail "measures they have adopted to which give effect to the rights recognised herein and on the progress made on the enjoyment of those rights", and requires that:

> Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

New Zealand's first report was presented to the Committee in late 1996. It was compiled by the Ministry of Youth Affairs, which noted in the report that New Zealand's existing legislation was consistent with the Convention, subject to three reservations to the Convention (none of which involved adoption).[36]

However, New Zealand's report, where it referred to intercountry adoption, merely outlined the ways in which a child could be intercountry adopted into New Zealand - by adoption in New Zealand, or by adoption overseas, and recognition under s 17 of the Adoption Act 1955. Mention was also made of the citizenship status of children adopted in each way.[37] Article 21 of the Convention was *not* mentioned in the section of the report headed "Inter-country adoption". As article 21 was not mentioned the provisions of that article were not detailed, and no analysis was made of New Zealand's compliance or lack of compliance with each paragraph.

B The Hague Convention on Intercountry Adoption

On 29 May 1993 the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption was opened for signature, ratification or accession.[38]

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35 Article 44, UN Convention on the Rights of the Child.

36 Initial Report of New Zealand: *United Nations Convention on the Rights of the Child* Ministry of Youth Affairs, November 1995, 90.

37 Initial Report of New Zealand: *United Nations Convention on the Rights of the Child* Ministry of Youth Affairs, November 1995, 37.

38 The following states are now party to the Convention: Canada, the Philippines, Venezuela, Mexico, Romania, Sri Lanka, Cyprus, Poland, Spain, Ecuador, Peru, Costa Rica, Burkina Faso. The Netherlands, The United States of America, the United Kingdom, France and Italy were among the signatories but have not yet ratified the Convention (Ministry of Foreign Affairs and Trade, 8 September 1997).

The Convention is linked to the United Nations Convention on the Rights of the Child. The Convention's preamble reads:

> taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child.

If New Zealand becomes a party to the Convention, it will apply to situations where people habitually resident in New Zealand wish to adopt a child from another Contracting State, whether the adoption is to be concluded in New Zealand or in the child's State of origin.

The aim of the Convention is not to create uniform international laws for the conduct of intercountry adoption. The objectives of the Convention are stated as:[39]

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 recognised 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; and

c) To secure the recognition in Contracting States of adoptions made in accordance with the Convention.

No reservations are permitted to the Convention.[40]

The Convention requires the nomination in each contracting state of a "Central Authority", to carry out functions in relation to intercountry adoption under the Convention. Some of these functions may be delegated to accredited bodies.[41]

The requirements for a valid intercountry adoption under the Convention are categorised into requirements for fulfilment by either the state of origin, or the receiving state. For example, the requirements for the receiving state in a particular adoption are that the competent authorities of the receiving State:

a) Have determined that the prospective adoptive parents are eligible and suited to adopt;

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39 Hague Convention on Intercountry Adoption, article 1.

40 Chapter VII.

41 Chapter III of the Convention.

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.[42]

The means by which the receiving state makes a determination that prospective adoptive parents are eligible and suited to adopt is a matter for state law, however, such determination would need to be made within the framework and principles of the Convention.

Where the "receiving" State is satisfied that particular applicants are eligible and suited to adopt, it is required to prepare a report containing 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. This report is transmitted to the Central Authority of the State of origin,[43] which has the power to reject it if it is not satisfied that the receiving state has fulfilled its obligations in respect of the suitability of the adoptive parents.

The State of origin also has various responsibilities, including determining:

that an intercountry adoption would be in the child's best interests;

that free consent has been given to the adoption of the child;

that consent has not been procured by payment;

and that, where the child is of sufficient age and maturity, they have been counselled and duly informed of the effects of the adoption.[44]

In addition, the Convention provides for such things as the promotion of adoption counselling and post-adoptive services[45] and the preservation by contracting states of information concerning a child's origin, so that the child may have access to this information in so far as that disclosure is permitted by the law of each State.[46]

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42 Article 5.

43 Article 15.

44 Article 4.

45 Article 9.

46 Article 30.

1 *Effect of Accession to the Hague Convention by New Zealand*

Accession to the Hague Convention by New Zealand would provide more safeguards than are currently provided for children brought to New Zealand via intercountry adoption from other Contracting states. It would, basically, provide for more Government intervention in such cases. In addition, it would provide protection for children adopted from New Zealand via intercountry adoption, to other Contracting States.

However, accession would not provide protection for children adopted from non-Contracting States. In 1996, 77% of children involved in intercountry adoptions by citizens or residents of New Zealand were from Samoa.[47] In every case, the adoption involved was concluded under Samoan adoption law. Samoa has not indicated any intention to accede to the Hague Convention.

If the requirements of the Convention make it more difficult for people to adopt from states which are parties, there is every likelihood that they will turn to source States which are not parties to the Convention to evade those requirements. Prospective adoptive parents have shown their willingness in the past to change quickly from one source state to another in the event that their first choice suddenly looks more difficult, for example, from Romania to Russia in 1992.

Since 1992 the Departments of Social Welfare and Justice have been working to develop proposals for a new Adoption Act. Some of the changes proposed by officials involve greater recognition of the interests of children and greater openness in adoption.[48] Such changes may make domestic adoption more difficult, or less desirable, for prospective adoptive parents. Currently, there are fewer than 150 adoptions in New Zealand per year where the adopted child is not known to the adoptive parents (often called "stranger adoptions").[49] In comparison, in 1980 there were 715 "stranger adoptions" in New Zealand.[50] It is becoming more difficult every year for prospective adoptive parents to find children available for adoption within New Zealand. Changes to adoption laws to make domestic adoption more difficult may further reduce the number of children placed by adoption each year and may increase the number of people seeking to adopt overseas.

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47 Figures from Documents of National Identity Division of the New Zealand Department of Internal Affairs, 29 August 1997.

48 Information from Department of Social Welfare *Post-Election Briefing Paper*, 1996, 36-139.

49 In 1996 there were 114 domestic adoptions in New Zealand (address by Hon Roger Sowry, Minister of Social Welfare, to conference on *Adoption and Healing*, Victoria University of Wellington, 20-22 June, 1997).

50 Figures from the Adoption Services Unit, Department of Social Welfare, October 1996.

For these reasons, it is imperative that New Zealand also provide protection for children who will not be afforded protection by the provisions of the Hague Convention.

2 *The First Move to Accession*

In 1996 Cabinet agreed to New Zealand's accession to the Convention. In pursuance of this aim the Adoption Amendment Bill (No 2) 1996 was drafted. The Bill was introduced into Parliament on 23 May 1996. The General Policy Statement of the Bill reads:

> This Bill implements in New Zealand the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention on Intercountry Adoption)...

The Bill provides that the Convention in its entirety will have the force of law in New Zealand. It contains specific provisions relating to, among other things, the delegation of functions concerning intercountry adoption to accredited agencies, a system for the accreditation of agencies, and for the retention of information relating to adoptions involving a New Zealand party. It also reads:

> **Intercountry adoptions to which the Convention does not apply**
>
> The Convention only applies to adoptions between Contracting States. Adoptions in countries which are not parties to the Convention will continue to be recognised in accordance with s 17 of the Adoption Act 1955. Section 17 provides for the recognition of overseas adoptions providing certain criteria are met. These criteria differ from, and are less comprehensive than, the criteria for recognition required by the Convention. Therefore to ensure compliance with the Convention, the Bill amends s 17 to exclude its application to adoptions in Convention countries.

Thus, the Bill does not do away with recognition of adoptions under s 17. It provides that, where an adoption takes place in a state which is a party to the Convention, s 17 shall not apply, and the higher standards of the Convention shall, while reserving the right of New Zealand to continue to recognise other adoptions under s 17.

In addition, New Zealand courts will continue to be able to approve adoptions in New Zealand where the adoptive child is from another State - these will have to be approved in accordance with the Convention where the child involved is from another Contracting State. Where the child is *not* from another Contracting State, however, the Convention standards will not apply (although it is expected that there is a reasonable standard of protection for children in such cases, through New Zealand's domestic adoption law and policy).

Thus, the Bill provides the legal framework for New Zealand to meet its reciprocal obligations towards other signatory countries, but does not make compliance with the Convention the sole means of intercountry adoption into New Zealand. Whether this is the

most appropriate option is, from a children's rights perspective, the central issue in relation to the Bill.

If the Bill becomes law New Zealand will continue to allow its residents and citizens to adopt children in, and from, non-Contracting states, even though to do so will be in some cases contrary to New Zealand's international obligations under the Convention on the Rights of the Child; and even though New Zealand will have agreed, by accession to the Hague Convention, that intercountry adoptions should take place in the best interests of the child, and with respect for his or her fundamental rights as recognised in international law.[51]

3 Progress of the Bill

The Bill was introduced and referred to the Commerce Select Committee.[52] The Committee received 119 written submissions, and heard 25 submissions orally. Sixty-six submissions supported the Bill, and provision for the approval of non-governmental organisations as accredited bodies to whom functions may be delegated. Twenty-eight submissions supported the implementation of the Hague Convention but opposed the provision for approval of non-governmental organisations. Ten submissions opposed all intercountry adoption.[53]

(i) Select Committee Report

The Committee recommended that:

- An urgent inquiry be undertaken into adoption practices in New Zealand over the past 50 years;
- Once that inquiry is completed, an immediate review of the Adoption Act 1955 take place, taking into account the outcome of the inquiry; and
- Steps be taken to establish a centralised information centre for all documentation and origin information of adopted children so that it can be readily accessed when information is sought by them.

In addition, the Committee made the following decisions;

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51 From art 1(a) Hague Convention on Intercountry Adoption.

52 Those presenting submissions were assured that the Bill had been referred to the Commerce Select Committee rather than the Justice Select Committee, due to workload difficulties, not because the Bill was considered unimportant.

53 From Commerce Select Committee report - tabled as Commentary to the second reading of the Adoption Amendment Bill (No 2) 1996. The Bill was reported back with the recommended title of Adoption (intercountry) Bill 1996.

- "Adoptable" will not be defined in the Act. This term is used in the Hague Convention in article 4, which states the requirements to be fulfilled in relation to a child by that child's State of origin. Article 4 requires that the State establish that the child is adoptable. Some submissions on the Bill requested that this term be defined in New Zealand to provide protection for children; however, the Committee was satisfied with competent authorities in a child's State of origin determining whether or not that child was adoptable. The Committee also noted that defining the term in New Zealand law could cause interpretation problems as the Hague Convention is a document which will require interpretation by a number of states, as well as at international level.
- The Bill was amended to require that accredited agencies operate in the best interests of the child - it had been submitted that they may operate, instead, in the interests of prospective adoptive parents.
- Clause 23 was not altered by the Committee. It amends the Citizenship Act to provide for citizenship by descent through Convention adoptions. Adoptions made in non-Convention countries will continue to be recognised for citizenship purposes if the requirements of s 17 of the Adoption Act are met. The Committee concluded that the wider issue of whether or not there should be automatic citizenship rights for children adopted under non-Convention adoptions was outside the scope of the Bill and a matter that would be more appropriately considered in a review of the Citizenship Act 1977 or the Adoption Act 1955.

Strong submissions were made by both Professor Angelo (Victoria University), and the Commissioner for Children, Laurie O'Reilly, recommending that the Bill be used as an opportunity to provide protection for all children brought to New Zealand for, or as a result of, intercountry adoption - not just those children adopted from other Contracting states.

Both the Commissioner for Children and Professor Angelo recommended that, where a child was to be adopted from a non-Convention country, recognition of the adoption under s 17 be limited to instances where the adoptive parents had been determined as eligible and suitable to adopt, by the Director-General of Social Welfare, prior to the adoption. The suggestion was made that such a determination be made in accordance with the requirements of articles 4 and 5 of the Hague Convention on Intercountry Adoption. This was not accepted by the Select Committee.

In addition, the Commissioner opposed delegation of functions to accredited agencies. In his opinion, the best way to ensure that the principles of the Convention are complied with

is to have the Central Authority fulfil all functions required under the Convention. The Commissioner noted:[54]

> There is a significant risk of a fundamental conflict between a non-government organisation's commitment to the objectives of the Hague Convention and its role as a service agency meeting the needs and demands of prospective parents. It will be very difficult for a non-government body to remain neutral and committed to the objectives under the Hague Convention, which include the encouragement of placement within the country of origin, when the organisation's very purpose will be to facilitate intercountry adoptions.

The Committee did not agree.

The Bill was carried over by the previous administration, to be debated by the new Parliament. It is currently set down for consideration by the committee of the whole House of Representatives.

V *INTERCOUNTRY ADOPTION - WHERE TO FROM HERE?*

If it is the desire of the New Zealand legislature to provide more protection for those involved in intercountry adoption, there are a number of ways by which this may be achieved. These include:

i Continuation of the Adoption (Intercountry) Bill 1996 in its current form, and accession to the Hague Convention;

ii To recognise only intercountry adoptions concluded under the Hague Convention;

iii To recognise only intercountry adoptions concluded in the New Zealand courts; or

iv To change the law to provide protection for all children who are adopted intercountry by New Zealand citizens and residents.

A Accession to the Hague Convention

If the Adoption (Intercountry) Bill 1996 is passed into New Zealand law, it will enable New Zealand to accede to the Hague Convention on Intercountry Adoption.

There have been many concerns raised about the potential operation of the Convention in New Zealand, most specifically about the use of accredited agencies to carry out functions under the Convention. It remains to be seen whether or not the Convention would

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[54] From submissions of the Commissioner for Children, to the Commerce Select Committee, on the Adoption Amendment Bill (No 2) 1996, 4.

be smoothly implemented in New Zealand along the lines indicated by the Bill. In any event, the Convention proposes a significantly higher degree of protection than currently exists for children involved in intercountry adoption between Contracting states. It is hoped that this degree of protection will eventuate and perhaps encourage the implementation of a standard by which all intercountry adoptions, whether Convention or non-Convention, may be measured.

B The Convention on the Rights of the Child

Accession to the Hague Convention will not meet New Zealand's obligations concerning adoption under the United Nations Convention on the Rights of the Child. There will remain grave difficulties with compliance in the case of non-Convention intercountry adoptions.

There has been some interest in the Convention on the Rights of the Child shown by the New Zealand courts. Some principles of the Convention form the basis for principles featured in New Zealand legislation, however, actual provisions of the Convention are not incorporated into New Zealand domestic law.

Prior to 1981 it appears to have been presumed by the courts that an unincorporated treaty had no effect in domestic law. That is, it did not create rights or obligations in domestic law, and therefore could not be referred to by the courts.

Since 1981, however, there has been some willingness by the courts to see international obligations as relevant to the exercise of statutory discretion, in a line of cases including: *Ashby v Minister of Immigration*,[55] *Tavita v Minister of Immigration*,[56] *Puli'uvea v The Removal Review Authority and the Minister of Immigration*[57], and *Auckland Health Care Services Ltd v 'T'*.[58] In the latter three of these cases, it was concluded by the courts that the Convention on the Rights of the Child was relevant to either the exercise of a statutory discretion, or to the interpretation of a provision.

This is not to say that the Convention on the Rights of the Child has itself become directly enforceable in New Zealand courts, but that it may be referred to in the context of the interpretation of, or exercise of powers under, statutes concerning children in New Zealand. As the Convention continues to gain attention in this way, it is increasingly likely

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55 [1981] 1 NZLR 222.

56 1 HRNZ 30.

57 [1996] 3 NZLR 538.

58 [1996] NZFLR 670.

that the whole issue of compliance of New Zealand laws with the Convention will be raised.

C Recognise only intercountry adoptions concluded under the Hague Convention

This was recommended in a number of submissions to the Select Committee on the Adoption (Intercountry) Bill 1996. Such a restriction would have the advantage of making clear what standards for the protection of children involved in intercountry adoption were acceptable in New Zealand. It would also provide prospective adoptive parents with a definitive list of acceptable source countries for children. In addition, it would send out a message to both the Hague Convention and the United Nations that New Zealand is serious about protecting children involved in intercountry adoption.

D To accede to the Hague Convention, but recognise only intercountry adoptions concluded in New Zealand

A number of overseas jurisdictions recognise only intercountry adoptions by those habitually resident within their borders, when such adoptions are concluded in their own state.[59] The Hague Convention does not preclude this type of restriction.

The effect of such a restriction in New Zealand would be to apply domestic adoption criteria to all intercountry adoptions with which New Zealand had involvement - whether these were Hague Convention adoptions or not. This would significantly improve the protection afforded to children involved in non-Convention adoptions and go a long way towards fulfilling New Zealand's obligations under the Convention on the Rights of the Child.

This option would involve a change to s 17 of the Adoption Act so that it no longer applied in the case of intercountry adoptions. It would also involve the Department of Social Welfare in all "New Zealand" intercountry adoptions, from "beginning" to "end", as is the case with intercountry adoptions currently organised by the Department.

Clearly this would have resource implications for government. It could also increase waiting times for prospective (intercountry) adoptive parents, and restrict those who are eligible to adopt, through current domestic adoption criteria. Whether or not this would be politically acceptable is debatable.

As already mentioned, the major difficulty with intercountry adoptions concluded in New Zealand is that the Department of Social Welfare is dependent on information from a child's country of origin to determine whether or not the child is truly adoptable; whether parental consent has been obtained, and so on. However, it is to be hoped that the

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[59] For example, Australia, the United States of America, and Sweden.

government to government scale on which such enquiries are conducted gives them some degree of integrity.

E To change the law to provide protection for all children adopted intercountry by New Zealand citizens and residents

This is another option for fulfilling New Zealand's obligations under the Convention on the Rights of the Child. It could be implemented in a number of ways.

Most easily, such a policy could be implemented by an amendment to s 17 of the Adoption Act to provide, for example, for parents who wish to adopt a child from a non-Hague Convention Contracting State to meet standards equivalent to those for adopting parents under the Hague Convention.

On a more holistic basis, a framework could be developed for "New Zealand" intercountry adoption, based on principles from both the Convention on the Rights of the Child, and the Hague Convention on Intercountry Adoption. The framework could provide for the carrying out of functions as required under the Hague Convention, and recognition of Hague Convention adoptions, as well as the carrying out of similar, legally imposed functions with regard to non-Hague Convention adoptions. Putting the intercountry adoption obligations of both Conventions into modern domestic law, as a guide for practice and interpretation, would provide a yardstick for measurement of government practice, and for judicial challenge of negligent practice.

VI CONCLUSION

Over the past four decades intercountry adoption has become a world-wide phenomenon, bringing with it legal, political, and social difficulties. A transaction such as this, involving potentially conflicting laws of at least two states, a high level of emotional charge, and affecting the lives of children, must take place within a framework of co-operation between states. Such a system must provide minimum safeguards for all concerned.

The laws which regulate intercountry adoptions with which New Zealand has involvement were never intended for that purpose. As a result, they do not provide adequate protection for those involved in intercountry adoption. Conversely, they provide a framework for those who would wish to use intercountry adoption for their own, sometimes illegitimate purposes.

New Zealand's current provisions for intercountry adoption breach its international obligations under the United Nations Convention on the Rights of the Child. The Convention is relatively new, having come into force in 1989. New Zealand became a party in 1993. As it matures, continuing breaches of its provisions by developed nations are likely to become more publicised and more difficult to defend.

The Hague Convention on Intercountry Adoption is the first modern international instrument to provide procedural safeguards in the case of intercountry adoption. The Convention provides a framework for intercountry adoption only between States parties. However, in acceding to the Convention, New Zealand will indicate to the international community that it respects the human rights of those involved in intercountry adoption. This will make it increasingly difficult to justify deficient provisions in New Zealand law which will apply to non-Convention adoptions.

In the end, it remains clear that issues concerning intercountry adoption in New Zealand should be determined according to the basic propositions:

> That the child's best interests shall be the primary consideration;[60]
>
> That children involved in intercountry adoption shall enjoy safeguards and standards equivalent to those existing in the case of national adoption.[61]

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[60] Art 3 United Nations Convention on the Rights of the Child.

[61] Art 21 United Nations Convention on the Rights of the Child.