Preliminary Paper 38

ADOPTION: OPTIONS FOR REFORM

A discussion paper

The Law Commission welcomes comments on this paper and seeks responses to the questions raised.

These should be forwarded to:
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Summary of Contents

		Page
	Preface	xi
1	Introduction	1
2	History of adoption in New Zealand	12
3	The participants – competing interests	18
4	Principles of adoption	27
5	Jurisdictional and citizenship issues	32
6	Who may be adopted?	40
7	Who may adopt?	43
8	Consent	55
9	Adoption orders	66
10	Succession	72
11	Forbidden marriage and Incest	75
12	Cultural adoption practices	81
13	Surrogacy	92
14	Ancillary services	102
15	Access to adoption information	108
	APPENDICES	
A	Terms of reference	117
B	A snapshot of adoption law	118
C	International obligations	127
D	Tables	160
E	Rules relating to customary adoption and succession	163
F	Recognition of indigenous adoption practices in other jurisdictions	164
	Bibliography	168
	Index	175

Contents

		Para	Page
	Preface		xi
1	INTRODUCTION		1
	Concepts of adoption	5	2
	The social context of adoption today	9	2
	Formulations of 'family'	10	3
	Open and closed adoption	13	3
	Cultural considerations	21	5
	The relevance of adoption in contemporary society	22	5
	The challenges of reproductive technology	23	5
	Adoption: the legal concept	24	6
	International conventions	33	7
	The future of adoption	36	8
	Option one – retain a modified version of adoption	39	8
	Option two – abolish adoption and use guardianship instead	42	9
	The Law Commission's provisional view	48	10
	The structure of the paper	50	10
2	HISTORY OF ADOPTION IN NEW ZEALAND		12
	The historical context of adoption	58	12
	Early practices	58	12
	New Zealand	60	12
	Adoption in New Zealand	62	13
	Early 1900s	63	13
	The 1940s – a change in attitudes	65	14
	The 1950s – adoption encouraged	66	14
	Public perception of the availability of children: supply and demand	68	14
	Open v closed adoption	71	16
	Adoption as a means of regulating status	75	17
3	THE PARTICIPANTS – COMPETING INTERESTS		18
	The child	77	18
	The birth parents	79	18
	The birth mother	79	18
	Counselling	81	19
	The birth father	83	19
	The interests of birth parents in open adoption arrangements	85	20
	Extended birth family	86	20
	Adoptive parents	92	21
	Counselling	93	21
	Security	94	22
	Genetic parents as adoptive parents	95	22

		Para	Page
	Adoption and the interests of the wider community	96	22
	Adoption and new family relationships	97	22
	The place of secrecy in adoption	103	23
	Adoption: knowing the options and obtaining professional advice	106	24
	Young people and education	107	24
	Adoptions where no independent assessment is currently required	108	24
	Private providers of adoption services	109	25
	Private adoption arrangements	114	26
4	PRINCIPLES OF ADOPTION		27
	The purpose of adoption	121	28
	Is adoption the most appropriate option?	123	28
	The paramountcy principle	124	29
	Assessing welfare and interests	130	30
	Recognising changing needs in adoption	131	31
5	JURISDICTIONAL AND CITIZENSHIP ISSUES		32
	Jurisdiction	133	32
	Prospective adoptive parents	133	32
	Prospective adoptee	137	33
	Recognition of an overseas adoption	138	33
	Intercountry adoption	140	34
	Recognition of overseas adoptions by New Zealanders in non-Hague Convention States	142	34
	United Kingdom approach to recognition	144	35
	Reform for New Zealand	148	36
	Citizenship and the Adoption Act	152	37
	Conferring citizenship	154	38
6	WHO MAY BE ADOPTED?		40
	Age	158	40
	Marriage	162	41
	The implications of reform on succession rights	166	41
7	WHO MAY ADOPT?		43
	Gender	170	43
	Marital status	172	44
	De facto couples	173	44
	Same-sex couples	179	46
	Adoption by a same-sex couple to regulate the child's status	184	46
	Applying to adopt generally	189	47
	Step-parent / de facto step-parent adoption	198	50
	Concerns about step-parent adoption	199	50
	Succession issues and step-parent adoption	205	52
	Adoption by birth parent in step-parent adoptions	208	52
	Adoption or care by family members	210	53
	Consultation and placement	210	53
	Guardianship or adoption?	213	54
	Succession issues	214	54
	A parent alone	215	54

		Para	Page
8	CONSENT		55
	Consent of the birth parents	*216*	55
	Mother's consent	*216*	55
	Father's consent	*223*	57
	Withdrawal of consent	*227*	59
	Conditional consent	*230*	60
	Dispensing with consent	*232*	61
	The effect of a valid consent	*233*	61
	Consent to adoption by husband or wife alone	*238*	62
	Child's consent	*239*	62
	Defective consent	*241*	63
	Procedural issues and consent	*242*	64
	Information given at the time of consent	*242*	64
	Witnessing consents	*244*	64
	Independent witness	*244*	64
	Barristers witnessing consent	*245*	65
9	ADOPTION ORDERS		66
	Interim and final adoption orders	*247*	66
	When an order can be made	*247*	66
	Potential changes	*248*	66
	Final orders	*250*	67
	Attaching conditions to the order	*251*	67
	Post-adoption maintenance and child support	*260*	70
	Discharging an adoption order	*264*	70
10	SUCCESSION		72
	Instruments pre-dating the adoption order	*270*	72
	Succession from natural relatives	*272*	72
	Succession from adoptive relatives	*274*	73
	Succession after the adoption order	*275*	73
11	FORBIDDEN MARRIAGE AND INCEST		75
	The Law	*285*	76
	Forbidden marriage	*285*	76
	Incest	*289*	77
	The considerations	*292*	77
	Genetic factors	*294*	77
	Integrity of the family	*297*	78
	Adoptive relationships?	*300*	78
	Degrees of affinity	*301*	78
	Forbidden marriage	*303*	79
	Incest	*304*	80
12	CULTURAL ADOPTION PRACTICES		81
	Māori customary adoption	*311*	81
	Legal constructs and customary 'adoption'	*311*	81
	Whāngai and atawhai – history	*312*	82
	Legal recognition of whāngai placements	*317*	82
	Court jurisdiction	*325*	84
	Succession	*326*	84

		Para	Page
	Māori concerns about legal adoption	*329*	85
	The impact of secrecy upon whakapapa	*330*	86
	Inability to establish entitlement	*332*	86
	Lack of whanau consultation	*333*	86
	Reconciling values	*334*	87
	Other jurisdictions	*335*	87
	A more accommodating adoption regime	*336*	87
	Redefining the "best interests" principle	*337*	88
	Counselling and family group conferencing	*338*	88
	Māori social workers	*339*	88
	Adoption plans	*340*	88
	Iwi databases	*341*	88
	A parallel system	*342*	89
	The legal effect of adoption	*343*	89
	Pacific Islands adoption	*344*	90
	Asian cultural groups	*348*	91
13	SURROGACY		92
	The legal state of surrogacy	*353*	92
	The regulatory arrangements	*353*	92
	The status of the child	*355*	93
	Surrogacy and adoption	*360*	93
	Similarities and differences	*362*	94
	Arguments against using adoption to confer status	*365*	94
	Arguments for requiring a legal process	*367*	95
	Alternatives to adoption	*368*	95
	Difficulties	*371*	96
	The Law Commission's tentative view	*374*	96
	Using adoption to regularise the arrangement – some issues	*381*	98
	Payments	*382*	98
	Advertising	*384*	99
	The role of Social Welfare	*386*	99
	Best interests of the child	*389*	100
	Possible relationship thresholds	*390*	100
	Dispensing with consent	*391*	100
	Succession rules	*392*	100
	Attaching conditions to the adoption order	*393*	101
	Access to information	*394*	101
14	ANCILLARY SERVICES		102
	Adoption counselling	*395*	102
	Continuing counselling	*398*	102
	Cost of counselling	*400*	103
	Which organisations should facilitate counselling?	*401*	103
	Family group conferences	*402*	104
	Need for greater powers of inquiry	*406*	105
	Counsel for the child	*408*	105
	Right of review	*410*	106
	Current review mechanisms	*411*	106
	Possible reform	*415*	107

		Para	Page
15	ACCESS TO ADOPTION INFORMATION		108
	The detail of a birth certificate	*419*	108
	Altering birth certificates	*419*	108
	The purpose of a birth certificate	*421*	109
	What is a birth certificate used for?	*423*	109
	Accessing adoption information – are the current procedures appropriate?	*426*	110
	Should the legislation be amalgamated?	*429*	111
	Age restriction	*430*	111
	Access to information by other family members	*432*	112
	The Assisted Human Reproduction Bill 1998	*434*	112
	Vetoes	*441*	113
	Upon access to information	*441*	113
	Non-contact vetoes	*445*	114
	Purpose of vetoes	*448*	114
	Options for reform of the veto system	*450*	115
	Access to Social Welfare records	*451*	115
	Access to court records	*453*	116
	APPENDICES		
A	TERMS OF REFERENCE		117
B	A SNAPSHOT OF ADOPTION LAW		118
	Adoption	*B1*	118
	Jurisdiction	*B3*	118
	Who may adopt a child	*B4*	118
	Adopting a child	*B5*	118
	Consent	*B6*	119
	Making an adoption order	*B10*	120
	Effect of the adoption order	*B15*	121
	Discharging an adoption order	*B19*	122
	Recognition of Māori customary adoption	*B20*	122
	Birth certificates and access to information	*B21*	122
	Overseas adoption	*B26*	123
	The role of social workers	*B28*	124
	Related legal concepts	*B31*	124
	Guardianship Act 1968	*B31*	124
	What is 'guardianship'?	*B31*	124
	How is guardianship different from adoption?	*B34*	125
	Children, Young Persons, and Their Families Act 1989	*B38*	125
	Wardship	*B42*	126
C	INTERNATIONAL OBLIGATIONS		127
	United Nations Convention on the Rights of the Child		127
	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		142
	Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption		147

		Page
D	TABLES	160
1	Adoptions to strangers and non-strangers	160
2	Adult Adoption Information Act statistics	161
3	Family indicator by number of children in family for families in private dwellings	162
E	RULES RELATING TO CUSTOMARY ADOPTION AND SUCCESSION	163
F	RECOGNITION OF INDIGENOUS ADOPTION PRACTICES IN OTHER JURISDICTIONS	164
	United States	164
	Canada	164
	Australia	165
	BIBLIOGRAPHY	168
	Reports	168
	Texts	169
	Articles and papers	170
	Unpublished material	173

Preface

THE MINISTER OF JUSTICE has asked the Law Commission 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 address contemporary social needs. The Law Commission was specifically asked not to examine past or present social worker practice. The terms of reference are reproduced in Appendix A.

The Adoption Act 1955 was enacted in a very different social climate from today's. The law imposed on children born out of wedlock, the stigma of illegitimacy, indelible unless superseded by marriage of the parents or by adoption. Adoption was, in consequence, a secret process, elaborate precautions being taken to conceal the fact as well as the identity of the child's natural parents and presenting the child to the world as in fact and in law born to the adoptive parents. The Status of Children Act 1969, justly celebrated internationally as a major advance in promoting the dignity of both mother and child, evidenced and contributed to a wider social change.

On the cusp of the new millennium traditional ideals are exposed to fundamental challenges. One example is that of the nuclear family, the premise underlying the Adoption Act 1955. When almost one-third of New Zealand's families with children do not fit within the concept of the nuclear family, some question whether it is still appropriate that adoption be based on that premise. Some indeed ask whether the institution of adoption in a form that severs the legal relationship between natural parents and their children, is needed at all, so we begin with that fundamental issue. Certainly adoption is less popular than it was; whereas in 1959 some 1969 adoption orders were made, by 1998 there were only 645 adoptions processed by the Department of Social Welfare ('Social Welfare'). A further question is whether couples in de facto and same-sex relationships should be permitted to adopt children. Many of the adoptions that have occurred over the last 10–20 years have been of children by step-parents in order to formalise a reconstituted family; and so we discuss issues of step-parent and intra-family adoption. The growing recognition and use of surrogacy arrangements as an option for infertile couples to have a child raises basic questions as to concepts of 'parent', 'family' and 'adoption'. We discuss these issues and others in order to invite discussion, so that a future regime for the long-term care of children may be created that is responsive to the changing needs of the parties involved, and of society as a whole.

The purpose of this preliminary paper is to ask questions rather than to offer answers. We hope that many New Zealanders will comment on the questions

posed in the paper so that in our final report we are able to draw on their experience and views when responding to our terms of reference.

To avoid begging questions we have attempted to refrain from imposing our own preconceptions as to what may be appropriate. But it is of no little interest that the move towards greater openness in adoption, described at paragraphs 13 to 20 of the paper, is closer to the assessment of the public interest made in New Zealand's Children Act 1895, the first Commonwealth statute on the topic, than to the provisions of the 1955 measure.

We are advised by the Māori Committee of the Law Commission that Māori opinion is likely to prefer a substantially greater openness in adoption and recognition of the importance of the blood ties of whakapapa.

We have been assisted by a number of individuals who have commented on drafts of this discussion paper, including Bill Atkin, Reader in Law, Victoria University of Wellington and Judge Boshier, Family Court Judge, 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 of Social Welfare, for their willingness to assist in answering our questions and sharing information with us.

The Commissioner in charge of preparing this discussion paper was the Honourable Justice Baragwanath. The research and writing was undertaken by Helen Colebrook and Megan Noyce.

Submissions or comments on this paper should be sent by 31 January 2000 to Helen Colebrook, Law Commission, PO Box 2590, DX SP23534, Wellington, or by email to Adoption@lawcom.govt.nz. We prefer to receive submissions by email if possible. Any initial inquiries or informal comments can be directed to Helen Colebrook: phone (04) 473 3453; fax (04) 471 0959. This paper is also available on the internet at the Commission's website: http://www.lawcom.govt.nz.

1
Introduction

1 THE MINISTER OF JUSTICE'S TERMS OF REFERENCE[1] require the Law Commission to examine 45 years after the Adoption Act 1955 (the 'Adoption Act') what changes to that institution are desirable in today's conditions. The primary focus of our inquiry is upon the welfare and interests of children.

2 Since 1955 changes in social conditions and public attitudes have had a marked effect upon the institution of adoption. They include:

- the Status of Children Act 1969 (the 'Status of Children Act'), which removed the legal concept of 'illegitimacy';
- the Adult Adoption Information Act 1985 (the 'Adult Adoption Information Act'), which has facilitated the open exchange of information between adopted persons and birth parents; and
- the increasing practice of open (as opposed to closed) adoption.

3 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. This has certainly been the experience with adoption legislation. Changing social needs and expectations have prompted several reviews of the Adoption Act, the first of which was conducted in 1979.[2] Other such reviews occurred in 1987[3] and 1990[4] and 1993.[5] None of these reviews have led to legislative reform. The result is that adoptions must be conducted in accordance with law that was drafted some 45 years ago and which may not adequately represent contemporary social needs and values.

4 The Law Commission, in its role of reviewing the law of New Zealand and advising the Minister of Justice on ways in which the law can be made as understandable and accessible as is practicable, welcomes the opportunity to address the adequacy of the current adoption legislation. The purpose of this paper is to offer for criticism and comment some tentative proposals for reform.

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1 See Appendix A for the terms of reference.

2 P Webb *A Review of the Law on Adoption* (1979).

3 Department of Justice *Adoption Act 1955: A Review by an Interdepartmental Working Party: Proposals for Discussion* (Wellington, 1987).

4 New Zealand Adoption Practices Review Committee *Report to the Minister of Social Welfare* (Wellington, 1990).

5 Department of Social Welfare *Review of Adoption Law: Adoption by Māori, A Consultation Document* (Social Policy Agency, Department of Social Welfare, Wellington, 1993).

CONCEPTS OF ADOPTION

5 The precise purpose and effect of 'adoption' varies depending upon 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. The reasons for adoption, its legal form, and consequences, have varied throughout history.[6]

6 There are regional and cultural variances in adoption law and practice. The consequences that attach to adoption orders may also vary between jurisdictions. Different states have different preconditions for an application for an adoption order.

7 Cultural practices may focus upon transferring the care of a child, often, but not always, to cement family or tribal relationships.[7] The consequences of such practice, sometimes called adoption, may be quite different from those articulated by the law. In New Zealand a prime example is the Māori practice of 'whāngai' placement, which varies substantially from the legal regime of adoption.[8]

8 Adoption in twentieth century New Zealand is a legal order which places a child permanently in the care of an adoptive parent(s). The United Kingdom Houghton Report[9] on the adoption of children observed that adoption:[10]

> [E]nables the child to achieve permanent security in a substitute home with a couple fully committed to fulfilling parental responsibilities. The child is the focal point in adoption; providing homes for children who need them is its primary purpose.

THE SOCIAL CONTEXT OF ADOPTION TODAY

9 New Zealand society today is quite different from that in the 1950s. Adoption law and practice have had to cope with modern challenges that legislators in 1955 would have been hard-pressed to predict. The traditional ideals of the 'nuclear' family and 'legitimate' children have been challenged by de facto relationships, same-sex relationships, reconstituted families after relationship breakdowns, 'single' parenthood and the rapid development of artificial reproductive technologies (ART).[11] New legislation must be responsive to the needs of citizens.

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6 See Chapter 2 for a fuller discussion of these developments throughout history.

7 J Metge *New Growth from Old* (Victoria University Press, Wellington 1995) 210–257; New South Wales Law Reform Commission *The Aboriginal Child Placement Principle* (NSWLRC R 7, Sydney, 1997).

8 Metge, above n 7. See Chapter 12 for a discussion of whāngai.

9 Home Office and Scottish Education Department *Report of the Departmental Committee on the Adoption of Children* (HMSO, London, 1976) [Houghton Report]. This report was a comprehensive review of adoption law in the United Kingdom and formed the basis of the Adoption Act 1976 (UK).

10 Above n 9, 4.

11 See M Henaghan and W Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Oxford, 1992).

Formulations of 'family'

10 The basis of Western European society is the reproduction and upbringing of children by their parents. For many Māori and other cultural groups there is a greater emphasis on the broader family.

11 Though for many people the Western European paradigm of a family comprising husband, wife and children within the wider family group remains the ideal, in the years since the enactment of the Adoption Act society has become more tolerant of alternative formulations of the family. For many people marriage is not seen as a condition of responsible child-rearing. De facto and single families now account for a significant proportion of families in New Zealand. The 1996 Census revealed that 62.75 percent of families with children are headed by a married couple, 28.29 percent are headed by a single parent, 8.17 percent are headed by a de facto opposite-sex couple and 0.06 percent are headed by a same-sex couple.[12]

12 Society recognises the right of de facto couples[13] and gay parents[14] to raise their own children. It is unusual that only married couples or single persons are permitted to adopt a child. The Adoption Act reflects the Western European paradigm of family, and does not recognise alternative formulations of the family. Adoption legislation must address differing concepts of family and parenting.

Open and closed adoption

13 The Adoption Act was based upon an assumption that the best way to conduct an adoption was in secret. The birth mother could then forget the ordeal and get on with her life, the new adoptive family unit could develop like any other family unit, and an illegitimate child was legitimised. This was a new notion in adoption practice; traditionally adoptions did not involve secrecy. Indeed, the English Tomlin Committee which reported on adoption in 1925 observed:[15]

> This notion of secrecy has its origin partly in a fear (which a legalised system of adoption should go far to dispel) that the natural parents will seek to interfere with the adopter and partly in the belief that if the eyes can be closed to the facts the facts themselves will cease to exist so that it will be an advantage to an illegitimate child who has been adopted if in fact his origin cannot be traced. Apart from the question whether it is desirable or even admissible deliberately to obscure the traces of a child's origin . . . we think that this system of secrecy would be wholly unnecessary and objectionable in connection with a legalised system of adoption.

14 The advantages and disadvantages of a system of 'closed' adoption and 'open' adoption with varying degrees of contact have been assessed in great depth over the last 20 years.

15 Longitudinal research into the experiences of closed stranger adoption has indicated that the expectations of the 1955 Parliamentarians have not always been fulfilled. Birth mothers do not just 'forget' about the child and carry on

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[12] See Appendix D, Table 3.

[13] Section 6 Guardianship Act 1968.

[14] *VP v PM* (1998) 16 FRNZ 621 (FC); *Re an Application by T* [1998] NZFLR 769 (HC).

[15] Cited in I Johnston "Is Adoption Outmoded?" (1985) 6 Otago LR 15, 21.

with life; rather, it has been shown that they go through a complex grieving process, similar to that undergone when a child dies. However, when secrecy shrouds the adoption, the natural grieving process that the birth mother goes through is not acknowledged by society.[16]

16 Some adoptees report problems in establishing a sense of 'identity'. Simple things like common interests, common thinking patterns, common behavioural and personality characteristics and common physical attributes may be lacking in an adoptive environment. Most people gain background knowledge of one's family as a part of normal development, yet an adopted person will never experience that in an environment of secrecy.[17] Problems of identity do not always occur, however, and many adoptees of this era have no desire to trace their biological family origins.

17 Over the last two decades, social workers have facilitated the practice of open, rather than closed adoption. Open adoption involves varying degrees of contact between the child, members of its adoptive family and members of its birth family. Contact may involve communication by mail at periodic intervals, or regular visits. The degree and regularity of contact is decided upon by the parties involved. Although the statute presumes secrecy, it does not prohibit communication and contact between the parties. Participants in such adoptions for the most part are positive about the benefits contact can confer.

18 The growth in open adoption arrangements has been achieved through the promotion by social workers of the idea that open adoption is beneficial for all involved, and their questioning the suitability of applicants for adoption if they do not wish to be involved in an open adoption. Throughout this period birth parents have become more involved in selecting adoptive parents for their child. Birth parents who wish to have some form of future contact with their child will be inclined to choose adoptive parents who are amenable to this arrangement.

19 During this period research has been conducted into the consequences of open adoption. Birth mothers have found that contact with the adoptive family and the child assists them in alleviating their sense of loss and helps them come to terms with the adoption. Adoptees are better able to establish a sense of self, come to terms with feelings of 'abandonment', and feel secure in their adoptive family environment.[18] The experience of adoptive parents has been that although they may be initially apprehensive, contact can improve their relationship with the child. Evidence suggests that adoptive children are more able to develop a successful attachment to their adoptive parents when there is contact with birth parents.[19]

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[16] See G Palmer "Birth Mothers: Adoption in New Zealand and the Social Control of Women 1881–1985" (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).

[17] M Ryburn *Open Adoption: Research, Theory and Practice* (Avebury, Sydney, 1994) [*Open Adoption*].

[18] *Open Adoption*, above n 17, 180.

[19] *Open Adoption*, above n 17, 84–86.

20 Previous reviews of adoption have recommended that open adoption be facilitated by new legislation.[20] At this stage of the review we do not wish to take a formal position, but prefer to invite public submissions on the consequences of open and closed adoption and views as to which is the better practice.

Cultural considerations

21 New Zealand is a multicultural society – in the 1996 Census 15.1 percent of our population identified as Māori, 5 percent as of Pacific Island origin, and 4.6 percent as Asian. New Zealand Europeans comprised 69 percent of our population.[21] Adoption legislation must take into account all of the ethnic groups in New Zealand. New Zealand Māori, as a partner to the Treaty of Waitangi, have a special place in New Zealand society. The terms of reference ask us to consider whether special recognition should be given to Māori customary adoptions or any other cultural adoption practices.[22]

The relevance of adoption in contemporary society

22 Adoption of New Zealand born children has become increasingly less common. In 1955 there were 1455 total adoptions, of which 984 were 'stranger' adoptions. In 1998 only 645 adoptions were processed by the Adoption Information Services Unit (the 'AISU') of Social Welfare, and of these only 125 were traditional 'stranger' adoptions.[23] In contrast, there is a growing number of adoptions by New Zealanders of children from other countries. This may be influenced by other countries applying less rigid criteria to adopting parents, or by the desire to obtain the advantages of New Zealand citizenship for relatives born in less affluent states. In 1998, 102 intercountry adoptions were made under New Zealand legislation, up from 70 in 1997.

The challenges of reproductive technology

23 New reproductive technologies also present challenges to the current adoption regime. The availability of in-vitro fertilisation and intra-fallopian gamete transfer has reduced the demand for adoption in some cases. Medically assisted surrogacy arrangements, however, present a unique situation that could not have been envisaged by lawmakers in 1955. A woman who agrees to carry a child (whether biologically her own or not) for another person or persons (commissioning parent(s)) is legally the mother of the child. In order for the commissioning parent(s) to become legal parents they must legally adopt the child. The law does not give any direction as to what rules or guidelines should apply in such instances. Any new legislation must address the challenges that these arrangements present.

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[20] Above n 3, n 4.

[21] Statistics New Zealand *New Zealand Official Yearbook on the Web 1999* (http://www.stats.govt.nz) para 6.4.

[22] See Chapter 12.

[23] K Griffith *New Zealand Adoption: History and Practice* (Wellington, 1998) 132. See Appendix D, Table 1. The term 'stranger adoption' refers to the adoption of a child by a person who is not a relative. It does not necessarily mean that the birth parents have not met the adoptive parents.

ADOPTION: THE LEGAL CONCEPT

24 The legal effect of adoption is to sever the legal ties between one or both of the birth parents[24] and the child, and establish substitute legal relations between the child and the adoptive parents. The change in legal relations does not alter the historical and genetic facts, but may give adoptive parents a greater sense of emotional security in relation to their newly formed family.[25]

25 In 1955 elaborate attempts were made to suppress such history. In an era when illegitimacy had significant legal and social consequences, such policy was intelligible. The former has since been removed by the Status of Children Act, the latter is now seen very differently.

26 The first question is whether in today's conditions adoption in some form continues to serve a valuable purpose. If it does serve a purpose, what is that purpose and how can it best be achieved? It is desirable to begin by placing the current institution of adoption within its wider context.

27 The Commission's enquiries suggest that adoptions occur to achieve, among others, the following results:

- to provide new legal parents for a child whose birth parents are unwilling or unable to care for the child;
- to substitute relations as between child and parents for a legal relationship with other members of the extended family;
- to recognise the advent of a step-parent;
- to regularise the status of a child born through surrogacy arrangements.

These purposes may, in various ways and to various degrees, be met by other means.

28 The essence of adoption is its permanency; adoption confers the status of parenthood which extends beyond the child reaching the age of majority. Adoption carries with it a clear change of status that has consequences in terms of:

- the legal responsibilities of the parents in respect of the child;
- succession;
- citizenship;
- status.

29 At present the law providing for the welfare of children comprises, in addition to adoption law:[26]

- the Children, Young Persons, and Their Families Act (the 'CYP&F Act');
- the Guardianship Act 1968 (the 'Guardianship Act');
- the parens patriae jurisdiction of the High Court.

There is some inconsistency in policy among the statutes. The expression of whether the welfare and interests of the child shall be paramount, and the role of the wider family, differs in each.

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[24] Or 'existing' parents – for example, a second adoption or IVF surrogacy.

[25] Although these facts may be obscured by a birth certificate.

[26] See Appendix B for a description of the Adoption Act and the related concepts of guardianship, care and protection, and wardship.

30 There is a need to consider the nature of "welfare and interests of the child", what legal rights should attach to that expression and what interests of the mother, the father and the wider family should receive recognition.

31 The common law treats the interests of the mother as paramount to the extent that they may conflict with the interests of an unborn child.[27] After birth the law immediately confers upon the new baby legal rights.[28] The interests of a child in the security of good parenting normally coincides with maternal, and usually paternal, love for the child. No issue of inconsistent legal rights exists. At the other extreme where parents abandon, neglect, persistently fail to maintain or persistently ill treat a child the Family Court and District Court have jurisdiction to dispense with consent to adoption.

32 Adoption involves the careful consideration of all of these interests, but should keep at the centre of the process the interests of the child. Throughout this paper we give consideration to how the interests of all parties might best be protected at all stages of the adoption process.

INTERNATIONAL CONVENTIONS

33 The United Nations has articulated the social and legal needs of children in order that principles for the protection of children can be applied internationally. 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 (the 'UN Declaration on Child Placement')[29] sets out the principles that should apply to the placement of children.[30] Generally it includes the principle that the child's interests should be the paramount consideration,[31] that where possible a child should be cared for within its extended family,[32] and that the child's need to know about family background should be recognised unless this is contrary to the child's best interests.[33] It states that the purpose of adoption is to provide a permanent family for a child whose birth parents cannot care for the child.[34]

34 New Zealand signed and ratified the United Nations Convention on the Rights of the Child ('UNCROC')[35] on 13 March 1993. UNCROC affirms that when a state permits a system of adoption, the interests of the child shall be the

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27 See *St Georges Healthcare NHS Trust v S, R v Collins, ex parte S* [1999] Fam 26 (CA) (UK); *Winnipeg Child and Family Services (Northwest Area) v G (DF)* [1997] 3 SCR 1210 (SC) (Can). This does not mean that the law does not recognise any interests of an unborn child – see *R v Henderson* [1990] 3 NZLR 174 (CA); *In the matter of Baby P (an unborn child)* [1995] NZFLR 577 (FC).

28 For example, the rights conferred by the United Nations Convention on the Rights of the Child (UNCROC).

29 Set out in Appendix C.

30 New Zealand participated in the formulation of this declaration.

31 Article 5.

32 Article 4.

33 Article 9.

34 Article 13.

35 Set out in Appendix C.

paramount consideration. States shall ensure that the adoption is authorised by competent authorities. State parties must ensure that persons giving consent to an adoption give informed consent, with the assistance of such counselling as may be necessary.[36]

35 By becoming a signatory to and ratifying UNCROC, New Zealand has committed itself to implement UNCROC's principles in our domestic legislation. The UN Declaration on Child Placement has a less formal status. 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.

THE FUTURE OF ADOPTION

36 Adoption differs from guardianship in four respects:[37]

- an adoption order is not easily revoked and so can be regarded as more permanent than guardianship;
- an adoption order confers the permanent status of parenthood upon adoptive parents;
- succession rights flow from an adoption order;[38]
- child support obligations automatically flow from the status of parenthood; conversely child support liability in respect of the birth parents ceases upon the making of the adoption.

37 In paragraph 22 we noted that adoption as an institution is becoming less common in contemporary society. It is necessary to consider whether it is in the interests of society to retain adoption.

38 Two alternative options present themselves. First, Parliament could retain adoption but modify the legislation so that it reflects contemporary adoption practice; or secondly, it might abolish the legal concept of adoption and replace it with a modified version of guardianship, for example a Care of Children Act that would provide a means of recognising and conferring the status of legal parenthood, whilst also encompassing custody and access issues.

Option one – retain a modified version of adoption

39 Caldwell has observed that the Adoption Act has been described as:[39]

> an anachronistic, adult-centred piece of legislation that fails to reflect child-focused values otherwise embedded in the modern family law framework.

Despite this criticism however, it can be powerfully argued that adoption maintains an important place in our society. Adoption is a process that is familiar to society. Inasmuch as it promotes the welfare and security of children, provides a permanent family unit that would not otherwise be available, and allows adoptive parents security in their parenting of a child, adoption has much to offer.

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[36] Article 21(a).

[37] See Appendix B for a more detailed description of the differences.

[38] But see Chapter 12 for a discussion of Māori succession rights.

[39] J Caldwell "Adoption: Keeping the Options Open" (1994) 1 BFLJ 86.

40 We should consider the appropriateness of the current adoption regime in its dealing with contemporary social issues such as surrogacy, de facto and same-sex relationships, the growing cultural diversity in New Zealand, the increasing practice of 'open adoption', and the use of adoption to 'cement' reconstituted families. Many of the original provisions of the Adoption Act should be reconsidered in light of society's increased understanding of issues relating to pregnancy and childbirth, and the importance of genetic identity. Although previous reviews of adoption legislation have considered such issues,[40] the law has not been amended in response.

41 In chapters 5 to 15 of this paper we examine most aspects of adoption legislation and consider how it might be reformed to better address the needs of contemporary society.

Option two – abolish adoption and use guardianship instead

42 We should also consider whether contemporary developments might mean that adoption is outmoded and should be abolished in favour of a modified form of guardianship. Caldwell in 1994 observed the existence of an "ideology in favour of abolishing adoption, adhered to in some influential Department of Social Welfare quarters".[41] There has been a swing in favour of guardianship which can, in some cases, provide some of the advantages of adoption without creating the legal fictions consequent upon adoption. It is common practice today for the courts when confronted with a step-parent adoption or an intra-family adoption to suggest that guardianship would be a better alternative.[42] Given that the majority of adoptions today involve step-parents and relatives, it is necessary to question the role of adoption in contemporary society.[43]

43 There are important distinctions between guardianship and adoption that mean that guardianship in its present form could not be substituted for adoption in every case. Issues of permanency, status and succession will always intervene.[44] The following paragraphs describe the conferment on the Family Court of a flexible jurisdiction to treat guardianship and adoption as different points on a single continuum of consequences attaching to a 'care of children' order.

44 At the least intrusive end of the spectrum of guardianship is testamentary guardianship, followed by the ability of the court to appoint additional guardians, either generally or for specific purposes. Natural guardianship would remain the same.

45 The other end would be a new concept of 'legal parenthood'. This would create 'legal parents' and confer upon them all parental rights and responsibilities. 'Legal parenthood' would carry with it rights of succession. The status of legal

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40 Webb, above n 2; Department of Justice, above n 3; New Zealand Adoption Practices Review Committee, above n 4.

41 Caldwell, above n 39, 86.

42 See, for example, *Parker v Pearce* (1985) 4 NZFLR 150 (HC); *MR v DSW* (1986) 4 NZFLR 326 (HC); *Application to adopt* M [1993] NZFLR 744 (FC); *Re Adoption Application 02100191* [1991] NZFLR 510 (FC).

43 In 1998, over half of the adoption orders made were in favour of a natural parent and step-parent, relatives or friends. P Trapski (ed) *Trapski's Family Law* (Brookers, Wellington, 1999) V App-4(r).

44 See Appendix B for a discussion of the differences between guardianship and adoption.

parenthood would not terminate upon the marriage or twentieth birthday of the child.

46 An order establishing a permanent arrangement could provide for complete openness from the beginning. An order appointing 'legal parents' would not conceal the existence of the birth parents but simply relieve them of such rights that normally flow from parental responsibility as the court sees fit. The court could determine what specific legal consequences should flow from the order – for example, in some instances it might be considered appropriate that the child have succession rights in respect of both sets of parents.

47 The advantage of a continuum of options is that the court could select the approach that would best suit the needs of the individuals involved, rather than imposing the 'all or nothing' status that constitutes adoption today.

The Law Commission's provisional view

48 At this preliminary stage of the process, we are wary of acting with haste and responding to perceived difficulties with a solution that is too flexible a response to the problem of excessive rigidity. Adoption has worked well for many people. A view that many hold is that the current system has virtues of permanence and security that are essential to provide a stable and secure future for the child. Amendments can be made to bring the law into line with contemporary social needs and perspectives.

49 But we are acutely conscious of the opposing opinion – that the severing in law of blood ties is never justifiable. The members of the Law Commission's Māori Committee are firmly of this view. Their opinion may reflect the Māori practice of family rather than stranger adoption. We are anxious to seek public comment on this fundamental issue.

Should the institution of adoption be retained?

Do the needs of contemporary society require amendment of the current law?

If so, what system should be adopted?

For example, could a new, more flexible system of 'care of children' be created?

THE STRUCTURE OF THE PAPER

50 Our terms of reference[45] direct us to review the legal framework for adoption, and more specifically to consider 15 defined issues that stretch across all stages of the adoption process – from the commencement of an application to adopt a child, to the parties' entitlement to discover adoption information after the adoption order is made. We have approached this sometimes daunting task by first considering the interests of all of the participants in an adoption and asking how the process might best meet their needs. We then consider the interests of the wider community in adoption and ask whether adoption is necessarily the best way to fulfil the community interest.

[45] See Appendix A.

51 We then address in specific detail each element of adoption law. We ask first whether there should be an expression of the principles upon which adoption in New Zealand is based. We then discuss the jurisdiction of the court over adoptions, the recognition in New Zealand of adoptions made overseas and the conferment of citizenship upon children adopted by New Zealand citizens. We consider who should be able to be adopted, which involves consideration of the purpose of adoption itself. We then discuss who should be entitled to adopt, which necessitates consideration of how adoption law should apply to non-traditional concepts of family. Consent is discussed next in considerable detail – this is an area where the current adoption law has been perceived not to serve the interests of all the parties.

52 The next chapter then turns to the adoption order itself. We ask whether the current process is necessary, and consider the possibility of attaching conditions to the adoption order so that those involved can formally record an agreement as to future contact. The grounds upon which an adoption order may be discharged are also considered here.

53 We then move on to issues that are consequent upon an adoption order. We consider the succession rights of adopted persons, and again, ask whether the current legislation is working. Following this, there is a chapter exploring how adoptive relationships should be treated for the purposes of the crime of incest and the prohibited degrees of marriage.

54 The final few chapters address overarching issues that are no less important but do not fit neatly within the parameters of the current adoption process. We felt that it was necessary to consider the way in which adoption works before discussing matters of more general importance. Chapter 12 considers the extent to which cultural adoption practices, including Māori customary adoption, are, and should be, recognised in adoption legislation. The following chapter considers how surrogacy arrangements fit within the framework of adoption, and the extent to which they should.

55 We have allocated a chapter to consideration of the ancillary services that could be attached to the adoption process. Counselling, general powers of inquiry and independent counsel for the child are already an integral part of many proceedings of the Family Court – for example, custody and access disputes, and dissolution of marriage. We ask whether it might assist the participants to provide these services for adoption.

56 The final chapter discusses access to adoption information and asks how access should be governed and whether the current procedures are appropriate.

57 For those unfamiliar with the legal framework of adoption, and the legal concepts of guardianship (defined in the Guardianship Act), care and protection (established by the CYP&F Act) and wardship, Appendix B provides a basic explanation.

2
History of adoption in New Zealand

THE HISTORICAL CONTEXT OF ADOPTION

Early practices

58 ACCOUNTS OF THE EARLIEST KNOWN ADOPTION PRACTICES date back to c2800 BC.[46] 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.

59 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 minus plena secured the child's succession rights in the natural family and allowed the child 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.[47]

New Zealand

60 Māori had a system of caring for children that has been equated with guardianship.[48] Māori would give members of their whanau a child to raise as their own.[49] Such children were referred to as whāngai or atawhai. Whāngai placement was not necessarily permanent. Such placements were a matter of public knowledge and the child was aware of its birth parents and other family members, and usually maintained contact with them.

61 In 1881 New Zealand became the first country of the Commonwealth to enact adoption legislation.[50] This arose out of a recognition that informal adoption,

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46 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 c 1200 BC.

47 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).

48 Although more recently one hears such whāngai arrangements being referred to as 'Māori customary adoption'.

49 Metge, above n 7.

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

described by Campbell as a "system of voluntary guardianship",[51] was already taking place. Such adoption contracts were not recognised by the common law on grounds of public policy. 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".[52] The adoption legislation gave legal status to adoption but did not prevent legal recognition of the Māori practice of whāngai placement.[53]

ADOPTION IN NEW ZEALAND

62 Social needs and perspectives change throughout history – what is considered to be acceptable practice by one generation can be considered 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.[54] It is the changes in social needs and perspectives between the 1950s and the 1990s that present challenges to the current law of adoption.

Early 1900s

63 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".[55] Prior to the Second World War it was unusual for single women to give up their babies. Else observed that:[56]

> 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:[57]

> [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.

64 Where a mother was not able to care for her child, institutional or foster care was the usual alternative. Where a mother chose to place her child in state care because she was unable to care for it (usually for financial reasons) she

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51 ID Campbell *Law of Adoption in New Zealand* (Butterworth & Co, Wellington, 1957) 1.

52 (4 August 1881) 39 NZPD 281.

53 *Arani v Public Trustee* [1920] AC 198, (1919) NZPCC 1 (PC).

54 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).

55 M Tennant "Maternity and Morality: Homes for Single Mothers 1890–1930" (1985) 2 Women's Studies Journal 28, 39.

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

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

had to pay maintenance to the State. Mothers usually attempted to keep their babies, despite the difficulties involved. Adoption was mainly reserved for instances where a married woman had an extra-marital child.[58]

The 1940s – a change in attitudes

65 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.[59]

The 1950s – adoption encouraged

66 In the 1950s single mothers were encouraged to adopt their children; 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.[60] The mother who gave up her child was praised for being responsible, and was deemed a better mother than the woman who wished to raise her own child.

67 Unmarried pregnant women were usually sent to live in a different town until the baby was born. Some women had positions arranged for them as unpaid (or poorly paid) domestic help. Women who went to institutions which cared for unmarried mothers theoretically had the option of keeping their children. However, in the 1950s there was fewer babies available for adoption than there were couples waiting to adopt a child, and some homes actively discouraged mothers from keeping their babies.[61] There was an unspoken presumption that an unmarried women 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 Social Welfare explained in the 1950s:[62]

> 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.

Public perception of the availability of children: supply and demand

68 The perception that there is either a 'surplus' or a 'shortage' of children to adopt illustrates the way that people viewed adoption – in this period (and perhaps

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58 Else, above n 56, 23–24.

59 Else, above n 56, 23–24.

60 N Collins "Adoption" (1966) 2(2) NZ Social Worker 71.

61 Else, above n 56, 39.

62 Cited by Else, above n 56, 44.

to a more limited extent, today) adoption was seen as a way to supply childless couples with a family.[63] 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.

69 The Destitute Persons Act 1910[64] and the Domestic Proceedings Act 1968[65] 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.[66] This maintenance continued until the child reached the age of 16; maintenance would continue to be payable in respect of a child over the age of 16 if the child was engaged in full-time education.[67] 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 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.[68] The Domestic Purposes Benefit (DPB), introduced in 1973,[69] mitigated these difficulties. The Act provided state financial support for single mothers, irrespective of whether the father was contributing to maintenance payments.[70]

70 The introduction of the DPB was blamed for "creating a shortage of babies for adoption".[71] 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.[72] The numbers of ex nuptial children being adopted had started to fall in 1962, before the introduction of state financial support.[73] 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.[74]

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63 See Else above n 56, and Dalley above n 54.

64 Sections 8 and 26 Destitute Persons Act 1910.

65 Sections 35, 36 and 39 Domestic Proceedings Act 1968.

66 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).

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

68 Section 38 Domestic Proceedings Act 1968.

69 By the Social Security Amendment Act 1973.

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

71 C Hadfield "Adoptions 1963 to 73" (DSW Conference, Department of Social Welfare, Wellington, 1973) 23, 30.

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

73 Griffith, above n 23, 133.

74 Else, above n 56, 168–170.

Open v closed adoption

71 Since the middle of this century, a climate of secrecy has surrounded adoption law. 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.[75] Section 7(6) of the Adoption Act provides that a parent or guardian of a child may give consent to an adoption without knowing the identity of the prospective adoptive parents. This was described by the Attorney-General at the time as "highly desirable",[76] and by another member of parliament as "a humane step".[77] Blanchard J commented in *Re Adoption of PAT* that the practice of a[78]

> 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.[79] Natural mothers were often told that they were not allowed to attempt to find their child.[80]

72 Once a child is adopted the birth record is sealed and a new birth certificate is issued. This certificate shows the names of the adoptive parents[81] only and their ages at the birth of the child. This obscuring of the factual and legal 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.[82]

73 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 adoption[83] 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 its birth parents; most adoptions involve some degree of contact from their inception.

74 New Zealand has been described as "leading western adoption practice with respect to openness".[84] Although open adoption is being widely practised, it is not recognised in law and Family Court judges struggle to reconcile open

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

76 (26 October 1955) 307 NZPD 3349 per the Hon J R Marshall.

77 Above n 76, 3356 per Mr Warren Freer.

78 [1995] NZFLR 817, 819 (HC).

79 Form 3.

80 Else, above n 56, 123.

81 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.

82 Although the child and the birth parent(s) may place a veto upon access to information.

83 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 *Open Adoption*, above n 17.

84 *Open Adoption*, above n 17, 16.

adoption with the Adoption Act which acts as a statutory guillotine, promoting secrecy and the complete severance of ties between birth parents and children.[85] 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.[86]

Adoption as a means of regulating status

75 Adoption has been used at various times this century as a means of regulating the status of the child. In the middle of this century, when illegitimacy was considered an undesirable status, a parent could 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'.[87] 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 it, therefore adoption is used to regularise the child's status.[88]

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[85] See for example *In the Guardianship of J* (1983) 2 NZFLR 314 (CA); *Adoption of PAT* above n 78; *In the Guardianship of P* (1983) 2 NZFLR 289 (HC); *Hamlin v Rutherford* (1989) 5 NZFLR 426 (HC). See also the UK case *Re O (a minor) (wardship: adopted child)* [1978] Fam 196 (CA).

[86] See Chapter 15.

[87] 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.

[88] For discussion on surrogacy, see Chapter 13.

3
The participants – competing interests

76 EACH PARTICIPANT in the adoption process has specific interests; the participants also have specific legal rights. We consider how adoption law might balance the interests of all participants in the adoption process.

THE CHILD

77 At the centre of the whole process is the child who is placed for adoption. For the child, the main aim of adoption should be to provide a permanent family that would otherwise not be available. Such an environment should provide the child with love, shelter, food, nurturing, education and emotional security. The welfare and interests of the child should be at the heart of the adoption process.

78 Chisholm J of the Australian Family Court[89] observed that:[90]

> [W]e know from research and from anecdotal material that many adopted people also have complicated feelings about identity and about their origins and their birth parents.

Adopted children have unique and continuing needs in this respect, and adoption law must be shaped in such a way that this is recognised. The law, as well as acting paternally to protect the child's best interests, should also respect the right of the child to the preservation of "identity, including nationality, name and family relations as recognised by law without unlawful interference".[91]

THE BIRTH PARENTS

The birth mother

79 The decision to place her child for adoption is one of the most crucial decisions in a mother's life.[92] Longitudinal surveys of birth mothers reflect the profound impact that this decision has on the rest of their lives, whether for better or

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[89] Commissioner in charge of the New South Wales Law Reform Commission review of adoption law.

[90] 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) 408.

[91] Article 8 UNCROC.

[92] See Palmer, above n 16; Langridge, above n 16; Winkler and van Keppel, above n 16.

for worse.[93] In order that birth mothers make the right decision for themselves and for the child, legislation needs to provide safeguards that ensure a considered decision is made.

80 Current legislation allows birth mothers to consent to an adoption 10 days after the birth of the child.[94] There is debate as to whether this allows sufficient time after the upheaval of pregnancy and childbirth to make a proper decision.[95] What needs to be taken into consideration is our increased understanding of the stresses and hormonal changes that accompany pregnancy and childbirth.[96] An appropriate period for consent will be discussed later in the paper.

Counselling[97]

81 There is no statutory requirement that a birth mother undergo any counselling to assist in deciding whether to consent to the adoption of the child. Social workers are encouraged to counsel birth mothers in assisting them to make the right decision;[98] however under the current law a birth mother may make the decision to place the child for adoption and select adoptive parents before Social Welfare becomes involved. If the birth mother has not approached Social Welfare prior to the birth of the child, the first contact with a social worker is likely to be after the birth when the mother wishes to place the child.

82 A further concern is that participants in the adoption process need to be able to access independent counselling services. We discuss in Chapter 14 how the provision of counselling might better protect of the birth mother's interests, before she gives consent to the adoption of her child and after the adoption order is made.

The birth father

83 Except in extraordinary cases[99] birth fathers have a moral right to take part in deciding whether to give up the child for adoption, and their interests are analogous to those identified above in the discussion about birth mothers. The importance of considered and informed consent and proper counselling should not be overlooked with respect to the father of the child.

84 The interests of a birth father who is not a guardian of the child are difficult to identify and hard to protect. Else describes the place of an unmarried birth father in the era of closed adoption as "at best shadowy and at worst completely invisible".[100] The law states that the consent of birth fathers who are not

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93 See Langridge, above n 16; Winkler and van Keppel, above n 16.

94 Sections 7(4) and (7) Adoption Act.

95 See Department of Justice, above n 3, 21; New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965 (NSW)* (NSWLRC R81, Sydney, 1997) 140–141; Victorian Adoption Legislation Committee *Report of the Adoption Legislation Review Committee* (Department of Community Welfare Services, Melbourne, 1983).

96 See NSWLRC R81, above n 95, 141.

97 See discussion of counselling as an ancillary service, in Chapter 14, paragraphs 395–401.

98 Children, Young Persons, and Their Families Service *Local Adoptions Placements Manual* (1996) 29.

99 Of which rape is the clearest example.

100 Else, above n 56, 14.

guardians shall be required if the court considers it expedient to do so.[101] There is judicial disagreement as to whether the consideration of 'expediency' requires an assessment of whether it is fair to deny the father the right to consent (or to withhold consent) to the adoption.[102] In some cases it is recognised that applications by a birth father to become a guardian may be vexatious or not genuinely motivated;[103] in others there seems to be a comparison between the father's suitability to act as a parent or guardian and the quality of home that the proposed adoptive parents can offer.[104] At paragraphs 223–226 there is a consideration of how the interests of the non-guardian birth father can be better balanced against the wishes of the birth mother and the needs of the child.

The interests of birth parents in open adoption arrangements

85 Current adoption practices facilitate varying degrees of contact between the birth parents and the adoptive family, and this is often a condition which birth parents seek to impose when consenting to adoption. There is no provision in the current legislation recognising these arrangements. If the adoptive family renege on the arrangement the birth parents have no legal means of redress, although social workers will often attempt to mediate between the parties to achieve an amicable outcome.

EXTENDED BIRTH FAMILY

86 Family members often play an important role in the life of their grandchild, niece or nephew. Some cultures place particular importance on intergenerational and wider family involvement in the life of the child. Current adoption law enables these links to be severed without any involvement of the extended family. The Adoption Practices Review Committee in 1990 noted[105]

> the concern of families, who were unaware of the child's birth, until after the decision to adopt was made. These families expressed feelings of grief and regret, not only at the loss of a family member, but at not having had the opportunity to participate in the decision-making regarding the child's future.

The lack of consultation with wider family can be particularly offensive to Māori, who value collective decision-making in relation to child placement.[106]

87 The model of family consultation established by the CYP&F Act provides a useful comparison. Where a child is in need of care and protection, the wider family can become involved in making decisions regarding that child's future. The CYP&F Act sets out in its long title the need to:

> [M]ake provision for matters relating to children and young persons who are in need of care or protection . . . to be resolved, wherever possible, by their own family, whanau, hapu, iwi or family group.

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[101] Section 7(3)(b) Adoption Act.

[102] Compare the comments of Judge Mahony in *In Guardianship of B* (1986) 4 NZFLR 306, 315 (FC) with those of Judge Inglis QC in *K v B* [1991] NZFLR 168, 187–188 (FC).

[103] See for example *Re Baby "C"* [1996] NZFLR 280 (FC).

[104] See *K v B* above n 102.

[105] Above n 4, 28.

[106] Department of Social Welfare, above n 5, 7 and 10.

88 Unlike the CYP&F Act, the Adoption Act does not require consideration of whether family members might be able to meet the needs of the child, before adoption outside of the family is considered. It is common for an older child who has been cared for within its birth family to have been the subject of a family group conference[107] or of a care and protection order[108] under the CYP&F Act before adoption is contemplated. This is not the case when newborn children are placed for adoption.

89 Wider family will usually have a legitimate interest in the welfare of family members, although in exceptional cases it may not be beneficial for the child that they should take such an interest.

90 A careful balance must be maintained between the interests of the wider family and those of the birth parents. Input from families may not always be helpful. Where after counselling a birth parent is adamant that there shall not be wider family knowledge or involvement in the making of decisions regarding that child, there should be discretion not to require the involvement of other family members. The Adoption Practices Review Committee concluded, after wide consultation with social workers, that[109]

> to have to face unwelcome family pressure when one is at one's most vulnerable seems inhumane, especially if, with open adoption, adoption may not harm the child's interests. It is likely that if the birth mother was on good terms with her family then she would already have involved them. If after some counselling a birth mother still does not want her family involved then should she be made to consult them?

91 In order to achieve consistency in child welfare legislation, and to comply with our obligations under the UNCROC,[110] where family members are available and willing to care for the child, the State should facilitate and intervene as little as is necessary.

ADOPTIVE PARENTS

92 Adoptive parents may seek to adopt for a number of reasons. A common reason is infertility. Another recent trend has been for people to adopt for humanitarian reasons, motivated to save children from lives of poverty in lesser developed nations. Common to all of these motivations is a desire to parent a child.

Counselling

93 Adoption is not, however, the same as having a biological child, and it may benefit adoptive parents and children to receive counselling to come to terms with the difference between raising an adopted child and a biological child. Adoptive parents need to be prepared for what the adoption process will entail, both in the short term and longer term.

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[107] Sections 20 to 38 CYP&F Act.

[108] Section 67 CYP&F Act.

[109] Above n 4, 26.

[110] Article 5.

Security

94 Taking full responsibility for someone else's child is a big commitment. Adoptive parents need to be supported and need to feel secure in the knowledge that their parenting efforts will not be disturbed or undermined. It is in the interests of adopted children that they be brought up by parents who are secure in their parental role.

Genetic parents as adoptive parents

95 Where adoptive parents have participated in a surrogacy arrangement, they may also be the genetic parents of the child. The interests of these parents are unique and will be discussed in detail in the chapter on surrogacy.[111]

ADOPTION AND THE INTERESTS OF THE WIDER COMMUNITY

96 Adoption, as a balancing of competing interests and rights, and as a means by which children are legally transferred from the care of one family to another, plays a fundamental role in society and the community interests involved must be considered. In this respect we consider a number of factors:

- the way family relationships are altered by adoption;
- the role that secrecy has played and should play in adoption;
- the role of the professionals involved in the adoption process;
- the regime that should regulate the process.

Finally, we will consider the relevance of adoption as an institution in contemporary society. The community has an important interest in each of these matters.

Adoption and new family relationships

97 Section 16 of the Adoption Act determines the family relationships that exist in law after the adoption order. Subsection (2) provides that:

> (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;
>
> (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.

98 These provisions create the legal fiction[112] that the adopted child is the child of the adoptive parents, and vice versa, and in law the links with birth parents cease to exist. This approach is reflected in the Births, Deaths, and Marriages Registration Act 1995 ('Births, Deaths and Marriages Registration Act').

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[111] See below Chapter 13.

[112] As to adoption creating a legal fiction, see for example *Adoption Application by T* [1999] NZFLR 300, 306 (FC); *Adoption application by T* [1996] NZFLR 28, 31 (DC); *Re Application by Nana* [1992] NZFLR 37, 47 (FC).

Section 63 provides that the birth certificate for an adopted person will not be issued unless it has been requested "by reference to the names most recently included in the registration of the person's birth under section 24 or section 25 of this Act".

99 Sections 24 and 25 refer to the provisions for the registration of adoptive parents. Unless a request is made under the Adult Adoption Information Act, the birth certificate of an adopted person will read as if that person had been born to the adoptive parents, to the extent that the adoptive parents' ages at the time of that child's birth are recorded. Original birth records are sealed.

100 Adoption is a change of status that creates between the adopter and adoptee all of the legal rights and obligations (and responsibilities) that exist between birth parents and their children. Section 16, which deems adopted children to be the child of the adoptive parents as if born to them, is viewed by some adoptees as an unnecessary distortion of the reality of the adoption process. This point may seem semantic, but appears to be of significant symbolic importance to some adoptees.

101 An adoption order must at the very least shift permanently 'full parental responsibility' from one set of parents to the next. Parental responsibility in this sense might comprise all rights, duties, powers, responsibilities and authority which, by law a parent has in relation to a child and that child's property.[113] The effect of such an order would be that only the adoptive parents could exercise parental responsibility.

102 Such reformulation would place less emphasis on obscuring the connection to the birth family, but would still ensure that the rights and responsibilities of the adoptive parents are made clear. A reformulation could guide an amendment to the description of the effect of adoption contained in section 16(2) of the Adoption Act. This may help assuage the concern expressed by adoptees that the current provision gives an unrealistic impression of the role of the adoptive parents in the child's life.

Should legislation reformulate the legal effect of an adoption?

What should be encompassed in a definition of parental responsibility?

The place of secrecy in adoption

103 The Adoption Act contemplates 'closed adoption', a concept premised upon the idea that the adoption should be kept secret, that involved parties should not be identified, and that there should be no contact between the parties. In 1955 it was assumed that a clean break was best for all concerned, that the birth mother would forget the child and begin a new life, and that the adoptive family would be no different from a natural one.

[113] Section 3(1) Children Act 1989 (UK) uses the concept of parental responsibility to describe who should have authority to make decisions in relation to the child, where the child should live (residence) and whom the child should have contact with (contact).

104 The legal consequences of adoption purport to give effect to such assumptions. The reality, however, is that there are birth parents who for some reason give up, or have taken from them, the right to care for their child. Adoption creates a new family relationship in which that child can be nurtured and raised. But adoption does not mean that the birth family never existed. There is increasing recognition that knowledge of, and perhaps even contact with, birth parents and relatives, can be important to the growth and development of the child.[114]

105 Social workers, through their duty to control the placement of children for adoption, have promoted openness whilst the law contemplates secrecy.[115] It is appropriate to consider whether the law should be altered to reflect current adoption practices.

Adoption: knowing the options and obtaining professional advice

106 We observed in paragraphs 81 to 82 that it is in the interests of both birth parents and adoptive parents to have access to effective counselling and advice so that informed decisions can be made and the adoption process and implications understood. Where a birth parent does not involve social workers, doctors or lawyers until a very late stage, it may not be possible for her (or him) to make a considered and informed decision.

Young people and education

107 Access to counselling and adoption services needs to be widely promoted so as to be available at an early stage to those who are vulnerable. Such services should provide accurate and impartial advice. Life education in schools should not be confined to 'sex education' but should also educate young people about relationships and responsibilities, the social consequences of pregnancy and should inform students of places from which they can seek advice.

Adoptions where no independent assessment is currently required

108 In the particular case of step-parent adoption of a spouse's children, there is no legal requirement to involve Social Welfare – often the only professional involved will be a lawyer. These cases especially can require careful assessment by social workers in order to determine the motivations for the adoption and the interests of the child. It is in the interests of the community that counselling be conducted and assessments be made to ensure that the child's links with the other birth parent (or previous guardian or adoptive parent) and that parent's family are not being severed unnecessarily or without good reason. Reports from counsellors and social workers should also be required in these cases.

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[114] *Open Adoption*, above n 17; Adult Adoption Information Act 1985. Openness in adoption has been reported to help birth mothers come to terms with their loss, and may help adoptive parents to parent their adoptive children. See Palmer, above n 16; Langridge, above n 16; Winkler and van Keppel, above n 16.

[115] See discussion of the role of social workers in Appendix B.

Private providers of adoption services

109 Agencies such as Bethany in Auckland, Catholic Social Services in Christchurch, and the Latter Day Saints Social Services are involved in matching up adoptive parents with birth mothers.

110 These agencies are not regulated and have no statutory powers. Since a child cannot be placed in a home without prior social worker approval,[116] these agencies must seek approval for the proposed placement from AISU social workers of Social Welfare. The AISU works with these agencies but requires that the prospective adopters make a formal application to adopt and take part in the education sessions provided by the AISU.

111 Experience suggests that these agencies perform a useful function. Potential adoptive parents screened and accepted by these agencies at first instance, are usually subsequently approved by Social Welfare. The agencies also provide extensive services for pregnant women who need 'time out' to make a considered decision about their ability to care for a child.

112 To this extent, an accreditation programme that allows agencies to have a formal role in the adoption process may relieve part of the burden of screening applicants, which is currently officially borne by the State. The United Kingdom Adoption Act 1976 contains a provision which allows the Secretary of State to approve voluntary agencies to work as adoption societies.[117] This allows the society to screen prospective adopters and place children for adoption. The adoption agencies are controlled by regulations made by the Secretary of State.[118] This model could be adapted for use in New Zealand. New Zealand already has an accreditation procedure for non-profit bodies arranging intercountry adoptions.[119]

113 There arises here a consideration of whether such agencies should be profit-making. 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. 'Payment' for adoption has in the past aroused fears that children will become commodities and baby-farming will be encouraged. It is for this reason that the Adoption Act provides that it is an offence to make or receive payments[120] in consideration of an adoption or proposed adoption, or in consideration of making arrangements for an adoption.[121]

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[116] Section 6 of the Adoption Act provides that only social workers can approve the placement of a child in another household. This restriction does not apply where the child is placed in a home pursuant to a provision of the CYP&F Act, or an order under the Guardianship Act. Nor does it apply where the child is in the home of a parent and a step-parent or is in the home of a relative.

[117] Section 3 Adoption Act 1976 (UK).

[118] Section 9 Adoption Act 1976 (UK).

[119] Sections 15–22 Adoption (Intercountry) Act. The Act came into force at the beginning of 1999. As yet there is little information upon which the efficacy of such bodies can be assessed.

[120] Without the prior consent of the court.

[121] Section 25 Adoption Act.

Should all agencies which provide adoption services be accredited?

Should accreditation be allowed only for non-profit agencies?

How should accredited agencies be regulated?

Should accredited agencies be permitted to authorise adoption placements?

Private adoption arrangements

114 Birth mothers often make their own arrangements to adopt their child to persons that they know or who are recommended to them by friends and acquaintances. These private arrangements are unregulated and often the first contact that the prospective adopters have with the AISU is when the court calls for a social worker's report on the suitability of the applicants to adopt. By this stage the child has usually already been placed with the prospective adopters (notwithstanding that this may constitute a breach of section 6 of the Adoption Act), and the court is presented with a fait accompli.

115 The birth mother's right to choose the prospective adopters is important. However, it needs to be balanced against the risk that the birth mother might be subjected to undue pressure to adopt by well-meaning family and friends. Unauthorised placements may also place the child at risk, as the screening of the prospective adopters occurs only after the child has already been placed with the prospective adopters.

Should all prospective adopters be required to be screened by the AISU (or an approved agency) before making an application for an interim adoption order?

Should section 6 of the Adoption Act be more stringently enforced to prevent unauthorised placements?

Should an unauthorised placement impact on the court's assessment of the suitability of the prospective adopters?

4
Principles of adoption

116 WE HAVE DESCRIBED the change in attitudes towards adoption and unmarried motherhood. The Adoption Act is a product of attitudes that are now less prevalent in contemporary New Zealand. Adoption practices have changed so considerably over the past 45 years that it is time to review the legislation. This section identifies some of the principles that might be reflected in any new legislation.

117 The Adoption Act does not contain a statement of purpose or guiding principles. By contrast, the long title of the CYP&F Act states that it is:

> An Act to reform the law relating to children and young persons who are in need of care and protection or who offend against the law and, in particular–
> (a) To advance the wellbeing of families and the wellbeing of children and young persons as members of families, whanau, hapu, iwi and family groups;
> (b) To make provision for families, whanau, hapu, iwi and family groups to receive assistance in caring for their children and young persons.

118 The long title, or statement of purpose, can be a useful interpretation tool when there is ambiguity in a statutory provision. The Law Commission has commented that "purpose provisions [that is, long titles] help users of legislation to understand the particular Act or part of an Act to which the provisions relate".[122]

119 Section 11 of the Adoption Act does set out certain restrictions upon making adoption orders, including that the welfare and best interests of the child be promoted. This is not, however, expressed to apply throughout the whole adoption process; for example, it is not stipulated that the best interests of the child must be taken into account when a court considers whether to dispense with the consent of a birth parent. More principled legislation would provide a focused set of guiding principles similar to those contained in the long title of the CYP&F Act. Such principles would be taken into account by social workers and the court at each step of the adoption process, for example when the court decides whether to make an adoption order or whether it is appropriate to attach conditions to an adoption order.[123]

Should a new Adoption Act contain guiding principles?

[122] *Legislation Manual* (NZLC R35, Wellington, 1996) 11 para 35.

[123] Conditions cannot currently be attached to an adoption order; we consider this option later in the paper at paragraphs 251–259. If it is accepted that conditions could be attached then this would be an appropriate point for these guiding principles to be considered.

120 The following paragraphs invite discussion as to what principles might or should be included in a statement of purpose.

The purpose of adoption

121 While in early times succession was a motivation for adoption, this has been more a consequence of, than a reason for, adoption in common law systems.[124]

> . . . [E]nglish law differs sharply from civil law systems which inherited the Roman concepts of *adoptio* and *adrogatio* in that its *primary* goal is and always has been to provide a new permanent, secure and loving home for the child and not to govern succession rights.

122 Article 13 of the UN Declaration on Child Placement states that "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". Adoption practices over the past 20 years have shifted from providing infertile couples with children to an approach that seeks to determine whether adoption is the best option for the child and who might be an appropriate family to care for that child. The purpose of adoption in contemporary New Zealand society is to provide a child with a secure and permanent[125] family life.

> Should new legislation state the purpose of adoption?
>
> Would an appropriate formulation be that the purpose of adoption is to provide a secure and permanent family life?

Is adoption the most appropriate option?

123 Adoption is one of several ways in which permanent care can be provided for a child. Child welfare legislation as a whole should encourage parties to consider all the possible forms of care that might be appropriate for the child. Adoption need not be presumed to be the first or only option. The State should first look at ways of supporting the child in its existing family.[126] Guardianship orders may be appropriate where other family members wish to care for the child. Guardianship has the advantage of not displacing legal relationships between family members. Only where care within the family unit is not feasible should adoption be considered. To this end, it may be appropriate that adoption legislation places social workers and the court under a duty to consider the alternatives to adoption before an adoption proceeds.

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[124] 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) 581, 582 referring to S Cretney *Principles of Family Law* (4th ed, Sweet & Maxwell, London, 1984) 418. See also Article 13 UN Declaration on Child Placement; and the remarks of Hardie-Boys J in *DGSW v L* [1990] NZFLR 125, 137 (CA).

[125] 'Permanent' could encompass an application to adopt that would 'regulate' the child's legal status, for example to give a co-parent a legal role in the child's life. This can give the child's place in the family a more permanent status.

[126] Article 4 UN Declaration on Child Placement.

Should alternatives to adoption be canvassed before decisions regarding adoption are made?

The paramountcy principle

124 Section 6 of the CYP&F Act asserts the principle that the welfare and interests of the child are the first and paramount consideration in administering or applying the provisions of the Act. This 'paramountcy principle' was enacted to bring New Zealand's child welfare legislation in line with its obligations as a signatory to and ratifier of the UNCROC,[127] although the principle had been developed and applied by the judiciary for many years.[128]

125 Section 11(b) of the Adoption Act requires 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.

Whether this means that the welfare and interests of the child are the paramount consideration in the making of an adoption order has been the subject of some judicial debate.[129] The issue has been discussed by the Court of Appeal in an application to dispense with the consent to adoption of a birth parent. To the extent that adoption will terminate the guardianship rights of an existing parent, the Court imported the paramountcy principle expressed in section 23 of the Guardianship Act:[130]

> Inasmuch as the first and paramount consideration in guardianship and custody cases is the welfare of the child, it is not to be expected that a lesser emphasis on the welfare of the child would justify the termination of guardianship on the making of an adoption order.

126 As an expression of the high value to be attached to the welfare and interests of the child, the paramountcy principle is valuable. But the expression is of a value, not of a legal right to be given effect without regard to other considerations. It does not derogate from the legal protections conferred upon other parties to an adoption.

127 One important protection conferred upon the parent of a child is that a parent's consent may not be dispensed with by the court unless it is satisfied that the parent has[131]

> 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;

or[132]

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[127] Article 21 of UNCROC states that in a system of adoption "the best interests of the child shall be the paramount consideration".

[128] See *Palmer v Palmer* [1961] NZLR 702 (CA).

[129] See for example *In the Adoption of G* (1984) 3 NZFLR 175 (FC); *L v B* (1982) 1 NZFLR 232 (HC).

[130] *DGSW v L* above n 124, 129 per Richardson J.

[131] Section 8(1)(a) Adoption Act.

[132] Section 8(1)(b) Adoption Act.

that the parent or guardian is unfit, by reason of any physical or mental incapacity, to have the care and control of that child; that the unfitness is likely to continue indefinitely;

and the parent has been given reasonable notice of the application.[133]

128 To this extent the term 'paramount' may be a misnomer. Thought should be given to an alternative way to express the importance of the child's welfare and interests in adoption. One method might be to replace 'paramount consideration' with 'principal consideration', which allows a recognition that the child's interests may not be the only interests.

129 We seek submissions on whether adoption legislation should set out the paramountcy principle, or whether another expression might be used that more accurately identifies the position of the interests of the child.

> Should the paramountcy principle be set out in a new Adoption Act?
>
> If not, should a new expression be used that recognises other interests are also protected?
>
> What should that expression be?

Assessing welfare and interests

130 New legislation could include guidelines by which the Family Court can assess the welfare and best interests of the child. A determination of such factors is often made by Family Court judges at their discretion, but is not provided for in the current legislation. It may be desirable to formalise this practice. Any such list of guidelines would not be exhaustive. Factors to be considered could include:

- the physical and emotional needs of the child;
- the importance of having a secure place as a member of a family;
- the quality of the child's relationship with a birth parent or other members of the child's extended family and the effect of maintaining or severing that relationship;
- the preservation of the cultural, linguistic and religious heritage of the child; and
- the quality of the potential relationship of the child with the proposed adoptive parents;
- the character and attitudes of the proposed adoptive parents.

> Should there be statutory guidelines to take into consideration in the determination of the welfare and best interests of the child?
>
> If so, what guidelines?

[133] Section 8(1)(a) and (b) Adoption Act.

Recognising changing needs in adoption

131 The 1955 legislation treats the making of an adoption order as an 'event' – it does not recognise that an adoption has lifelong implications. It does not acknowledge the needs of the birth parents to express grief for their loss, [134] nor does it recognise the issues of identity and rejection that an adoptive child may experience.[135] The 1955 legislation also fails to recognise that adoptive families face challenges that do not arise in the context of biological families. Past adoption theory has been criticised for its[136]

> failure to take full account of the fact that adoption is both for the present and for the future, so that decisions taken in the light of present knowledge and understanding require the flexibility to accommodate changing future circumstances.

132 Although the needs of all parties involved in adoption should be identified at the outset, legislation should also recognise that the psychological needs of the parties may continue to change. The process must meet the parties' changing requirements at various stages. A new Act should recognise that the psychological, social and emotional effects of an adoption may be felt long after an order is made. We might give consideration to whether services should be provided to all those directly involved in the adoption process on a longer term basis.[137]

Should there be recognition in the principles of the legislation that adoption has long-term consequences?

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[134] See Palmer, above n 16; Langridge, above n 16; Winkler and van Keppel, above n 16.

[135] See *Open Adoption*, above n 17; J Triseliotis "Identity and Genealogy in Adopted People" in 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).

[136] 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) 65.

[137] See paragraphs 395–401.

5
Jurisdictional and citizenship issues

JURISDICTION

Prospective adoptive parents

133 SECTION 3(1) OF THE ADOPTION ACT provides that a court may make an adoption order on the application of any person, whether domiciled in New Zealand or not, in respect of any child, whether domiciled in New Zealand or not. The effect of section 3 is that the parties need neither be resident, nor intend to be resident in New Zealand, for an adoption order to be made under New Zealand legislation by a New Zealand court.

134 Campbell argued in 1957 that:[138]

> [S]ome connection with New Zealand is essential. Parliament has the power to legislate for the peace, order and good government of New Zealand, and the Act must be interpreted in the light of the legislative competence of Parliament. The Adoption Act should not be construed as empowering the Court to make an adoption order where persons resident and domiciled abroad come to New Zealand solely for the purpose of obtaining an order of adoption in New Zealand. Nor should it be considered that there is an appropriate connection with New Zealand if the sole connecting factor is the New Zealand citizenship of any of the parties.

135 In terms of jurisdiction, section 3 would allow New Zealand to be used as a 'clearing house' for adoptions. This could be seen as undesirable: if persons are unable to adopt in their own country, should New Zealand provide an easy alternative? The United Kingdom, by contrast, imposes a residency requirement on applicants for adoption.[139]

136 However, there is no evidence that this provision has been misused. For this reason our preliminary view is that it is unnecessary to impose limitations on the jurisdiction of the Family Court. Perhaps the Court should entertain an ultimate discretion to allow non-citizens or non-residents to adopt a child in New Zealand, and exercise it if it sees fit. Factors to consider might include whether there is some material connection to New Zealand.

Should section 3 remain unencumbered by residency requirements?

Should a list of factors to consider be provided?

If so, what factors?

[138] Campbell, above n 51, 175.

[139] Sections 14(2) and 15(2) Adoption Act 1976 (UK).

Prospective adoptee

137 Section 3 of the Adoption Act allows children who are not domiciled in New Zealand to be adopted under New Zealand legislation. This provision was not amended when the Adoption (Intercountry) Act 1997 (the 'Adoption (Intercountry) Act') was enacted and would appear to allow adoptions to occur without benefit of the safeguards provided by the Adoption (Intercountry) Act and the Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption (the 'Hague Convention'). This should be clarified, as section 3 could potentially be interpreted so as to render the provisions of the Adoption (Intercountry) Act a dead letter.

RECOGNITION OF AN OVERSEAS ADOPTION

138 None of the following comments are intended to apply to adoption orders made in another state in favour of applicants who are citizens (or residents) of another state. If a family comes to New Zealand and one or more of their children have been adopted according to the laws of another state and those laws are sufficient to satisfy the requirements of section 17, then that adoption is recognised in New Zealand.

139 Section 17 of the Adoption Act provides that where a person has been adopted in another country, and that country is not a Hague Convention State,[140] then the adoption shall have the same effect as an adoption order validly made in New Zealand if:[141]

- the adoption is legally valid according to the law of that place; and
- in consequence of the adoption the adoptive parents would have a right superior to that of any natural parent[142] of the adopted person in respect of custody of that person; and either:
- the adoption order was made by a court, judicial or public authority in a Commonwealth country or in the United States or any other country which the Governor-General by Order-in-Council may prescribe; [143] or
- in consequence of the adoption, the adoptive parent(s) had, immediately following the adoption, a right superior to or equal with that of any natural parent in respect of any property the adopted person was capable of passing

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[140] As at 1 September 1999, Uruguay, the United Kingdom, the United States, Switzerland, Luxembourg, Italy, Ireland, Germany, Belarus, Belgium, Slovakia, Panama and Portugal had signed but not yet ratified the Convention; Mexico, Romania, Sri Lanka, Cyprus, Poland, Spain, Ecuador, Peru, Coast Rica, Burkina Faso, The Philippines, Canada, Venezuela, Finland, Sweden, Denmark, Norway, The Netherlands, France, Colombia, Australia, El Salvador, Israel, Brazil, Austria and Chile had ratified the Convention; and Andorra, Moldora, Lithuania, Paraguay, New Zealand, Mauritius, Burundi, Georgia and Monaco had acceded to the Hague Convention (http://www.hcch.net/e/status/adoshte.html).

[141] Section 17(2) Adoption Act.

[142] Section 17(2)(b) Adoption Act. The Governor-General, by Order-in-Council, has deemed the following countries to be approved Countries for the purposes of s 17(2)(c)(i) Adoption Act: Australia, Austria, Belgium, Brazil, Bolivia, Canada, China, Cook Islands, Denmark, England, Fiji, France, Ghana, Hong Kong, India, Kenya, West 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 and Tobago, Tuvalu, Ukraine, United States of America, Vanuatu, Venezuela, Zimbabwe, Zambia.

[143] Section 17(2)(c)(i) Adoption Act.

to parents in the event of the adopted person dying intestate without any other next of kin.

Section 17 does not apply to an adoption by a New Zealand citizen which takes place in a Hague Convention State. Such adoptions are now governed by the provisions for recognition contained in s 11 of the Adoption (Intercountry) Act.

Intercountry adoption

140 The Adoption (Intercountry) Act came into force on 1 January 1999. It provides that, subject to the provisions of the Act, the provisions of the Hague Convention have the force of law in New Zealand.[144] The Hague Convention applies to the intercountry adoption of children between states that are parties to the Hague Convention. Adoptions of overseas children by a New Zealand resident will not be recognised unless they are made in accordance with the Hague Convention.

141 The Hague Convention establishes safeguards to ensure that the child is adoptable, that placements within the child's country of origin are unavailable, that informed consent from the necessary persons or institutions has been obtained freely and legally, that persons giving consent have been counselled if that is necessary, and that, having regard to the age and maturity of the child, the child has been counselled and consideration has been given to the child's wishes and opinions.[145] Competent authorities in the receiving State must ensure that the prospective adoptive parents are eligible and suitable to adopt, that they have been given any necessary counselling, and that the child is or will be authorised to enter and reside permanently in that State.[146] Article 30 provides that the authorities of a Contracting State shall ensure that information held by them about the child's origin is preserved, particularly information concerning the identity of the child's parents, and the child's medical history. Procedural requirements are set out in the Hague Convention to ensure that practical effect is given to the safeguards.[147]

Recognition of overseas adoptions by New Zealanders in non-Hague Convention States

142 Adoptions by New Zealanders of a foreign child in a foreign country that is not a Hague Convention State are not made with any of the safeguards of the Hague Convention. No doubt most children adopted overseas do end up in suitable homes, but the existing law provides no assurance that this will be the ultimate result. In 1996 a case was brought to media attention involving a prominent Hawkes Bay clergyman who had adopted 19 children from foreign countries over a five year period, in groups of up to six children. Sixteen of those children had complained of sexual or physical abuse. The adoptive father was found guilty of sexual offences relating to three of the children.[148]

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[144] Section 4.

[145] Article 4.

[146] Article 5.

[147] Articles 14–22.

[148] J Couchman "Intercountry Adoption in New Zealand – A Child Rights Perspective" (1997) 27 VUWLR 421, 431.

143 The court has no discretion to refuse to recognise an adoption if it complies with the provisions of section 17. By way of contrast, the Adoption (Intercountry) Act gives a judge (with the prior approval of the Attorney-General) the discretion to refuse to recognise an overseas adoption subject to such terms and conditions as the judge thinks fit.[149] Statistics suggest that many people wishing to adopt a child from a foreign country choose to adopt from non-Hague Convention countries where there are fewer hurdles to intercountry adoption. In 1990 and 1991, prior to ratification of the Hague Convention by Romania, New Zealanders adopted 159 Romanian children. Since the ratification of the Hague Convention, New Zealanders have adopted only six Romanian children. As the frequency of such adoptions in Romania decreased dramatically, they increased equally dramatically with respect to Russia, which as yet has not signed the Hague Convention. In the 14-year period 1980–1994 there were 76 intercountry adoptions between New Zealand and Russia. In the five-year period 1994–1999 there were 298 such adoptions. Couchman notes that section 17 may fail to prevent:[150]

> 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 birth 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.
>
> These are all factors which New Zealand's domestic adoption practices have sought to prevent through law and policy.

United Kingdom approach to recognition

144 The United Kingdom Adoption Act 1976 provides for recognition of defined overseas[151] and regulated[152] adoptions and deems that they have the same incidents and effects as if the order were made in the United Kingdom.[153]

145 The courts in the United Kingdom have a broad discretion when dealing with these adoptions. Overseas and regulated adoptions may be denied recognition or declared invalid if the adoption is held to be contrary to public policy: for example, where the law of the other state differs greatly from that of the United

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[149] Sections 11(3), 11(4) and 11(5) Adoption (Intercountry) Act.

[150] Above n 148, 432.

[151] An overseas adoption is an adoption made in a country that has been specified by Order-in-Council.

[152] A regulated adoption is an adoption made in accordance with the Hague Convention on Adoption (1965). This Convention governs choice of law issue relating to adoption between the United Kingdom and Austria and Switzerland.

[153] See PM North and JJ Fawcett *Cheshire and North's Private International Law* (12th ed, Butterworths, London, 1992) 765–766 [*Cheshire and North*].

Kingdom, or if the authority which purported to authorise the adoption was not qualified to do so.[154] The authors of Dicey and Morris *The Conflict of Laws* comment that:[155]

> [A]part from exceptional cases . . . it is submitted that the court should be slow to refuse recognition to a foreign adoption on the ground of public policy merely because the requirements in the foreign law differ from those of the English law.

146 The courts may also choose to deny recognition in relation to the incidents of adoption and the effect of the adoption on the status of the parties (ie whether a new parent/child relationship had been created at all). Thus there is a distinction between recognising an adoption and giving effect to its result.

147 In addition to statutory rules, common law also governs the recognition of overseas adoptions. The private international law principles relating to recognition of overseas adoption orders were discussed in the Court of Appeal decision *Re Valentine's Settlement*.[156] Lord Denning MR stated that the United Kingdom courts would recognise an adoption order made in another country if the adopting parents were domiciled in that other country at the time of the adoption, and if the adoptive child were resident there.[157] Salmon J observed that recognition should not be refused lightly:[158]

> It seems to me that we should be slow to refuse recognition to an adoption order made by a foreign court which applies the same safeguards as we do and which undoubtedly had jurisdiction over the adopted child and its natural parents.

Reform for New Zealand

148 The commentary of the Commerce Select Committee when it reported to the House of Representatives on the Adoption Amendment Bill (No 2)[159] observed that Professor Angelo[160] had argued that section 17 of the Adoption Act should be amended to prohibit overseas adoption without the prior approval of the Director-General of Social Welfare, in order to ensure children in non-Hague Convention countries were afforded protection from the risks we identified in paragraph 143. The Select Committee commented that this was outside the scope of the Bill, but was a matter that might be considered during a review of the Adoption Act.

149 Clearly there are inconsistencies in New Zealand's current approach to intercountry adoption. Children who are being adopted from Hague Convention States are afforded greater protection than children adopted from other states. Considering New Zealand's commitment to the principles of the Hague Convention, we should consider various ways of reconciling the two approaches in order to protect the children involved.

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[154] Section 53(2)(a) Adoption Act 1976 (UK); *Cheshire and North*, above n 153, 766.

[155] L Collins (ed) *Dicey & Morris The Conflict of Laws* (12th ed, Stevens and Sons Ltd, London, 1992) 898.

[156] [1965] Ch 831, 842.

[157] Above n 156, 843.

[158] Above n 156, 852.

[159] Renamed the Adoption (Intercountry) Bill 1997.

[160] Professor of Law, Law Faculty, Victoria University of Wellington.

150 This issue could be partially resolved if adoptions made by New Zealand citizens in non-Hague Convention states were not recognised unless procedures akin to those contained in the Hague Convention were observed. A licensing regime akin to that created by the Adoption (Intercountry) Act could authorise agencies to conduct such adoptions; in the case of non-Convention states, additional criteria might need to be added as there may not be a similar agency set up for screening to deal with in the other state. Extra obligations might need to be imposed on agencies in this country, in order to ensure compliance in both countries with the principles of the Hague Convention. By imposing such procedures, there could be assurance that a child being adopted from or in a non-Hague Convention state is free to be adopted, that the child's parents have given free and informed consent to an overseas adoption, and that the prospective adoptive parents have been screened for suitability.

151 An alternative could be to allow the Family Court to assess an overseas adoption order and confirm its validity. This would be similar to the United Kingdom approach, and could allow a court to determine whether appropriate consents had been sought and to assess the adoptive parents. The difficulty with this approach is that the adoption has already occurred, and the child has already been transferred to another country. Refusing to recognise the adoption at this stage could have serious implications for the welfare of the child.

Should non-Hague Convention State intercountry adoptions by persons domiciled in New Zealand be recognised?

Should recognition depend on whether prior approval for the adoption has been given by the Director-General of Social Welfare?

Should such adoptions be regulated by procedures akin to those contained in the Hague Convention?

Should adoptions made in non-Hague Convention States by New Zealand citizens be subject to confirmation by the New Zealand Family Court?

Citizenship and the Adoption Act

152 Intercountry adoption is frequently used to circumvent New Zealand immigration laws, to allow the adoptee to secure a New Zealand citizenship. Section 3(2) of the Citizenship Act 1977 ('Citizenship Act') confers New Zealand citizenship upon:

- Children who have been adopted by a New Zealand citizen in New Zealand by an adoption order made under the Adoption Act.
- Children who are adopted outside New Zealand by New Zealand citizens by an adoption to which section 17 of the Adoption Act applies and either the adoption took place before the commencement of the Citizenship Amendment Act 1992, or the child was under the age of 14 at the time that the adoption order was made.
- Children adopted by New Zealand citizens in accordance with the Hague Convention.

153 Prior to the Citizenship Act, adoption by a New Zealand citizen did not confer New Zealand citizenship on the adopted child. Section 16(2)(e) of the

Adoption Act provided that an adoption shall not affect the race, nationality or citizenship of the adopted child. To obtain citizenship, the adopter had to apply under section 9 of the British Nationality and New Zealand Citizenship Act 1948 to register the child as a New Zealand citizen.

Conferring citizenship

154 The automatic conferment of citizenship upon an adopted child of a New Zealand citizen may cause problems when adoption is used to circumvent immigration laws and to secure New Zealand citizenship for the child. A number of cases involving such motivation have been heard in the Family Courts.[161] The situation arises most often in the context of adoption by New Zealand citizens of family members who are citizens of another state, to secure New Zealand citizenship.[162]

155 A new adoption statute could contain a provision to the effect that the Court may decline an application for adoption where it considers that citizenship is the primary motivation for adoption. This option is not straightforward. It may not be possible to ascertain the primary motivations behind an application for adoption – issues of citizenship may not be separable from educational and quality of life issues.[163]

156 Consideration should also be given to whether adoption is the most appropriate option; guardianship may be preferable in cases where the child will be cared for by extended family, or where legal adoption is not part of the child's culture.[164] Perhaps where the Immigration Service receives an application for citizenship for a child who has a New Zealand guardian, lenient criteria might be more appropriate than in other cases, so as to remove the need for intra-family adoption.

157 Alternatively, some immigration problems could be resolved by reverting to the pre Citizenship Act approach, requiring an application for citizenship rather than automatically conferring citizenship by descent when an adoption order is made. The disadvantage of the pre 1977 approach is in the potential for genuinely motivated adoptions to be thwarted by an overly rigid application of immigration policy. This might also deter some people from adopting overseas, since adoptions by New Zealanders made in an overseas country would

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[161] See Judge Mahony's comments in *Re an Adoption by L and L* (1984) FRNZ 144 (FC) where he remarked that where adoption is sought only to secure immigration status or citizenship the order will not be granted. See also *Re Application by Nana* above n 112; *Re Adoption of Patel* [1992] NZFLR 512 (FC); *Application by Webster* [1991] NZFLR 537 (FC); *Adoption Application by T* [1999] NZFLR 300 (FC).

[162] See *Adoption Application by T* above n 161, a case involving the proposed adoption of a 19-year-old Tongan man by his relatives. Judge Mather adjourned the application to allow the Immigration Service to consider accepting the young man as a permanent resident pursuant to a guardianship order. Note also that this can occur in the reverse – Children, Young Persons, and Their Families Agency (CYPFA) has also observed its use in the context of emigration. An adoption by a step-parent for example could be used in order to gain the benefits of that step-parent's citizenship. This has occurred particularly in relation to obtaining United Kingdom or American citizenship.

[163] See cases discussed at n 161.

[164] See cases discussed at n 161.

risk not automatically conferring citizenship rights upon the adopted child. The Hague Convention requires that the child is or will be authorised to enter and reside permanently in the receiving state.[165] To avoid uncertainty, an application for adoption under New Zealand legislation of a foreign child could be made subject to a determination of citizenship status by the Immigration Service.

Should there be a legislative provision requiring or permitting a judge to reject an adoption application where citizenship is the primary motivation for the adoption?

Should adopters be required to lodge an application for citizenship for the child with the Immigration Service?

Should change of citizenship be a factor in considering whether an adoption order should be made?

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[165] Article 5(c).

6
Who may be adopted?

AGE

158 NEW ZEALAND HAS SUPPORTED the UN Declaration on Child Placement.[166] This declaration states that the primary purpose of adoption is to provide a child with a permanent family.[167]

159 At present any person under (and in some cases over) the age of 20 years[168] may be adopted. Whether an adult needs to be adopted is doubtful. Where the upper age limit is so high, other motivations often become apparent, such as to secure citizenship status.[169]

160 The maximum age for adoption could be fixed to the maximum age for which child support is payable.[170] The Child Support Act 1991 ('Child Support Act') links the upper age limit to a stage when a person is considered to be independent of that person's parents.

161 Alternatively, New Zealand could adopt the approach taken in the United Kingdom,[171] Victoria,[172] Western Australia,[173] New South Wales,[174] and Northern Territory[175] which restricts adoption to those who are under the age of 18; but in the case of a young person who has been brought up by or maintained by the applicant(s) and/or their spouse, allows an adoption after that person has reached the age of 18.

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166 See above n 124.

167 Article 13.

168 Where the application is made before the person turns 20 it may proceed after the person turns 20. See section 2 Adoption Act.

169 See for example, *Adoption Application by T*, above n 161.

170 19 years – see section 5 Child Support Act 1991.

171 Section 72 Adoption Act 1976 (UK).

172 Section 10 Adoption Act 1984 (Vic).

173 Section 4 Adoption Act 1994 (WA).

174 Section 6 Adoption of Children Act 1965 (NSW).

175 Section 12 Adoption of Children Act 1995 (NT).

What should be the maximum age at which a person can be adopted?

Should adult adoption be allowed in exceptional circumstances?

MARRIAGE

162 The Adoption Act allows the adoption of a married person.[176] Allowing married persons to be adopted expresses a different policy from that of sections 9C and 21 of the Guardianship Act which provide that guardianship rights terminate upon the marriage of a child. The principles of the UN Declaration on Child Placement raise the question of whether it is necessary to permit a person to be adopted once the law has recognised that person's entitlement and ability to live independently. Marriage may provide a suitable conclusion to status as a child.

163 In *Re E* the applicant had been adopted by her mother and stepfather without her knowledge; by law her consent to the adoption was not required.[177] Judge Boshier commented that[178]

> It is surprising that the Adoption Act, while recognising in broad terms a child's welfare, contains no express provision restricting adoption in the event of marriage.

The Judge indicated that had the Magistrate known that the woman was married, he would not have granted the order in the absence of strong support from the woman.

164 Our tentative view is that a married person should be treated in the same way as a person over the age of 20 (or any other maximum age that might be set) for the purposes of adoption legislation.

165 The fact that an increasing number of young people live in de facto relationships requires consideration in the present context. Difficulties of proof may require such relationships to be disregarded.

Should the court be prevented from granting an adoption order in respect of a person who is or has been married?

Should the same restriction apply in the case of a person who is living or has lived in a de facto relationship?

THE IMPLICATIONS OF REFORM ON SUCCESSION RIGHTS

166 Altering the age under which a person can be adopted, and restricting adoption to those who are not married (or living in a de facto relationship) could, in some cases, prevent succession rights from being automatically conferred by

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[176] *Re E* (1991) 7 FRNZ 530 (FC).

[177] Above n 176.

[178] Above n 176, 533.

adoption. However, were adult adoption allowed in circumstances where the adult was raised by the applicants, this difficulty might be resolved.

167 Succession can also be determined by inter vivos disposition or a testamentary disposition. Both of these options are less intrusive ways of achieving a desired outcome. The disadvantage is that a testamentary disposition can be challenged by children of the deceased and this could have a substantial effect on the intended disposition.

Should adoption be used to secure succession rights?

7
Who may adopt?

168 THE LAW CURRENTLY PERMITS the making of adoption applications by single persons and two spouses together.[179] Birth parents may adopt their own children.[180] Age restrictions apply to some of these applicants.[181] The law does not permit applications by de facto couples,[182] same-sex couples, or a male in respect of a female child.[183]

169 In this chapter we consider whether there should be any, and if so what, constraints on the categories of persons who may apply to adopt a child. It has traditionally been the dominant opinion in New Zealand and elsewhere that the most satisfactory form of adoption is by persons whose relationships most closely reflect the 'nuclear family' – a male and female who are married. But the change in the make-up of contemporary society means that for many families this is no longer the norm.[184] It is necessary to examine whether it is desirable for a single person to adopt a child, whether couples in de facto relationships ought to be permitted to adopt a child together and whether couples in same-sex relationships ought to be permitted to adopt a child together. We consider each in turn.

GENDER

170 A male may not adopt a female child unless he is the father of the child or there are special circumstances justifying the proposed adoption.[185] This provision was undoubtedly enacted in an attempt to protect female children from sexual abuse.[186] It constitutes a statutory presumption that it is inappropriate for single men to parent a female child. The Houghton Report commenting on this provision in the previous United Kingdom adoption legislation, observed that "a distinction should be drawn between the legal criteria of eligibility and professional assessment of suitability".[187] A general prohibition against certain classes of persons adopting a child may not be the best approach.

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[179] Section 3(2) Adoption Act.

[180] Section 3(3) Adoption Act.

[181] Applicants must be at least 25 years old and at least 20 years older than the child unless the applicant is a relative of the child, in which case the applicant must be 20 years old. No age restriction is applied to natural parents: section 4(1) Adoption Act.

[182] See discussion below at paragraphs 173–178.

[183] Section 4(2) Adoption Act.

[184] See the discussion on the formulations of family relationships in contemporary society, above paragraphs 9–12.

[185] Section 4(2) Adoption Act.

[186] See the debate at (22 July 1881) 40 NZPD 7.

[187] Houghton Report, above n 9, 21.

171 Social Welfare screens most applicants for suitability to adopt, and is appropriately placed to make an assessment on an individual basis. While it is the welfare of the child that should predominate, this general prohibition may be viewed as a form of gender discrimination against the male adopter (and perhaps the female adoptee).[188] Consideration is warranted as to whether a general prohibition against adoption of female children by males is necessary where both the court and Social Welfare specifically approve the adoption.

> Is section 4(2) of the Adoption Act still necessary or appropriate?

MARITAL STATUS

172 As noted earlier, the Adoption Act allows a person alone, and spouses together, to adopt a child.[189] The use of the term 'spouse' has posed problems for couples in de facto and same-sex relationships who want to adopt a child.

De facto couples

173 The Adoption Act allows only married couples to adopt. In 1955 it was unlikely that the legislature would have contemplated permitting adoption by unmarried couples.[190] However, over the past 45 years social mores have changed quite dramatically. A significant number of New Zealand children are raised in de facto relationships.[191] The rate of marriage dissolution is rising. The prospect of separating or divorcing is likely to be higher still for second marriages.[192]

174 Single persons can adopt a child, and some de facto couples skirt the apparent prohibition on de facto couples adopting by having one partner apply as a single person to adopt the child. Some judges have adopted a more flexible approach to the issue of whether de facto couples are able to adopt. In *Re Adoption by Paul and Hauraki*[193] a couple living in Māori customary marriage[194] successfully applied to adopt their niece. In that case Judge Boshier stated that:[195]

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188 Section 21(1)(a) of the Human Rights Act 1993.

189 Section 3(1), (2) and (3) Adoption Act.

190 The debate preceding the passage of the Adoption Bill contrasted unmarried mothers with adoptive parents. There was an unspoken presumption that adoptive parents would be a married couple (26 October 1955) 307 NZPD 3349.

191 The 1996 Census data reveals that 8.17 percent of New Zealand families with children are headed by a de facto (opposite-sex) couple.

192 Johnston, above n 15, 40 citing from Institute of Family Studies Paper *Legal Status and Family Relationships of Children in Step-families – the legal options* (Institute of Family Studies Paper, Conference of Welfare Administrators, Alice Springs, October 1982) 16. Unfortunately, census data does not measure the rate of breakdown of second marriages / relationships.

193 [1993] NZFLR 266 (FC).

194 The couple deposed that they lived together in a traditional Māori marriage. In making this ruling, Judge Boshier emphasised the couple's commitment to Māori culture. However, the judgment did not discuss the nature of Māori customary marriage or the status given to such marriage by law. For a discussion of Māori customary marriage, see 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, 1998) 19–20.

195 *Paul and Hauraki*, above n 193, 271.

> A "spouse" outside marriage is not specifically excluded in terms of section 3 of the Adoption Act. Depending on context, it is appropriate to include partners to a de facto relationship as "spouses". In pieces of social legislation that may be all the more important . . . For the purposes of the Adoption Act 1955, I am of the view that marriage is not a prerequisite to definition of "spouse" and that the Court is entitled to look at the actual relationship in question to see whether it is of such an enduring and stable nature to enable the word "spouse" to be applied to the partners to that relationship.

175 The issue of whether de facto couples may adopt a child as a couple is still not resolved. In *Re T W [adoption]*[196] a Pākehā/Māori couple who had lived in a de facto relationship for 10 years were allowed to adopt a child. Three months after *Re T W* was decided a similar application came before Judge Inglis. He disagreed with the decision in *Re T W*, holding that it was an unwarranted extension of the point decided in *Paul and Hauraki*, which he stated was restricted to situations involving a Māori customary marriage. He concluded that it was not possible to change the meaning of terms in statutes simply because society's values had changed. He stated that "the Court is forbidden by Parliament to entertain a joint application for adoption by two people who are not married".[197] The legality of these adoptions in New Zealand should be clarified. Some Australian state legislation permits de facto couples to adopt, subject to their having been in a relationship for a certain period. [198]

176 A consideration of whether de facto couples should be allowed to adopt raises a question of principle. In the case of couples, married or not, who are the birth parents of a child, there is an indelible physical link to the child, even if there is no legal link between the parents.

177 In the case of married adopters there is a double legal tie which may be said to add to the security of the position of the adopted child: the relationship of marriage; and the adoption order. While there is a substantial incidence of marriage dissolution, the formality of two legal acts provides a powerful legal relationship between each spouse and the adopted child.

178 In the case of those who decline to enter a marriage relationship but who wish to adopt, issues arise concerning the interests of children generally, and of the particular child, and whether:

- qualification to adopt should be declined for that reason; or
- such status should be a factor to take into account in considering the potential future stability of the relationship and thus the security of the child.

We seek responses.

> Should the Adoption Act treat married and de facto applicants in the same way?
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> Should there be a requirement that de facto couples have lived together for a certain amount of time prior to seeking to adopt? If so, for how long?

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[196] (1998) 17 FRNZ 349 (FC).

[197] *In the matter of R (adoption)* [1998] NZFLR 145, 159 (FC).

[198] See section 11 Adoption Act 1984 (Victoria); section 19(1A) Adoption of Children Act 1965 (New South Wales); section 12 Adoption Act 1988 (South Australia); section 18 Adoption Act 1993 (Australian Capital Territory).

Same-sex couples

179 In the case of same-sex relationships similar issues arise. It may be said that the absence of one or other sex within the adopting parents' relationship removes that relationship further from the paradigm.[199] The question is as to the significance of that absence.

180 Same-sex couples cannot adopt a child together under the current law. There have been calls to allow persons in same-sex relationships to be permitted to adopt children as a couple.[200]

181 It is desirable to acknowledge at the outset of this discussion that New Zealanders hold a range of opinions upon issues concerning same-sex relationships. Such opinions are honestly held and require careful consideration. The views now expressed are advanced tentatively to seek response.

182 The Wolfenden Report's[201] conclusion that homosexual relationships are not the law's business has been increasingly adopted by the legislature and the judiciary.[202] In New Zealand, section 21(1)(a) of the Human Rights Act 1993 (the 'Human Rights Act') confers the right not to be discriminated against on the basis of sexual orientation. A further issue is whether, and if so to what extent, the law should provide for the consequences of homosexual relationships.[203]

183 These factors are important to take into account in relation to whether same-sex couples should be eligible to apply for adoption. But adoption is not primarily about the rights of applicants for adoption, important though those are; it is about the best interests of the child. We have therefore thought it desirable to look beyond that general expression of Parliament's will to the available evidence and to its application in the present context. We offer for consideration the proposal that sexual orientation towards the same gender should not constitute a general disqualification for making an adoption application.

Adoption by a same-sex couple to regulate the child's status

184 The advent of assisted reproductive technology means that it is no longer necessary to have heterosexual intercourse to conceive a child. In New Zealand and elsewhere some lesbian couples have made a decision that they would like to raise a child together, and one of the partners is artificially inseminated with donor sperm. The birth mother is the child's legal mother, but her partner has

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[199] In 1996 there were 3,255 same-sex couple families of which 571 had dependent children living with them. This is of a total pool of 949,497 families living in private dwellings, as measured by the 1996 Census. See Statistics New Zealand *Census 1996: Families and Households* (Statistics New Zealand, Wellington, 1998) 39.

[200] See comments in the Evening Post, Thursday 5 August, 1999.

[201] HMSO *Report of the Committee on Homosexual Offences and Prostitution* (HMSO, London, 1957) [the Wolfenden Report].

[202] See *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA), especially Thomas J's dissenting judgment. See also *Re W (A Minor) (Homosexual Adopter)* [1997] 3 WLR 768 (HC); *Re AMT (Known as AC) (Petitioners for authority to adopt SR)* [1997] Fam Law 225 (Sc); *Fitzpatrick v Sterling Housing Association Ltd* [1997] 4 All ER 991 (CA); *Re K and B* [1995] 125 DLR (4th) 653 (Ontario Court Provincial Division).

[203] See Law Commission *Succession Law: A Succession (Adjustment) Act* (1997) NZLC R39.

no biological or legal relationship to the child. The threshold question is whether it is in the child's best interests to permit the same-sex partner of the mother to adopt the child.

185 There are several ways that the status of the child and the status of the birth mother's partner could be regulated. One option would be to make the Status of Children Amendment Act 1987 neutral as to sexual orientation. This Act applies to heterosexual couples who have a child with the assistance of donor sperm or ovum, and deems the parents of the resulting child to be the birth mother and her spouse (if he consented to the insemination). It would be a simple step to extend this statute to lesbian couples who conceive a child through assisted reproductive technology.

186 A second option would be for the lesbian partner to be treated in the same way as a step-parent adopter. This would entail such a partner applying to adopt the child with the support of the natural mother. We discuss the issues relating to step-parent adoption in more detail in paragraphs 198–207.

187 The third option would be to retain the status quo, whereby the partner can be appointed as a guardian of the child.[204] This has the disadvantage of not automatically conferring succession rights and is perceived as being less permanent than adoption.[205]

188 These options are not available to male same-sex (gay) couples. A gay couple wishing to raise a child together may be reliant on surrogacy to enable the conception and birth of a child who is biologically related to one of the partners.

> Should the Status of Children Amendment Act 1987 be amended to allow lesbian couples to be treated as parents?
>
> Should lesbian co-parents be treated in the same way as step-parents?; or
>
> Should the status quo be retained?

Applying to adopt generally

189 We have observed that the crux of any discussion about whether same-sex couples should be allowed to adopt a child together is the welfare of the child. Because so few jurisdictions allow same-sex couples to adopt a child together, we draw on research conducted into the experiences of children with gay and lesbian parents.

190 The main concerns that have been expressed about the parenting of children by same-sex persons are:

- that the child will be predisposed to homosexuality;
- that the child will be more prone to develop psychiatric problems;
- about a lack of appropriate role models; and
- about stigma and harassment by peers.

We address each issue in turn.

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[204] *Re an application by T*, above n 14.

[205] See discussion in Appendix B for the disadvantages of guardianship as compared with adoption.

191 The concern that a child will be predisposed to homosexuality is based upon the premise that homosexuality is itself undesirable. We refrain from making any judgments about this, but the concern must be addressed. Empirical research on children raised by lesbian mothers suggests that these children are no more inclined to become homosexual than children raised by heterosexual parents.[206] A survey of adult sons of gay fathers supports this conclusion.[207] Some scientific analysis, still in its early and controversial stages, suggests that there may be biological rather than environmental reasons for homosexuality.[208] However, studies of children of lesbian mothers do suggest that where these children experience feelings of attraction to a person of the same gender (and they were no more likely to experience this than children raised by heterosexual parents) they are more likely to act on their feelings than children raised by heterosexual parents.[209] This does not mean they ultimately identified themselves as being homosexual, but that they were more inclined to sexual experimentation.[210]

192 The next concern is that children brought up by a gay or lesbian parent are more likely to experience psychological problems. This is based upon findings that some childhood family experiences carry an increased risk of psychiatric problems.[211] Research into the experiences of children raised by lesbian mothers suggests that such children are no more inclined to experience psychiatric or emotional disorders than children raised by single parents.[212] This indicates that a parent's homosexuality alone does not predispose the child to psychosocial disorder.

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[206] 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 ["Do Parents Influence the Sexual Orientation of Their Children"]; 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.

[207] J Bailey, D Bobrow, M Wolfe and S Mikach "Sexual Orientation of Adult Sons of Gay Fathers" (1995) 31 Developmental Psychology 124.

[208] D Hamer, S Hu, V Magnuson, N Hu, A Pattatucci "A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation" (1993) 261 Science 321; S Le Vay and D Hamer "Evidence for a Biological Influence in Male Homosexuality" [1994] Scientific American 20; C Burr *A Separate Creation: How Biology Makes Us Gay* (Bantam Books, London, 1997).

[209] "Do Parents Influence the Sexual Orientation of Their Children?" above n 206.

[210] It is important to note here that these children were raised in an environment where homosexuality was accepted. During this era (children born in the early 1970s) the average heterosexual family may not have been as accepting of homosexuality and this is likely to have influenced the behaviour of the children when they experienced feelings of same-gender attraction. It will be interesting to see whether studies of children born in more recent years and raised in heterosexual environments reveal a different result, given the increased public acceptance of homosexuality.

[211] For example, family discord and disruption and rearing in a single parent household carry increased risks of psychosocial disorder. See 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 [Psychosexual and Psychiatric Appraisal]; F Tasker and S Golombok "Children Raised by Lesbian Mothers: The Empirical Evidence" [1991] Fam Law 184 ["Children Raised by Lesbian Mothers: The Empirical Evidence"].

[212] Golombok, Spencer and Rutter above n 211; 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).

193 A third concern that has been expressed is that children raised by homosexual parents will not have appropriate role models, and as a consequence their psychosexual behaviour may not develop normally. In a lesbian-parent family, for example, there will be no 'father-figure' and the mother does not play a 'normal' female role. A study of children raised by lesbian mothers has concluded that the child's psychosexual behaviour is not altered by the sexual orientation of the mother.[213] Moreover, children raised in such families generally have greater access to a male role model than do children raised in single-mother families – the lesbian mother tends to make a conscious effort to give her child other role models.[214]

194 The final concern, one frequently expressed by the judiciary in contested custody proceedings involving a homosexual parent, is that the child will be exposed to the 'stigma' of homosexuality and will suffer teasing by peers.[215] Tasker and Golombok looked for such an impact in their empirical studies on children raised by lesbian parents. They found that, on the whole, such children experienced no more 'teasing' by peers, and no more severity of teasing, than children raised in a heterosexual family.[216] The children were more likely to perceive a sexual overtone to any teasing than were children from a heterosexual family.[217] Much depended on the extent to which the child perceived the parents as being openly homosexual, and how the parents behaved in the presence of the child's peers.[218]

195 Recent research conducted by Tasker and Golombok into planned lesbian-led families suggests that in these families both parents are more involved in daily caregiving than in heterosexual families. Lesbian-led families were also far more likely to have a coordinated or joint policy on discipline than heterosexual parent families. However this did not appear to influence the child's feelings about the parents. When feelings of warmth towards parents are measured, the perceptions of the children were similar regardless of the family type.[219]

196 Research into these families suggests that the homosexuality of the parents makes little difference to the ultimate welfare of the child, as long as parents exercise quality parenting skills.

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[213] Golombok, Spencer and Rutter, above n 206, 561; "Do Parents Influence the Sexual Orientation of Their Children", above n 206.

[214] Golombok, Spencer and Rutter, above n 206, 557; M Gold, E Perrin, D Futterman and S Friedman "Children of Gay or Lesbian Parents" (1994) 15 Paediatrics in Review 354; CJ Patterson "Children of Gay and Lesbian Parents" (1992) 63 Child Development 1025, 1033–1034; 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, 204.

[215] *VP v PM* above n 14; *B v B (Minors) (Custody, Care and Control)* [1991] 1 PLR 402 (HC) (UK); *In the Marriage of L* (1983) FLC 91–353; *In the Marriage of Doyle* (1992) FLC 90–286 (FC) (Aust).

[216] *Growing Up in a Lesbian Family*, above n 212, 89.

[217] *Growing Up in a Lesbian Family*, above n 212, 90.

[218] *Growing Up in a Lesbian Family*, above n 212, 84–85.

[219] F Tasker and S Golombok "The Role of Co-Mothers in Planned Lesbian-Led Families" (1998) 2 Journal of Lesbian Studies 49.

197 Our preliminary view[220] as to whether same-sex couples should be permitted to adopt a child is that, rather than create a blanket prohibition, such applicants should be assessed on their merits, alongside other potential options for the child. The way in which gay or lesbian people plan to take account of their sexual orientation when raising the child – for example, whether they plan to provide appropriate role models – would be an extra element for a social worker and the court to consider.[221]

> Should applications to adopt by same-sex couples be permitted?
>
> If so, on what terms, if any?

STEP-PARENT / DE FACTO STEP-PARENT ADOPTION

198 Step-parent adoption is currently used in situations where a parent remarries and the parties want the new family relationships to be legally recognised.

Concerns about step-parent adoption

199 Concern has been expressed that step-parent adoption has been used to sever the relationship between the child and the non-custodial parent. The other birth parent will often be a guardian of the child and may also be exercising rights of access. In considering step-parent adoption the Houghton Committee commented[222]

> We suggested in our working paper that it was desirable to recognise openly the fact and consequences of divorce and of death; that one of these consequences is that many children are living with a parent and a step-parent; and that the legal extinguishment by adoption of a legitimate child's links with one half of his own family was inappropriate and could be damaging.

Similarly an English judge has made the following observation:[223]

> It is quite wrong to use the 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.

200 As we have noted earlier,[224] while the current approach in other areas of family law favours maintaining links between children, their parents and extended family networks, once an adoption order has been made the existing parents of

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[220] Based on the research discussed above in paragraphs 191–196.

[221] Tasker and Golombok observe that "[e]mpirical evidence demonstrates that the mother's sexual orientation does not appear to influence the child's wellbeing. Legal decisions concerning where the child should reside . . . should focus instead on the quality of parenting" in "Children Raised by Lesbian Mothers: The Empirical Evidence", above 211, 187.

[222] Above n 9, 29.

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

[224] Above at paragraphs 33, 86–91, Appendix B.

a child cease to be the legal parents.[225] In the absence of guardianship or legal parenthood the court has no jurisdiction to award or enforce access. Step-parent adoption leaves a non-custodial parent without any legal rights of custody or access to the child. Such an adoption leaves the child with only one side of a family; the other birth parent's family is legally pruned away.

201 The Guardianship Act allows the court to appoint a person as an additional guardian, without derogating from the rights of existing guardians.[226] A step-parent could be made a guardian or joint guardian, whilst maintaining the legal status and rights of the non-custodial parent. Appointing the step-parent as a guardian could be preferable to making an adoption order. *Butterworths Family Law in New Zealand* notes that:[227]

> Adoption is not an accurate expression of what normally happens in the formation of a stepfamily. In reality the child acquires a new day-to-day parent and the role of the absent natural parent changes but does not come to an end . . . The most accurate legal expression of the reality of a step-parent family would be guardianship. Although the failure of guardianship to give "ownership" may render it less satisfactory from the applicants' perspective, this should not be allowed to obscure the child's interests. 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.

202 Some of the practical concerns about the effect of step-parent adoption upon access might be allayed if open adoption were practised. However, the Adoption Act redefines family links and this has the effect of severing the child's legal links with other family members. In the absence of a means of ensuring that contact between non-custodial parents will be observed, perhaps step-parent adoption should be permitted only where it is in the best interests of the child and where guardianship or custody orders would not be a more appropriate solution.

203 One argument against restricting step-parent adoption is that children who are adopted are better cared for than children who are cared for by a guardian. We have no evidence to suggest that children who are cared for by a parent and a step-parent pursuant to a guardianship order are less well cared for than children who are adopted by the parent and a step-parent.

204 There may be cases where it is in the child's best interests not to have contact with a birth parent. In cases where the birth parent has had little or no contact with the child, it may best serve a child's interests to allow step-parent adoption. The law should be cautious about severing the birth parent-child relationship.

Should there be a presumption that a step-parent may only adopt where this is clearly preferable to being appointed an additional guardian?

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[225] Section 16 (2)(a) Adoption Act.

[226] Section 8 Guardianship Act.

[227] Webb et al *Butterworths Family Law in New Zealand* (8th ed, Wellington, 1997) 1186.

Succession issues and step-parent adoption

205 The result of a presumption against step-parent adoption in favour of guardianship is that children of a former relationship may not have the same rights of succession[228] as their half-siblings from the subsequent relationship. This difference could create undesirable friction within the family unit. This may be one reason why adoption might be preferred to guardianship in some cases.

206 Where a step-parent/step-child relationship exists, the step-child is entitled under section 3 of the Family Protection Act 1955 (the 'Family Protection Act') to make an application for provision out of the estate of the step-parent where that step-child was "being maintained wholly or partly or was legally entitled to be maintained wholly or partly by the deceased immediately before his death".[229]

207 The definition of a step-child in the Family Protection Act precludes claims by a step-child who was born to parents who never marry; furthermore, the deceased step-parent must have been the legal spouse of the step-child's birth parent. This definition excludes children of de facto relationships.[230]

> Should the automatic conferral of equal succession rights with half-siblings be considered a legitimate reason for step-parent adoptions?

Adoption by birth parent in step-parent adoptions

208 In a step-parent adoption, the existing[231] parent must consent to the adoption of his or her child, and then apply together with his or her spouse to adopt the child. A birth parent's legal relationship to the child will be changed from a natural to an adoptive relationship. In our view it is unnecessary for a birth parent to adopt their own child. Australian adoption legislation requires an application to adopt from the step-parent only, and does not terminate the existing parental rights and responsibilities of the birth parent whose partner is seeking to adopt.[232]

209 The birth parent has to give consent to the child being adopted, whether by the step-parent, or another person. Perhaps a better way of dealing with such applications would be for the birth parent (or existing adoptive parent) to file a document in support of the proposed adoption of the child by their spouse. In this way the existing parent's legal rights would not be extinguished and replaced; but the step-parent could be recognised as a legal parent.

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[228] If the step-parent does not think to, or decides not to, include the children of a former relationship in his or her will.

[229] Section 3(1)(d).

[230] Section 2 Family Protection Act 1955.

[231] We use the term existing parent because that parent may be a natural parent or an existing adoptive parent who has re-partnered.

[232] See section 11(2) Adoption Act 1984 (Victoria); section 15(4) Adoption of Children Act 1995 (Northern Territory); section 18(1) and (2) Adoption Act 1993 (Australian Capital Territory); section 67 Adoption Act 1994 (Western Australia).

In step-parent adoptions, is it necessary for an adoption order to terminate the rights and responsibilities of the existing parent whose spouse is seeking to adopt the child?

If not, should the existing parent simply be required to endorse or support the application without giving up existing rights and responsibilities in respect of the child?

ADOPTION OR CARE BY FAMILY MEMBERS

Consultation and placement

210 We have observed that families have a legitimate interest in the care of family members.[233] The CYP&F Act operates on the assumption that wherever possible the care and protection issues of their children and young persons should be resolved by their own family, whanau, hapu, iwi and family groups.[234]

211 The Adoption Act does not encourage family members to become involved in deciding whether the child should be placed in another home or adopted. In this respect it is inconsistent with the CYP&F Act and New Zealand's obligations under the UNCROC.[235]

212 Where a birth parent agrees that the family group should be consulted, adoption law should facilitate this. Social workers should investigate whether members of the family group could provide a suitable home for the child. Children are best cared for within a happy, stable family. Where that family is related the child benefits by retaining its sense of family connection, and where the child already knows the family members the readjustment process for the child will be made easier. In such cases the applicants should be assessed in accordance with the criteria for any placement under the CYP&F Act or Guardianship Act.

Should there be a legislative 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?

Should there be a legislative requirement that the Family Court Judge inquire whether placement within the family group has been considered?

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[233] Above paragraphs 86–91, 199–204.

[234] Sections 2, 4, 5 CYP&F Act. Section 2 defines family group as:

a family group including an extended family,—

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

(i) With whom the child or young person has a significant 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 group.

[235] Article 5 UNCROC, see Appendix C.

Guardianship or adoption?

213 The form of care provided within a family can have important consequences. Although adoption creates a more permanent legal relationship than does guardianship, it severs and distorts family relationships. We observed earlier that guardianship is a less intrusive means of legally recognising the arrangement.[236] Consideration should be given to creating a presumption that guardianship should be used to regulate the care of a child by family members, unless adoption is clearly preferable.[237]

> Should there be a presumption that guardianship or custody be used to regulate the care of the child by family members, rather than adoption?

Succession issues

214 If guardianship is used as an alternative to adoption one of the resulting practical differences is that the child's rights of succession are not changed. As we noted earlier in our discussion of step-parent adoptions, specific dispositions may be made in a will.

A PARENT ALONE

215 Section 4(1)(c) provides for the adoption of a child by either of the birth parents alone. When the Act was introduced in 1955 this was a mechanism by which a parent could legitimise his or her illegitimate child. Upon the introduction of the Status of Children Act 1969, the legitimisation of children by adoption became unnecessary.[238] We have found no reported cases of adoption by a birth parent alone.[239] There now appears to be little reason to use this provision other than to deprive the other parent of access rights.[240]

> Should the provision for adoption by a parent alone be removed from the Adoption Act?

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[236] Above paragraph 42; paragraphs 201–202.

[237] This approach was recommended in the Houghton Report, above n 9, 30–31; NSWLRC R8, above n 95, 98–114.

[238] See Webb, above n 2, 14–16; Department of Justice, above n 3, 12; Webb et al, above n 227, paragraph 6.708.

[239] This is not to say that such cases have not occurred. Social Welfare would not record such cases as a natural parent does not have to apply to Social Welfare for permission to adopt. Court records are sealed and so we are unable to verify whether there have been any adoptions by a parent alone.

[240] See the Houghton Report, above n 9, 27–28 which reaches the same conclusion.

8
Consent

CONSENT OF THE BIRTH PARENTS

Mother's consent

216 THE CHILD'S PARENTS AND GUARDIANS must consent to the adoption of the child,[241] unless their consent has been dispensed with under section 8 of the Adoption Act.[242] This does not necessarily mean that both the mother and father of the child are required to give consent. A father's consent will be required only if he was married to the child's mother at the time of the child's birth or after the time of conception,[243] or where the father is a guardian of the child.[244] The mother is the sole guardian of a child where:[245]

- she is not married to the father of the child; and either:
  - has never been married to the father of the child; or
  - was married to the father but the marriage was dissolved before the child was conceived; or
  - she and the father were not living together when the child was born.

217 A natural mother cannot give consent to the adoption until the child is at least 10 days old. Childbirth and the post partum period is a time of great physical, emotional and hormonal upheaval,[246] and this can impact upon the mother's ability to make such an important decision. Parliamentary debates in 1955 indicate that the reason for choosing the 10 day period, rather than the four week period that appeared in the first draft of the Bill, was to ensure that consent was obtained before the birth mother left the hospital and disappeared.[247] It is now extremely uncommon for a woman to remain in hospital for 10 days after the birth of her child, unless there are medical

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[241] Section 7(2)(a); 7(3)(a)(b) Adoption Act.

[242] Section 7 (3) Adoption Act.

[243] Section 7(2) and (3)(a) Adoption Act.

[244] Section 7(2) and 7(3)(a)(b) Adoption Act.

[245] Section 6(2) Guardianship Act.

[246] See C Hapgood, GS Elkind and JJ Wright "Maternity Blues and Post Partum Depression" (1988) 22 Australia and New Zealand Journal of Psychiatry 299; M Steiner "Perinatal Mood Disorders: Position Paper" (1998) 34 Psychopharmacology Bulletin 301; 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; GN Marsh (ed) *Modern Obstetrics in General Practice* (Oxford University Press, Oxford, 1985) 389 ff; S Kitzinger *The Complete Book of Pregnancy and Childbirth* (Alfred A Knopf, New York, 1996); S Pullon *The New Zealand Pregnancy Book* (Bridget Williams Books, Wellington, 1996).

[247] (26 October 1955) 307 NZPD 3349 per Hon J Marshall.

complications. In this respect it now makes little difference whether the period is 10 days or four weeks.

218 Some other jurisdictions provide a lengthier period before the birth mother can give consent to the adoption.[248] It has been suggested that our legislation should also provide a longer period so the mother can make a considered and informed decision, and is not overwhelmed by the stresses of childbirth.[249]

219 The impact of a longer period for consent must be considered. Provisions preventing consent being given during this period give the birth mother time to resolve issues relating to the birth and proposed adoption, but may make the period more difficult for those who have made a firm decision and want the adoption to proceed immediately. A submission by the Australian Association of Social Workers to the New South Wales Law Reform Commission during their review of adoption law states:[250]

> In our original submission we stated that we believed birth mothers to be too vulnerable and too much in shock during the immediate *post partum* period. Lengthening this entire period, while it may be uncomfortable for some women who have envisaged a "clean break", will mean that birth mothers are able to truly experience the impact of separation from their baby, and to make a more informed and reality-based decision in the end.

220 The next consideration is the impact of a longer consent period on the child. John Bowlby's research into anxiety of young children when separated from their mothers noted an important difference between infants younger than seven months and infants older than seven months. Bowlby observed that the younger infants[251]

> tended to respond to mother and to 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.

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248 *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 six weeks of the birth of the child. *Norway*. A parent cannot give consent within two 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 of a consent signed by the mother on or within three 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 five days after the birth of the child. Between five 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 seven 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.

249 G Weiss "Revocation of Mother's Consent to Adoption – Some Proposals for Reform" [1976] NZLJ 497.

250 NSWLRC R81, above n 95, 141.

251 J Bowlby *Attachment and Loss: Volume 2. Separation: Anxiety and Anger* (Penguin Books, London, originally published 1973, Reprint 1991) 76.

Bowlby went on to observe that:[252]

> 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.

Adoption inevitably involves more upheaval for an infant than is experienced in a normal situation. It is important that this is managed in a way that minimises stresses upon an infant. An extension of the consent period from 10 days to, for example, one month, is unlikely to increase the effect of any stress, provided suitable arrangements can be devised for the interim care of the child. But real questions arise as to how the child will be cared for during such period.

221 The New South Wales Law Reform Commission was not in favour of placing infants with adoptive parents during this period; the Commission considered it was unfair to the adoptive parents to care and bond with a child whose mother has the right to take the child back. On the other hand, if the adoption does go ahead it may transpire that the child has been unnecessarily placed in temporary care at the taxpayer's expense and the bonding process may have been disrupted.

222 The original considerations upon which the 10 day period was based are outmoded. Concerns for the mother's ability to make a considered decision were not given high regard in the parliamentary debates on the third reading of the Adoption Bill; the needs of the adoptive parents were given greater consideration. Adoption is an extremely important decision and at this stage there should be consideration of the interests of the mother, the child and any potential impact on the adoptive parents. It may be advisable for New Zealand to allow a longer period. If so, consideration of the placement and of the child during this period and the impact upon adoptive parents would be required.

> Should the period after childbirth before consent can be given be extended?
>
> What would be an appropriate period?
>
> Should the child be placed with adoptive parents during this period?
>
> If not, how should the child be cared for?

Father's consent

223 Where the father is living with, or is married to, the mother at the time of the child's birth, he is a guardian of that child and required to consent to the adoption.[253] A father who has never been married to the mother, or did not live with[254] the mother when the child was born, will not be a guardian, even if he is named on the birth certificate.[255] In these circumstances, the father's

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[252] Bowlby, above n 251, 77.

[253] Section 7(2) and (3) Adoption Act.

[254] Living together as husband and wife.

[255] Section 7(2) and (3) Adoption Act and section 6(2) Guardianship Act.

consent will be required only if the court considers it expedient.[256] The court will often consider the issue of expediency in conjunction with the question whether a father should be appointed as guardian of the child.[257] The issue of expediency generally arises only when the natural father objects to the adoption of the child.[258] Some judges may be reluctant to find that it is expedient to require the father's consent where it is likely that the father will oppose the adoption:[259]

> [C]an the father's appointment as guardian be justified when as the inevitable result of that appointment the present adoption plans, plainly in the welfare and interests of this child, will be frustrated and the child will be forced into an upbringing by two solo parents who will certainly be in conflict on a variety of issues connected with the child's upbringing and care?

When there are suitable adoptive parents ready and willing to adopt the child, it may be difficult for the birth father to provide alternative arrangements that compare favourably.

224 Consideration is warranted as to whether recognition should be given to the rights of the natural father who is not a guardian, and to what form that recognition might take. Options include allowing the birth father to object to the adoption, to object to a placement, or to maintain the status quo.

What status should be given to a birth father's objection?

Should a birth father be empowered to object to the mother's decision to have the child adopted to strangers?

Should the birth father be allowed to object to the adoption only where he, or his family, wish to raise the child?

Should the father be allowed to object only to a placement decision rather than the mother's decision to adopt the child?

Should the status quo be retained?

225 Difficulties will always arise where the birth mother will not name and does not wish to contact the birth father. In some cases it may be inappropriate to compel disclosure – for example, where the pregnancy was the result of rape or incest, or where the birth mother has been a victim of domestic violence. In cases that do not involve such factors, social workers or the mother could be required to attempt to identify and locate the putative father.

226 There are practical difficulties associated with locating fathers to obtain their consent, especially where the father has no knowledge of the pregnancy or where he does not wish to acknowledge paternity. For this reason we recommend that any requirement to contact the father be limited to Social Welfare making reasonable attempts to locate and notify the birth father.

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[256] Section 7(3)(b) Adoption Act.

[257] See *K v B* above n 102.

[258] See *K v B* above n 102; *Application by GN (adoption)* (1991) NZFLR 513 (FC); *Re Adoption A9–90* (1990) 7 FRNZ 524 (FC); *Re Baby "C"* above n 103.

[259] *K v B* above n 102, 187.

Should social workers be required to make reasonable efforts to identify and locate the putative father?

Should an exception be made where the pregnancy has resulted through rape or incest, or where the birth mother has been a victim of domestic violence?

Should the mother be required to identify and locate the putative father?

If so, what if any exceptions should be made?

Withdrawal of consent

227 Once a valid consent to the adoption has been given it is in most cases irrevocable. When consent has been given to specified persons[260] (other than the Director-General) it cannot be withdrawn until after the proposed adoptive parents have been given an opportunity to apply to adopt the child. The birth parents of the child do not have standing to appear in court to oppose the adoption application once consent has been given.[261] This means that if the adoptive parents are prompt in filing their application to adopt the child, there is no means by which the birth parent can withdraw consent or voice an opposition to the adoption itself. Where the Director-General has been appointed as the guardian of the child under section 7(4) and consent has been given, that consent may be withdrawn at any time if neither an interim nor final adoption order has been made. Section 9 narrowly limits the circumstances in which a birth parent can withdraw consent to the adoption. This section has been the source of much litigation as birth mothers attempt unsuccessfully to withdraw their consent, or to challenge the validity of the consent.[262]

228 Other jurisdictions allow a defined time period during which a mother can withdraw consent. For example, Australian states allow on average a period of 30 days after the signing of consent, during which time the consent can be withdrawn.[263]

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[260] Adoptions to specified persons account for the majority of adoptions in New Zealand today.

[261] *L v R and H* [1980] 2 NZLR 765 (HC); *In the Matter of A (adoption)* [1998] NZFLR 964, 970 (FC). The issue of standing was again raised before the High Court, which declined to address the issue in general terms – *H and R v* C above n 286.

[262] See for example *In the Matter of A* above n 261; *B v M* [1997] NZFLR 126 (FC); *B v H* [1996] NZFLR 390 (FC); *CL v R* [1993] NZFLR 351 (FC); *Re an Application by H and H* (1987) 4 NZFLR 389 (FC); *In the adoption of* G (1981) 1 NZFLR 116 (DC).

[263] 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 1995).

229 To increase the period before which a birth mother may consent to an adoption, as outlined above, would allow her to test her reaction to separation from the child before a binding decision is made. Additionally, or alternatively, the right to revoke consent to an adoption could be granted in every adoption and a defined period could be set during which the parents can revoke consent. But such change could run counter to the desire of the adoptive parents for certainty and a sense of security in respect of their newly forming relationship with the child, and potentially to the child's security. We seek submissions upon how the tension between these competing interests should be resolved.

> Should the entitlement to revoke consent be extended to all adoptions?
>
> If so, what should be the period for revocation of consent?

Conditional consent

230 Section 7(6) of the Adoption Act allows parents to impose conditions regarding the religious denomination and practice of the applicants or requesting that the applicants raise the child according to certain religious preferences.[264] Parents cannot give consent to an adoption subject to other conditions. There are a range of matters that birth parents may wish to ensure for their child. They may wish to ensure that their child is raised with knowledge and an understanding of its cultural and linguistic heritage. For Māori, in particular, there is a strong emphasis on the importance of whakapapa.[265] In practice, Social Welfare attempts to give effect to the wishes of the birth parents by matching the child with suitable adoptive parents, sometimes with the input of the parents. We might wish to consider whether birth parents should be able to attach conditions other than religious conditions to the consent.

231 Social Welfare attempts to ensure that the religious condition is fulfilled when arranging an adoption placement, and the court must be satisfied that such a condition is being complied with before making an interim or adoption order.[266] However, the 1987 Department of Justice review recommended the removal of the provision allowing the imposition of a religious condition, because for practical reasons it is difficult to enforce.[267]

> Should birth parents be able to impose conditions upon their consent to the adoption?
>
> What importance should be attached to such conditions?
>
> What would the effect be of a more open system of adoption, with the opportunity for the birth parent(s) to know whether conditions are being observed?

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[264] There is no provision for a parent to impose this condition if their consent has been dispensed with by the court.

[265] Metge, above n 7, 90; New Zealand Adoption Practices Review Committee, above n 4, 50.

[266] Section 11(c) Adoption Act.

[267] Department of Justice, above n 3, paragraph 4.36.

Dispensing with consent

232 The court may dispense with a parent's consent where the parent is physically or mentally unable to care for the child and that disability is likely to continue for some time,[268] or where the parent has abandoned, neglected, persistently failed to maintain or persistently ill treated the child or failed to discharge obligations as parent or guardian of the child.[269] Although the Adoption Act does not explicitly require the best interests of the child to be promoted by the dispensation of consent, the Court of Appeal has imported the paramountcy principle from the Guardianship Act. Adoption involves the extinguishment of any existing rights of guardianship. The Court of Appeal reasoned that because guardianship issues were involved (albeit peripherally) the paramountcy principle should be applied when making such determinations.[270]

The effect of a valid consent

233 Consent is a necessary prerequisite to the adoption order,[271] yet the legislation does not describe the legal consequences of a valid consent. If the intending adopters fail to apply for an interim adoption order, or allow an interim order to lapse without applying for a final adoption order, the birth parents remain the legal parents of the child. As birth parents are not notified when an adoption order is made, they might 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.

234 The adoptive parents will be in breach of section 6 of the Adoption Act if they retain custody of the child for more than one month[272] before applying for an adoption order, or if they let the interim order lapse without applying for a final adoption order.

> Should new legislation set out the status of the parties once a valid consent has been given?
>
> Should the court be required to notify the birth parents when an adoption order has been made?

235 The legislation does not state whether a consent to adoption remains valid if an interim or adoption order is not made, or the interim order lapses before an adoption order is made.[273] To clarify the effect of consent in these

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[268] Section 8(1)(b) Adoption Act; notice must be given to the birth parents.

[269] Section 8(1)(a). See, for example, *In the Adoption of J* [1992] NZFLR 369 (FC); *Re Applications by W* [1991] NZFLR 231 (FC); *D-GSW v L* above n 124; *Whittaker v Hancox* [1991] NZFLR 328 (FC); *D-GSW v H* (1984) 3 NZFLR 183 (FC); *D-GSW v Pond* (1985) 3 NZFLR 660 (FC).

[270] *D-GSW v L* above n 124.

[271] Section 7 Adoption Act.

[272] Section 6(2) Adoption Act.

[273] Judge Mill considered an application for an adoption order after an interim order had lapsed in *H v S* [1999] NZFLR 241 (FC), where the birth mother was objecting to the adoption. Judge Mill did not consider whether the consent to the new adoption application was still valid in light of the birth mother's objections to the adoption. He allowed the adoption application to proceed.

circumstances, it could be defined as lasting only a finite period. This would also encourage prompt determination of the child's legal status. An appropriate period might be six months. If an application for an interim adoption order has not been made within that six month period, the social worker involved should call a family group conference with the birth parents and adoptive parents in order to determine a future course of action.

236 However, this option has the disadvantage of potentially allowing a child to be in the care of adoptive parents for longer than one year,[274] and then allowing a birth parent to object to the adoption if the interim order is allowed to lapse.

237 New legislation should clarify these matters.

> Should parental consent expire after a certain period if an application for an adoption order is not commenced or an adoption order is not made by the court?
>
> If so, what should that period be?

CONSENT TO ADOPTION BY HUSBAND OR WIFE ALONE

238 Applicants for an adoption order are deemed to consent to the adoption.[275] Specific consent to the adoption is required only where an application to adopt a child is made by either a husband or a wife alone. In such cases the spouse of the applicant must consent to the proposed adoption.[276] We endorse the exception set out in section 8(4) that the consent of the spouse may be dispensed with if the court "is satisfied that the spouses are living apart and that their separation is likely to be permanent".

CHILD'S CONSENT

239 There is no provision requiring the court to inquire into the wishes of the child, or to require the consent of the child to the adoption.[277] The UNCROC requires that signatories take into account the views of the child when making a decision affecting the child.[278] Most overseas jurisdictions also stipulate that a child over a certain age must give consent before an adoption order can be made.[279] Below that age it is sometimes required that there be an inquiry into the wishes of the child.

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[274] This is the term for which an interim order remains in force.

[275] Section 7(10) Adoption Act.

[276] Section 7(2)(b) Adoption Act.

[277] See also paragraphs 162–165 which discuss adoption of a married person.

[278] Article 12 – if that child is 'capable of forming his or her own views', and having regard to 'the age and maturity of the child'.

[279] *England*: section 6 UK Adoption Act 1976 places the court under a duty to promote the welfare of the child and states that the court shall "so far as is practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding". Section 9 Adoption (NI) Order 1987 also reads the same. *Australia*: Victoria – section 14 Adoption Act 1984 places the court under a duty to ascertain the wishes of the child so far as that is practicable and to give due consideration to

240 An alternative to setting an age at which a child must consent to the adoption is to use a test which determines whether a child can make decisions, taking into account the maturity of the child.[280] A test of this nature is set out in section 23(2) of the Guardianship Act:

> the Court shall ascertain the wishes of the child, if the child is able to express them, and shall . . . take account of them to such extent as the Court thinks fit, having regard to the age and maturity of the child.

Should the consent of a child old enough to give consent to the adoption be required?

Should an age limit be set, or should a general competency test apply?

If a child consents to the adoption, should the child be able to revoke consent at any time until the time that the final adoption order is made?

DEFECTIVE CONSENT

241 Circumstances may arise where the birth mother was unable to give true consent, for example, because of fraud or duress. Similarly, the mother may be unfit or otherwise unable to give consent. In such cases, on application the court has the ability to discharge the adoption order.[281] The existing provisions appear to be satisfactory.

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those wishes, having regard to the age and understanding of the child. Western Australia – section 17(1)(c)(ii) of the Adoption Act 1994 requires the consent of the child where the child to be adopted is over the age of 12. New South Wales – the Adoption of Children Act provides in section 26(4A) that where a child is aged between 12 and 18 years of age and has been brought up and maintained by the applicants for a period of five years before the making of the application, the only appropriate person to give consent is the child. South Australia – section 16 of the Adoption Act 1988 provides that the court may not make an adoption order in respect of a child over the age of 12, unless the child has given written consent to the adoption after counselling has taken place. Twenty five days must have elapsed since the consent was given, and the court must have interviewed the child in private and established that the child's consent is genuine and the child does not wish to revoke consent. Northern Territory – section 10 of the Adoption of Children Act 1995 requires the court to have regard to the wishes and feelings of the child, having regard to the child's age and understanding. Section 10(2) prevents the court from making an adoption order for a child over the age of 12 years unless the child has consented to the adoption. The court may disregard the child's refusal to consent to the adoption where it is satisfied that there are special reasons relating to the welfare and interests of the child that would justify the making of the order (section 10(2)(b)). *Canada*: Nova Scotia – section 74(1) of the Children and Family Services Act 1990 states that the court cannot make an adoption order in respect of a child over the age of 12 years who is of sound mind, unless that child gives his or her written consent to the adoption. Alberta – section 56(1)(b) of the Child Welfare Act 1984 requires the consent of a child over the age of 12 before an adoption order can be made. British Columbia – section 13 of the Adoption Act 1996 requires the consent of the child where the child is over 12 years of age. The court can dispense with the child's consent (section 17), but only where the child is not capable of giving informed consent. Furthermore, the child can revoke consent at any time before the adoption order is made (section 20).

[280] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL).

[281] Section 20 Adoption Act.

PROCEDURAL ISSUES AND CONSENT

Information given at the time of consent

242 In order to be valid a consent to adoption must be witnessed by a District Court Judge, a Registrar of the High Court or of the District Court, or a Solicitor, or a Judge or Commissioner or Registrar of the Māori Land Court.[282] The document in which consent is given must contain an explanation of the effect of the adoption order and the person witnessing the consent must endorse on the certificate that he or she has personally explained the effect of the adoption order.[283] It may be advisable to set out a standard form explanation of the effect of an adoption order in a schedule to the legislation. The form should be written in plain English (with translations available) and should be made as comprehensible as possible. Every lawyer would have to use this standard form. This option would achieve consistency and ensure the quality of explanations given.

243 In the past many birth mothers have been unaware of the narrow limits of the grounds upon which they may withdraw consent. In order that birth parents understand their right to revoke consent to the adoption the witness could be required to explain the circumstances in which consent can be withdrawn and how to go about it.

Should a standard form explanation of the effects of adoption be set out in legislation?

Should a standard form for revocation of consent be given to the birth parents when they give consent?

Witnessing consents

Independent witness

244 It appears to be common practice for the lawyer of the potential adoptive parents to witness the birth parent's consent to the adoption. This raises ethical issues as the lawyer owes no duty of care to the birth parent, but is acting for the adoptive parents. It may be thought that there is value in a requirement that, in order for the consent to be valid, it must be taken by an independent party.

Should there be provision in the new legislation that the person witnessing the consent must be independent?

[282] Section 7(8)(a) Adoption Act.

[283] Section 7(9) Adoption Act, unless the consent is given by the Director-General.

Barristers witnessing consent

245 The Adoption Act provides that a document signifying consent to an adoption shall not be admissible unless it is witnessed by a District Court Judge, a Registrar of the High Court or District Court, or a Solicitor, or a Judge, Commissioner or Registrar of the Māori Land Court.[284]

246 Family Court decisions cast doubt on whether a barrister sole can take an effective consent to an adoption.[285] These judgments were overturned when the High Court confirmed that the Adoption Act cannot be taken to have intended to prevent barristers from being able to witness a consent.[286] There appears to be no logical reason to prevent barristers witnessing adoption consents. New legislation provides the opportunity to confirm the decision that barristers are able to witness consents to an adoption.

Should new legislation make it clear that both barristers and solicitors are able to witness consents to adoption?

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[284] Section 7(8)(a) Adoption Act.

[285] *H v S* (4 July 1996) unreported, Family Court, Thames Registry, Adoption 1/96; *Adoption application by B* (28 April 1999) unreported, Family Court, Gisborne Registry, A6/98.

[286] *H and R v C* [1999] NZFLR 721 (HC).

9
Adoption orders

INTERIM AND FINAL ADOPTION ORDERS

When an order can be made

247 SECTION 5 OF THE ADOPTION ACT provides that upon application for an adoption order, an interim order shall be made in the first instance, with the exception that an adoption order can be made where special circumstances render it so desirable[287] and all other conditions governing interim orders are met. Before an interim order is made, the court must be satisfied that the persons applying are fit and proper parents, that the welfare of the child will be promoted and due consideration has been given to the child's wishes, and that any religious condition imposed by the parent or guardian has been complied with.[288] The court must also have received a report from the social worker on the application, unless one of the applicants is an existing parent of the child.[289] If these requirements are met, there is no restriction on how quickly an interim order may be made.

Potential changes

248 In Chapter 8 we discussed altering the provisions relating to when consent to adoption may be given. In particular we asked whether there might be a lengthier period before which a mother can give consent, and whether consents should be more easily revoked by the mother under a new scheme. Both of these factors will have an impact on when an interim order might be made, and the security of the interim order from the perspective of the adopting parents.

249 It may be more appropriate for the potential adopters to be appointed as guardians of the child (if they so desire)[290] until such time as the period for revocation of consent expires and an interim order can be made. However, circumstances may arise where the birth parent wishes to pass immediate legal

[287] In practice a final order is readily made in the first instance where there is a connection between the adopters and the child.

[288] Section 11 Adoption Act.

[289] Section 10 Adoption Act.

[290] Prospective adoptive parents may not want to begin to care for the child while there is a possibility that the birth parent may revoke consent.

responsibility to the adoptive parents.[291] If the adoptive parents are willing to take legal responsibility earlier in such cases, knowing that the parent still may revoke consent, then early placement of the child and an interim order could be considered.

Final orders

250 Six months after an interim order is granted the prospective adoptive parents may apply for an adoption order.[292] The Registrar shall issue the adoption order without a further hearing if that is in accordance with a social worker's recommendation, or the interim order did not require the application to be dealt with by the court, or no proceedings for the revocation of the interim order are pending or on appeal, and a District Court has not within the immediately preceding month refused to revoke the interim order.[293]

> Is the present system of interim and final orders satisfactory?

ATTACHING CONDITIONS TO THE ORDER

251 The terms of reference require us to consider whether it might be desirable to attach conditions to an adoption order. At present a birth parent cannot attach conditions (except as to religion) to an adoption order. We discussed at paragraphs 13–20, and 71–74 the growth in the practice of open adoption over the last 20 years. These practices have developed in spite of current legislation, rather than because of it. The Adoption Act contains no provision for giving effect to any type of contact agreement or plan between the respective parents. Allowing conditions to be attached to an adoption order could provide a means by which an access order can be made in favour of the birth parents. There has been debate over whether the court has jurisdiction to make an access order in favour of a birth parent at the time that the adoption order is made. Blanchard J in *Adoption of PAT* was of the view that, generally, such an order cannot be made, but that the High Court could use its parens patriae jurisdiction to make such an order.[294] Attaching conditions to the adoption order would allow open adoption agreements to be legally recognised and, if necessary, enforced.

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[291] An example might be where the birth parent knows the adopters and is firmly resolved that the adoption take place or where there has been some trauma such as rape and the birth mother does not want involvement with the child. There may be continuing expenses with respect to the care of the child which the parent is unwilling to meet but for which the parent could be held responsible. A parent in such circumstances might be anxious to be relieved of legal responsibility. There should be provision that the birth parent reimburse the adoptive parent for expenses incurred in relation to the child if consent is later revoked.

[292] Section 13 Adoption Act.

[293] Section 13(3) Adoption Act.

[294] Above n 78.

252 A criticism of the current law is that it places control over the process in the hands of the adoptive parents. Many mothers contemplating adoption may do so only on the understanding that they retain some degree of contact with the child. The adoptive parents could renege on that understanding after the adoption and the birth mother would have no avenue of redress. A mother considering adoption may decide against it if there is no means of enforcing a contact agreement.[295]

253 Where the birth parents and adoptive parents agree, the court could be allowed to attach conditions to the adoption order. Contact agreements could take many forms, from limited contact by letter and photographs, to direct regular personal contact. The type of contact might be agreed upon by the birth parents and the adoptive parents. The agreement could provide for contact arrangements to alter as the parties become more comfortable with the situation or as circumstances change.

254 The Adoption Practices Review Committee concluded that an "adoption plan" should accompany all adoption applications.[296] Negotiating a plan would be part of the pre-adoption process. The plan would set out the agreement that the parties made about future contact. The type and degree of contact, if any, would be set by the parties. Such a plan would be submitted to the court, and the Judge would check that it was in the best interests of the child. It would be lodged with the court but would not comprise a formal part of the adoption order.

255 We consider that this proposal is valuable. The use of the word "plan", rather than "conditions", recognises that the approach to an open adoption arrangement should be flexible: these arrangements do not work as well if people are compelled.

256 An open adoption plan could also be used to provide for contact with other members of the birth family, for example, grandparents. A birth parent might not want to have contact with the child but might be happy for the grandparents to do so. Attaching an adoption plan to the adoption order would be a flexible way to facilitate this.

257 The family group conference structure might be an appropriate forum in which to negotiate open adoption agreements.[297] However, relatives of the birth parents should only be invited to attend a family group conference where the birth parents agree to their involvement.[298] The agreement could provide for further family group conferences to be held when the parties wish to renegotiate the plan.

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[295] Iwanek, above n 83.

[296] Above n 4, 41–43. The Committee noted that there would be cases where a plan was not suitable – for example, where the birth parents are dead or contact would place the child at risk. The court would have the power to dispense with the requirement for a plan in such exceptional circumstances.

[297] See paragraphs 402–405 for an explanation of the family group conference.

[298] See *CMP v DGSW* [1997] NZFLR 1 (HC).

Should the Family Court be able to attach an adoption plan to an adoption order?

If not, what would be an appropriate means of recognising open adoption arrangements?

Should the process of negotiating open adoption remain informal?

Would a family group conference be an appropriate forum for negotiating conditions of an open adoption agreement?

258 Issues then arise as to the effect that an adoption plan might have on the adoption order. Should a plan go to the heart of the adoption order, so that non-compliance would invalidate the order, or should non-compliance simply occasion a return to negotiation (assisted by a mediator if necessary) to resolve issues?

259 It would be untoward to suggest that an adoption order could be invalidated by a breach of an adoption plan. This would have severe implications upon the child's stability. An adoption plan might provide birth families with discretionary access rights in respect of the adopted child, but non-compliance with those conditions (either on the part of the adopters or indeed the birth parents) should not affect validity of the adoption itself. The family group conference procedure might be used to attempt to reconcile the parties in the event of non-compliance with an adoption plan. Alternatively, or perhaps in addition to the family group conference, legislation could allow a Family Court Judge to hold a mediation conference to resolve disputes.[299] If the dispute is still not resolved, then the matter could proceed to a hearing to resolve access issues.[300]

Should an adoption plan be enforceable?

How would a plan be enforced?

Could a family group conference process be used to resolve disputes?

Should a Family Court Judge have powers to hold a mediation conference to attempt to resolve disputes?

Would it be appropriate for access disputes to proceed to a court hearing?

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[299] Similar to the procedure provided in sections 13 and 14 of the Family Proceedings Act 1980 (the 'Family Proceedings Act').

[300] Sections 15 and 16 of the Guardianship Act would have to be expanded to give the court jurisdiction to hear such matters.

POST-ADOPTION MAINTENANCE AND CHILD SUPPORT

260 Prior to the Child Support Act a natural father could be held liable to pay maintenance for his child after an adoption order had been made in favour of the mother alone, or the mother and her husband:[301]

> [T]hese children have three "parents" in respect of maintenance liability although only two parents in terms of legal status.

261 The ability to make maintenance orders with respect to children was repealed by section 10(1)(a) of the Family Proceedings Amendment Act 1991. However, some maintenance orders will survive by virtue of section 16(2)(i) of the Adoption Act, which states 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.

262 The Child Support Act creates a different regime. The Child Support Act provides in section 6(2) that:

> Notwithstanding subsection (1) of this section, where –
> (a) A child has been adopted under the Adoption Act 1955 or under an adoption to which section 17 of that Act applies; and
> (b) That adoption order has not been discharged, –
> child support may not be sought in respect of the child in relation to any period after the time at which the final adoption order became effective from any person who was a parent of the child unless that person is also a person who adopted the child.

263 Section 16(2)(i) is subject to section 6(2) of the Child Support Act.[302] The effect of this is that the continuing maintenance provisos only apply in respect of maintenance orders or agreements made prior to the commencement of the Child Support Act. As these maintenance orders and agreements expire and are replaced by child support assessments, the need for these provisos disappears. The provisos could be removed from the main text of the legislation and be placed in transitional provisions, as they are no longer relevant to most adoptions.

> Should the provision relating to maintenance and affiliation orders be placed in transitional provisions in new legislation?

DISCHARGING AN ADOPTION ORDER

264 The terms of reference invite us to consider "whether an adoption order may be cancelled by an adopted person". Section 20 provides limited justifications for discharging an adoption order. An applicant must first seek the Attorney-General's approval before applying for the discharge of an adoption order.[303] The court may discharge an adoption order only where the order was made by

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[301] *Burrows v Whittington* (1984) 3 NZFLR 340, 344 (FC); see also *K v F* (1983) 2 NZFLR 1, 12 (HC).

[302] Section 16(5) and (6) Adoption Act.

[303] Section 20(3) Adoption Act.

mistake as to a material fact or by a material misrepresentation to the court or any other person concerned.[304]

265 An adoptee (with the permission of the Attorney-General) may seek to have the adoption order discharged. However, the Court cannot simply discharge an adoption order because there has been an irretrievable breakdown in the relationship between parent and child. In deciding whether to exercise the discretion to discharge an adoption order, the court is not required to consider the welfare of the child.

266 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.[305]

267 We might consider whether a discharge would be warranted in broader circumstances than the legislation currently allows. For example, in cases of severe child abuse and neglect by an adoptive parent, the adopted person may wish to sever all legal ties with the adoptive parents as a symbolic measure.

268 Just as making an adoption order entails serious legal consequences, so does discharging the adoption order. The latter process severs the adoptive family relationships and the adopted person reverts to being the child of the natural parents. It is unclear whether the natural parents would be notified of the discharge as a matter of course,[306] and there is no requirement that the court inquire whether the natural parents are willing or able to resume parental responsibility for the child. We might wish to reconsider what should occur in the event that an adoption order in respect of a child or young person is discharged.

269 When considering this option we should remember that irretrievable breakdown can occur in natural family relationships as well, and there is no ability in law to 'divorce' one's birth parents. We would appreciate submissions on whether it is desirable to discharge an adoption order and if so, upon what grounds.

Should it be necessary for the Attorney-General to grant permission to enable an application for a discharge of an adoption order to be made?

Should the justifications for discharging an adoption order be extended in special circumstances?

If so, in what circumstances?

Should natural parents automatically be notified when an adoption order is discharged?

Should the court be required to request information about the suitability and willingness of the natural parents to resume the care and responsibility for the child, and should alternative care for a child be arranged before an adoption order is discharged?

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[304] Section 20(a) and (b) Adoption Act.

[305] See Thomson Adoption Discharge Act 1958, the Thomas Adoption Discharge Act 1961, the Liddle Adoption Discharge Act 1963, the Papa Adoption Discharge Act 1982.

[306] Section 20(c) requires the court to serve notice of the discharge upon every person who is bound by an affiliation order, maintenance order or agreement in respect of the child.

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Succession

INSTRUMENTS PRE-DATING THE ADOPTION ORDER

270 SECTION 16(2)(d) OF THE ADOPTION ACT provides that:

> 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 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.

271 In plain English, this provides that where the death of the testator or intestate occurs before the adoption order is made, the adoption will have no effect on rights of succession unless there is an express provision made to the contrary. A provision in a trust deed or will for grandchildren will not benefit grandchildren adopted after the date of the deed or after the death of the will-maker.

Succession from natural relatives

272 This provision means that an adopted child is able to succeed a natural relative if the adoption order was made after the death of the testator or intestate natural relative.[307] This is subject to some consideration of subsequent events.[308] However, where the intestacy occurs after the adoption order, the adopted child is not entitled to inherit from birth parents or relatives.[309] Where there exists a deed, instrument or will, the adopted child may inherit if there is express provision. A gift to a class of persons (a class gift), to be determined at the date of the testator's death, will not include the adopted child if the child was adopted before the death, even if the provision was made before the adoption order.[310]

273 An example is *Re Walker* where the natural grandmother left a class gift to her children with a substitutionary gift to the issue of any child who predeceased her. The grandmother's son predeceased her, leaving a daughter. However, two years later the daughter was adopted by her mother and her new stepfather. The effect was to deprive her of succession rights under the grandmother's will.

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[307] If the gift specifies that it is to pass to "children", or where there is a Family Protection Act claim.

[308] *Re O (deceased)* [1975] 1 NZLR 444, 447 (SC).

[309] *Reeves, Rhodes and Reeves v Public Trustee* (16 July 1993) unreported, High Court, Christchurch Registry, M 658/91.

[310] *Re Walker (deceased)* [1973] 1 NZLR 449 (SC).

Succession from adoptive relatives

274 Section 16(2)(d) provides that an adopted child is not considered a "child" of the adopted relatives where an adoption order is made after the death of the testator or intestate, unless express provision is made to that effect. This is unproblematic – at law an adopted child is not considered to be a child of the adopted parent until the adoption order is made. If the future adoptive parents wish to provide differently before the adoption order is made, they are able to do so in a will.

SUCCESSION AFTER THE ADOPTION ORDER

275 After the adoption order is made, the adopted child is entitled to inherit from the adopted parents as if it were a natural child, but is deemed to no longer be the child of the birth parents.

276 An option that might be considered is whether the adopted person should be entitled to inherit from both sets of relatives if those relatives die intestate. This is currently provided for whāngai (Māori customary adoptions) in relation to Māori freehold land.[311] This could be said to be consistent with the new approach to adoption set out at the start of the paper – that natural relatives should not be 'expunged' from the legal record of an adopted child's life. If the relatives did not wish the adopted child to inherit, they could provide differently by will. Such a course would expose the estate to Family Protection Act claims by natural children.

277 We might consider reversing the result in *Re Walker* by providing for wills to speak from the date of execution rather than from the date of the death on the issue of the status of a natural descendent of a testator who is later adopted. This might adversely impact on the adoptee's interests.

278 Yet another option would be to create a presumption that all gifts to classes of persons be construed as including children adopted into that family.

> Should an adopted person be entitled to inherit from both natural and adoptive relatives?
>
> Should the principle in *Re Walker* be altered?
>
> Should class gifts be interpreted as including children adopted into the family?

279 In accordance with the philosophy that biological parents relinquish parental rights and responsibilities, the biological parents should not be entitled to inherit from the adopted child if that child dies intestate.

280 Problems could arise if the natural relatives are not aware of the existence of an adopted-out child. They cannot consciously exclude the succession rights of a child of whose existence they are unaware. Although such a situation is likely to be increasingly rare in light of current adoption practices, it is not

[311] Section 115 Te Ture Whenua Māori Act 1993 (Māori Land Act 1993)('Te Ture Whenua Māori Act').

inconceivable. Legislation could provide to the effect that if the natural relatives are unaware of the adopted child's existence, then that child shall not be entitled to inherit on intestacy.

Should the adopted child have a right to inherit on the intestacy of a natural relative where the intestate was unaware of the child's existence?

11
Forbidden marriage and incest

281 SECTION 130 OF THE CRIMES ACT 1961 (the 'Crimes Act') provides that:

(1) Incest is sexual intercourse between—
  (a) Parent and child; or
  (b) Brother and sister, whether of the whole blood or of the half blood . . . ; or
  (c) Grandparent and grandchild—
  where the person charged knows of the relationship between the parties.

(2) Every one of or over the age of 16 years who commits incest is liable to imprisonment for a term not exceeding 10 years.

282 The second schedule of the Marriage Act 1955 (Marriage Act) sets out forbidden marriages:

1. A man may not marry his—

(1) Grandmother:
(2) Grandfather's wife:
(3) Wife's grandmother:
(4) Father's sister:
(5) Mother's sister:
(6) Mother:
(7) Stepmother:
(8) Wife's mother:
(9) Daughter:
(10) Wife's daughter:
(11) Son's wife:
(12) Sister:
(13) Son's daughter:
(14) Daughter's daughter:
(15) Son's son's wife:
(16) Daughter's son's wife:
(17) Wife's son's daughter:
(18) Wife's daughter's daughter:
(19) Brother's daughter:
(20) Sister's daughter.

2. A woman may not marry her—

(1) Grandfather:
(2) Grandmother's husband:
(3) Husband's grandfather:
(4) Father's brother:
(5) Mother's brother:
(6) Father:
(7) Stepfather:
(8) Husband's father:
(9) Son:
(10) Husband's son:
(11) Daughter's husband:
(12) Brother:
(13) Son's son:
(14) Daughter's son:
(15) Son's daughter's husband:
(16) Daughter's daughter's husband
(17) Husband's son's son:
(18) Husband's daughter's son:
(19) Brother's son:
(20) Sister's son.

3. The foregoing provisions of this Schedule with respect to any relationship shall apply whether the relationship is by the whole blood or by the half blood.

4. In this Schedule, unless the context otherwise requires, the term "wife" means a former wife, whether she is alive or deceased, and whether her marriage was terminated by death or divorce or otherwise; and the term "husband" has a corresponding meaning.

283 The Adoption Act provides that the adoptive parents are the parents of the adopted child and the birth parents are no longer parents, except for provisions of the Crimes Act relating to incest and the Marriage Act provisions relating to prohibited degrees of marriage.[312]

284 Adoption creates new family relationships based upon legal and social ties rather than biology. The obscuring of family relationships creates some difficulties in interpreting the law of incest and the law relating to prohibited degrees of marriage.

THE LAW

Forbidden marriage

285 The court has the discretion to consent to a marriage within the prohibited degrees if the relationship is one of affinity (by marriage) rather than of consanguinity (descended from the same ancestor).[313] Case law about the way that this discretion applies to adopted persons and the adoptive family has varied.

286 In an application by an adoptive brother and sister to marry (where the male had been adopted at age 20) Haslam J found that the effect of section 16 of the Adoption Act was to deem the pair "brother and sister". As such, they fell within the prohibited degrees of marriage set out in the Second Schedule to the Marriage Act. Haslam J stated that:[314]

> they are within the prohibited degrees of consanguinity appearing in the Second Schedule in that, in law, they are brother and sister. Furthermore, they do not fall within any degrees of affinity . . . it is all too clear that I have no jurisdiction to grant the consent sought.

287 In *An Application by Barlow and Hohaia*[315] the Court had to consider whether it could consent to the marriage of an adopted woman to her adoptive uncle. Gallen J noted that if he were to apply the reasoning of Haslam J, there would be no power to consent to the marriage as it would offend against the degrees of consanguinity. However Gallen J questioned whether the couple were in fact within the degrees of consanguinity. Section 16(2)(b) of the Adoption Act provides that for the purpose of the crime of incest and the prohibited degrees of marriage, the adopted child shall not be deemed to cease to be the child of his birth parents. Gallen J considered that this section was significant in that it suggests that the restrictions relating to forbidden marriage are considered necessary to prevent marriages where the blood relationship is too close. Gallen J concluded that for the purposes of the Marriage Act, the adoptive child does not cease to be the child of the birth parents, and therefore the applicants were not within the prohibited degrees.

288 What Gallen J did not examine was the possibility that section 16(2)(b) really creates two sets of parents for the purposes of the crime of incest and the law relating to forbidden marriages. The retention of the natural parents in

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[312] Section 16(2)(b) Adoption Act.

[313] Section 15(2) Marriage Act.

[314] *In Re Thomson and Thomson* [1958] NZLR 580, 581(HC).

[315] (1985) 3 NZFLR 714 (HC).

section 16(2)(b) for the purposes of incest and forbidden marriage does not necessarily mean that the adoptive parents are not also considered parents for this purpose. Otherwise there would be no barrier to an adoptive parent marrying an adoptive child, which instinctively seems wrong.

Incest

289 The application of the crime of incest to adoptive relationships is similarly obscure. Section 130 of the Crimes Act provides that:

> (1) Incest is sexual intercourse between—
> (a) Parent and child; or
> (b) Brother and sister, whether of the whole blood or the half blood . . . ; or
> (c) Grandparent and grandchild–
> where the person charged knows of the relationship between the parties.

290 Where a person is adopted the requirement of knowledge may not be satisfied as an adoptive person may not be aware of the identity of all such relatives.

291 The status of the natural parents is preserved in section 16(2)(b) for the purposes of the crime of incest. If Gallen J's reasoning in *Application by Barlow*[316] was applied then members of an adoptive family might not be able to be found guilty of the crime of incest.

THE CONSIDERATIONS

292 New Zealand's laws on forbidden marriage and incest derive from English legislation, which in turn derives from Leviticus 18:7–18. What is important is why the laws are on the statute book today. We suggest that there are two main reasons:

- the protection of the integrity of the family; and
- the genetic effects of incest.

293 It cannot be said that the laws of incest and forbidden marriage are maintained for one of these reasons alone. The categories are closely linked.

Genetic factors

294 The genetic argument focuses on blood ties rather than the fact of a family relationship. Hereditary disabilities or diseases are believed to be more likely to occur through inbreeding, although statistics do not always bear this out. Therefore society places strict limitations upon the degrees within which related persons can marry and incest is prohibited.

295 Section 130 of the Crimes Act makes it clear that the genetic argument is an important factor. The section refers to brothers and sisters "whether of the whole blood or half blood", and to the Marriage Act which provides[317] that persons not within the defined degrees of consanguinity but within the degrees of affinity may apply to the High Court for consent to their marriage.

296 Logically, genetics cannot be the sole determining factor, as contraception can prevent the birth of children to such relationships.

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[316] Above n 315.

[317] Section 15(2) Marriage Act.

Integrity of the family

297 The integrity of the family is the element that needs to be added to the above reasoning in order to justify the prohibitions. The United Nations stated in 1994 that the "family constitutes the basic unit of society". It is crucial to the development and nurturing of its individual members.[318]

> For most people a family is a place where they wish to belong and feel secure, where they are accepted and acknowledged, loved and cared for. But the most crucial need is for society to ensure that families are stable and healthy, and that members accept responsibility for one another, as they are the most effective defensive structures against marginalisation, frustration and want. At times of crisis, social tension and personal problems the first place from which help is usually sought is within the family. The family has the potential for being the best institution for the nurture of children and for intimacy between adults.

298 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.[319]

299 These concepts apply equally to families linked by an adoptive relationship and those that are linked by consanguinity.

ADOPTIVE RELATIONSHIPS?

300 How adoptive relationships should be treated by the laws of incest and prohibited degrees of marriage is primarily determined by the weight given to the sanctity and integrity of the family relationship. The strength of feeling about these issues may vary according to the particular adoptive relationship. 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.

Degrees of affinity

301 We believe that there is validity in deeming that adoptive relationships are relationships within the degrees of affinity for the purposes of the prohibited degrees of marriage. However, in any family, whether involving adoption or not, the relationship between parent and child is sacrosanct. We do not believe that there is any reason why the relationship between an adoptive parent and an adopted child should be treated any differently from that of a biological parent and child. As was stated by Fisher J in *S v Police* with regard to incest:[320]

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[318] Rhyl, Lady Jansen "Building the smallest democracy at the heart of society" (1995) 1 BFLJ 160, 160–161.

[319] Law Commission (Scotland) *The Law of Incest in Scotland* (Scot Law Com 69, Edinburgh, 1981) 9.

[320] (1990) 7 CRNZ 173, 174 (HC).

> [T]he 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.

302 The parent/child relationship should be an exception to the assumption that adoptive relationships are within the degrees of affinity, and should be deemed to be within the degrees of consanguinity.

> Should adoptive relationships be deemed to be within the degrees of affinity but not consanguinity?
>
> Should the parent/child relationship be considered an exception and be deemed to be within the degrees of consanguinity?

Forbidden marriage

303 It would be possible to empower the High Court (or Family Court) to consent to a marriage between such persons in accordance with section 15(2) of the Marriage Act. However section 15(2) would need to be amended in the following manner in order that this occur:

- Remove from the text of section 15(2) the qualification that the High Court must be satisfied that "neither party to the intended marriage has by his or her conduct caused or contributed to the cause of the termination of any previous marriage of the other party". Arguably this provision is archaic and serves no purpose – there is no longer requirement that a party prove fault in order to obtain a dissolution,[321] nor for most purposes[322] does the Court take into account a party's conduct when determining matrimonial property shares.
- If, had the parties been biologically related, 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 morality.

> Should the court be required to take into account certain considerations when deciding whether to consent to a marriage between those related by adoption?

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[321] The parties need only show that there has been an irreconcilable breakdown in the marriage and that the parties have been separated for two years before the filing of the order for dissolution (section 39 Family Proceedings Act).

[322] The court may take into account any misconduct that has had a negative effect on the value of the matrimonial property (section 15(3) Matrimonial Property Act 1976 (the 'Matrimonial Property Act')) or any circumstances that render equal sharing repugnant to justice (section 14 Matrimonial Property Act).

Incest

304 The crime of incest expresses society's condemnation of sexual relationships between those related by blood because of the destructive nature of incest upon the integrity of the family unit. The applicability of the offence to adoptive relationships entails more difficult issues.

305 The parent/child relationship should be regarded as sacrosanct, whether adoptive or natural. No change should be made to the present law of incest in this respect. The provisions with regard to brother/sister incest are expressed in terms of blood relationships. As far as we are aware the issue whether an adoptive relationship would be encompassed by this provision has not yet been determined by the courts. Because of the varying circumstances of adoptive sibling relationships, it is difficult to set hard and fast rules. There are some circumstances in which a relationship between an adoptive brother and sister will be so repugnant to morality that society would want the crime of incest to apply, in others society might not have a problem at all.

306 One option is to apply the same recommendations contained in paragraph 303 when determining whether incest has been committed:
- 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 whether the sexual relationship is repugnant to morality.

307 But the criminal law needs to be certain. It would be wrong to define an act as criminal when it is not possible to determine its criminality until a court has assessed the circumstances. The fundamental criminal element of *mens rea*, or intent to commit the crime, would of necessity be missing.

308 On this basis we invite submissions whether, with regard to adoptive relationships the crime of incest be restricted to the parent/child relationship.

> In the case of adoptive relationships, should the crime of incest be limited to the parent/child relationship?

12
Cultural adoption practices

309 THE TERMS OF REFERENCE require us to consider whether special provision should be made to recognise Māori and other cultural adoption practices. Apart from the statutory provisions of the Te Ture Whenua Māori Act 1993 (the Te Ture Whenua Māori Act), Māori customary adoptions are no longer recognised in law.[323]

310 For the purposes of this paper we have concentrated mainly on Māori adoption issues. This is partly because there is more information available about Māori perspectives on adoption than there is about the adoption practices and views of other cultural groups. We seek information about other cultural perspectives on adoption, and we would be grateful for submissions on adoption issues from other cultural groups.

MĀORI CUSTOMARY ADOPTION

Legal constructs and customary 'adoption'

311 In the paragraphs below we attempt to give a rudimentary definition of how whāngai placements differ from adoption. We also provide a brief history of the way in which the New Zealand legal system has chosen to recognise (or has refused to recognise) the legal validity of such placements. Although for the purposes of adoption law, whāngai placements are not legally recognised,[324] an informal system of customary 'adoption' which corresponds with the traditional concept of whāngai or atawhai placements[325] is still practised by some Māori. This cannot be equated with adoption under the Adoption Act, as it does not carry the same incidents or consequences as adoption.[326] Dame Joan Metge's studies indicate that the current Māori use of the term whāngai generally makes no reference to the legal status of the child involved.[327] If an analogy needs to be sought, the Pākehā concept of guardianship more closely equates to customary placements.[328] For this reason we have sought to use the terms 'whāngai placement'. Any reference to 'Māori customary adoption' in this paper should be understood in the context of the above comments.

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[323] See section 19 Adoption Act. Section 3 Te Ture Whenua Māori Act defines "whāngai" as "a person adopted in accordance with tikanga Māori".

[324] Section 19 Adoption Act.

[325] Discussed in paragraphs 312–324.

[326] See D Durie-Hall and Dame J Metge "Kua Tutu Te Puehu, Kia Mau Māori Aspirations and Family Law" in Henaghan and Atkin, above n 11, 54–82.

[327] Above n 7, 211.

[328] Department of Social Welfare, above n 106, 7,10.

Whāngai and atawhai – history

312 The position as far as Māori custom is concerned is that there was, and still is,[329] a recognised practice of giving a child into the care of relatives. Very often the relative will be the child's grandparent or an aunt. Children given into the care of persons other than their parents were commonly referred to as whāngai or atawhai.[330]

313 There are no particular formalities, but it appears that whāngai or atawhai placements were a matter of public knowledge and were made with the express or tacit approval of the whanau or hapu.[331]

314 The child was aware of its birth parents and other family members, and usually had contact with the members of its birth family. 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 whanau. Whāngai placements were not necessarily permanent and it was not uncommon for such a child to later return to its parents.

315 Whāngai placements were used for a variety of reasons[332] and with a number of results. The tikanga[333] relating to whāngai varies between iwi.[334] Generally, whāngai placement was a means of strengthening relations within a hapu or iwi and had the advantage of ensuring that land rights were consolidated within the tribe, rather than diluted. For this reason, whāngai adoptions were traditionally arranged between members of the same hapu or iwi, although relations by marriage would sometimes be deemed acceptable candidates.

316 Adoption of children from outside the whanau/hapu/iwi was uncommon. A child who was adopted by a stranger was vulnerable and had little protection.[335] Whāngai placements contrast markedly with Pākehā closed adoption practices whereby children were usually adopted by strangers.

Legal recognition of whāngai placements

317 The legal system has given 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

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329 Metge above n 7, 252.

330 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 Māoris of New Zealand" (1922) 4 Journal of Comparative Legislation and International Law (3rd series) 60; Metge, above n 7, 228–257.

331 See *Arani v Public Trustee* above n 53, 201.

332 As with Pākehā adoption, infertility was often a reason why a child was offered as a whāngai to a relative. See paragraph 92.

333 Tikanga can be defined as law, custom, traditional behaviour, philosophy.

334 For this reason we have not attempted to articulate the tikanga. The Law Commission's forthcoming Māori Custom Law paper will attempt to identify principles of tikanga in respect of a number of practices, one of which is whāngai placement.

335 Mead, above n 330, 7. See also paragraph 49 which discusses the Māori Committee's view of adoption.

Court order. Māori could avail themselves of the statutory adoption procedure if they wished to do so, but it was not obligatory. [336]

318 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.[337] Between 1901 and 1904 customary placements became increasingly regulated, largely due to the potential for whāngai to dispute land entitlement.[338] 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.[339] 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 enquire 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 customary placements and determine succession rights.[340] To a certain extent, customary law principles informed the substance of the mainstream law relating to adoption.

319 Section 161 of the Native Land Act 1909 provided that no adoption in accordance with Native custom, even if made before the Act was passed, should have any force or effect, particularly as regards intestate succession to Māori land.[341] An adopted child's rights were only preserved if the adoption had been registered before 31 March 1910.[342] This was the express intention of the legislature, as indicated by Sir John Salmond's notes of the Bill which was to become the Native Land Act.

> [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.[343]

320 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.

321 In 1927 the legislative policy was reversed. Section 7 of the Native Land Amendment Act 1927 and the Native Claims Adjustment Act 1927 re-instated 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

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[336] *Arani v Public Trustee* above n 53.

[337] Section 50 Native Land Claims Adjustment and Laws Amendment Act 1901.

[338] Department of Social Welfare, above n 5, 6.

[339] Section 50 Native Land Claims Adjustment and Law Amendment Act 1901.

[340] See Appendix E.

[341] Sections 161–164. It also provides that adoption in this form has 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.

[342] Section 161(2); *Piripi v Dix* [1918] NZLR 691 (SC).

[343] New Zealand Law Commission *The Law of Succession – hui notes* (unpublished, 1997) 11.

applied "in the case of a Māori who dies or who has died subsequently to the commencement of the principal Act".

322 Section 202 of the Native Land Amendment Act 1931 re-instated the original section 161. It provided, as before, that "no adoption in accordance with Native custom, whether made before or after the commencement of this Act, shall be of any force or effect".[344] Clearly this provision was intended to have retrospective effect, as had its 1927 predecessor.

323 Thereafter, the proscription of customary placements continued in much the same form until 1955. An abridged version was then inserted in the Adoption Act 1955.[345] That law is still in force.

324 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 1930, the law once again recognised whāngai and equated such practice with adoption. From 1930 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 the Te Ture Whenua Māori Act.[346]

Court jurisdiction

325 Despite the legal changes, adoption practices in the Magistrates' Court[347] 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. Adoption proceedings in the Magistrates' Court were heard in closed chambers and the proceedings were not published. From 1962 all adoptions had to be processed by the Magistrates' Court (the District Court and the Family Court now have jurisdiction to make adoption orders).

Succession

326 Customary law varies as to whether whāngai children may inherit from their "adoptive" family. Some iwi allow a whāngai child to inherit only if the child is a blood relative. Ngai Tahu, for example, oppose succession by adopted or whāngai children.[348]

327 Children who have been formally adopted (and other relatives by adoption) can take the property just as if they were natural children. Whāngai children[349] who are not formally adopted (according to Pākehā procedures) can only take

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[344] Section 202 Native Land Amendment Act 1931.

[345] Section 19 Adoption Act.

[346] Section 19(1).

[347] Now the District Court, or the Family Court.

[348] Above n 343, 44.

[349] 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.

(a) under the will of the whāngai parent;[350] or (b) by order of the court, on the intestacy of the whāngai parent.[351] The Māori Land Court is able to make provision for whāngai when distributing an estate under the Te Ture Whenua Māori Act.[352] The Court must determine whether a person is to be recognised for the purposes of the Act as having been a whāngai of the deceased owner of land.[353] 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.[354] 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.[355] These provisions have effect notwithstanding section 19 of the Adoption Act.[356]

328 Te Puni Kokiri is currently undertaking a review of the Te Ture Whenua Māori Act. A Bill is currently being prepared which may deal with whāngai succession issues. The effect that this Bill will have on the present law is unclear. We consider that it would be advisable to await the results of the Te Puni Kokiri review before commenting further on whāngai succession issues.

Māori concerns about legal adoption

329 In December of 1995 and between May and June 1996 the Law Commission held hui around New Zealand. At these hui a concern was expressed about the way in which adoption impacts on Māori family structures. Hui participants pointed out that the many concepts that underpin the Adoption Act are alien and constitute an affront to Māori culture.[357] There was a general concern about the uncertain status of whāngai.[358] The following aspects of adoption were singled out for particular criticism:

- 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.[359] The effect of section 16 of the Adoption Act was considered excessive by many Māori attending the hui.
- Some Māori consider that the Adoption Act is an imposition on customary law rules relating to lines of descent.[360] The risk that the child will lose its sense of identity was a matter of great concern.[361]

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[350] Section 108(2)(e) Te Ture Whenua Māori Act.

[351] Section 115 Te Ture Whenua Māori Act.

[352] Section 115 Te Ture Whenua Māori Act.

[353] Section 115(1) Te Ture Whenua Māori Act.

[354] Section 115(2)(a) Te Ture Whenua Māori Act.

[355] Section 115(2)(b) Te Ture Whenua Māori Act.

[356] Section 115(3) Te Ture Whenua Māori Act.

[357] Law Commission *Draft Preliminary Paper on Māori Succession Law* (NZLC Draft, 31 January 1997) [*Draft Preliminary Paper on Māori Succession Law*].

[358] *Hui notes* above n 343, 39 to 44.

[359] Above n 357, 144. See also *Hui notes* above n 343, 43.

[360] *Hui notes*, above n 343, 42.

[361] *Hui notes*, above n 343, 42, 43.

- Many of the participants were highly critical of the secrecy surrounding Pākehā adoption practices.[362]
- The Adoption Act was criticised for being inconsistent with customary law because of the lack of consultation involved in the adoption process.[363]

In spite of the criticisms, some participants at the hui argued that no law can break the links of blood in Māori tradition, so although the Adoption Act distorts legal relationships, it does not necessarily do so in fact.[364] Furthermore, some saw adoption as a better means of ensuring that a child is provided for upon the parents' death.[365]

The impact of secrecy upon whakapapa

330 Unlike Pākehā adoption, Māori customary placements were not secret. The transfer of jurisdiction over Māori adoptions 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.

331 An issue of prime importance in the adoption debate is the negative impact of the law upon whakapapa.[366] Māori regard children as an integral part of the whanau, rather than as individuals divisible from the whanau.[367] When the child is adopted outside of the whanau, it may lose its cultural identity and sense of connection with its forebears and relatives.[368] This concern is magnified when a child is adopted by non-Māori.

Inability to establish entitlement

332 Certainty in relation to one's identity is crucial to facilitating access to a range of opportunities and entitlement. Māori who are not aware of their ethnic background 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 also depends 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 their whakapapa and access entitlements.

Lack of whanau consultation

333 Pākehā society is often criticised by Māori for valuing individual rights above communal rights. Many Māori are critical of the lack of consultation and whanau 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,

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362 *Hui notes*, above n 343, 42

363 *Draft Preliminary Paper on Māori Succession Law*, above n 357, 145.

364 Above n 357, 144.

365 Above n 357, 144.

366 Genealogy.

367 *In re T* (1998) 16 FRNZ 599.

368 Mead, above n 330, 13.

parents alone did not have the right to decide whether and with whom a child should be placed; rather whanau, hapu and iwi played a role in the decision-making.[369]

Reconciling values

334 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.[370] 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 whanau and does not recognise that issues relating to the care of Māori children should be resolved at a whanau level. This is not a view held by all Māori and may not reflect reality for many urban Māori. In addressing the weight to be accorded to various claims to rights, Professor Hirini Moko Mead indicated that Māori values and children's rights can be harmonised when he stated at an adoption conference[371]

> 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.

There is ample scope for Māori values to be recognised, whilst ensuring that the welfare and best interests of the children prevail.

Other jurisdictions

335 Other jurisdictions provide a separate process or additional requirements for adoptions of children from indigenous groups.[372] Most stop short of granting tribes complete jurisdiction over children.[373] 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.[374] Others apply a child placement principle, where 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.[375]

A more accommodating adoption regime

336 Much of the criticism levelled at the Adoption Act relates to lack of input into decision-making and the restrictions placed upon access to information. Some of the changes we have discussed throughout this paper may better accommodate other cultural practices and may assuage some of the concerns that have been expressed in relation to the mono-cultural nature of the present

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[369] Above n 326, at 69.

[370] Wai 160, Wai 286.

[371] Mead, above n 330.

[372] See Appendix F for a discussion of procedures in other jurisdictions.

[373] The United States grants limited jurisdiction over Indian children to Indian tribal authorities.

[374] United States, Nova Scotia, Alberta.

[375] British Columbia, Victoria, South Australia, Northern Territory.

Adoption Act. Such general suggestions accommodate a range of cultural adoption practices, rather than attempting to prescribe a particular approach to adoptions for each culture.

Redefining the "best interests" principle

337 Overseas legislation illustrates various ways to accommodate customary adoption practices. Most achieve this by stating that a consideration of the "best interests" of the child involves placing children within their extended family or at least with members of their own cultural/ethnic group.[376] If placement within a family from the same cultural group is not possible, the court should be satisfied that the prospective adopter(s) will help foster the child's cultural and linguistic heritage, and facilitate contact with that child's family.

Counselling and family group conferencing

338 Providing counselling throughout the adoption process and allowing family members to participate in decision-making in family group conferences might help to resolve some of the issues Māori have raised about lack of consultation during the adoption decision-making process.[377] In some cases cultural norms might mean that a family group conference would be inappropriate, and such norms should be taken into account. For this reason it might be better to facilitate rather than mandate such conferences.

Māori social workers

339 The present 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.[378] It would be desirable to involve such persons in all cases involving a Māori child and we suggest that this provision should be strengthened.

Adoption plans

340 An open adoption plan could be attached to the adoption order to allow contact to be maintained between the child and the child's birth family. In this way the child would retain its genealogical history (whakapapa) and would be aware of its cultural links.[379]

Iwi databases

341 Iwi authorities could maintain a register of adoptions of Māori children of their iwi. The database could include such information as the iwi thinks necessary to enable the child to establish its whakapapa and turangawaewae. Iwi specific guidelines would determine the basis upon which a person would have access to the information contained in the database.[380]

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[376] See Appendix F.

[377] See paragraphs 329, 333.

[378] Section 2 Adoption Act.

[379] See paragraphs 329–332.

[380] Submission by Ngai Tahu Māori Trust Board to Social Welfare above n 106, 30 September 1993.

Would:
- the best interests principle;
- counselling and family group conferencing;
- Māori social workers;
- open adoption plans; and
- iwi databases;

help to resolve the concerns raised by Māori about adoption?

Should Māori values be mentioned specifically in a new Adoption Act as they are in the CYP&F Act?

A parallel system

342 Māori customary adoption was expressly extinguished by the Native Land Act and no longer forms part of the legal system. In spite of this (or perhaps as a result of this) there have been calls by some Māori for legal recognition of "Māori customary adoption".[381] Little consideration has been given to how this might be achieved or what legal consequences Māori would wish to flow from such recognition.

The legal effect of adoption

343 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. Further work needs to be done to determine the consequences that should or would need to flow from any parallel system of adoption. Whatever system is devised, there must be legal certainty.

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?

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

[381] See paragraphs 311–316 for discussion about the difference between whāngai and legal adoption.

PACIFIC ISLANDS ADOPTION

344 Little written information is available about Pacific Islands adoption practices. Samoan culture has a form of adoption which appears to be similar to Māori customary adoption practices, that is, the child is placed within the extended family and kinship links are maintained and strengthened. A considerable proportion of adoptions in New Zealand involve the adoption of a Western Samoan young person (up to the age of 20) by a New Zealand based relative.

345 Judge Mather recently considered an application to adopt a Tongan relative.[382] The judge investigated whether a legal adoption would be in accordance with Tongan custom. He observed that Tongans have a system of informal adoption where a child might go to live with a family member. However, he observed that:[383]

> Despite such informal adoptions the children never lose their rights or entitlements or obligations in respect of birth families. The arrangements are voluntary and do not imply a breakdown in formal legal relationships between children and their parents.

Adoption and fostering are more of a continuum in Tongan culture, and birth parents are never "replaced".[384] Judge Mather considered that guardianship was more consistent with Tongan culture than adoption.[385]

346 Tahiti has two main forms of customary adoption, tavai and faaamu (faaai).[386] Tavai is an agreement to adopt another person's child and involves a change in the legal status of the child. Faaamu involves transferring a child to other persons for variable periods of time, but did not usually involve a transfer of property rights. One of the difficulties with faaamu adoption is that it has frequently led to disputes over succession rights. Faaamu adoptions almost always take place between family members and the child maintains contact with its birth parents. Adoption is used for a variety of reasons: to release a young mother from the obligation of caring for her child, to reinforce links between family members, to provide a source of labour, or to ensure that there will be a successor.

347 Social workers have indicated that Pacific Island peoples do not regularly resort to legal adoption as a means of ensuring the right to care for a child. When Pacific Island peoples do use the Adoption Act, they appear to do so to secure the legal benefits and consequences that flow from the status of adoption.

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[382] Adoption application by T, above n 112.

[383] Adoption application by T, above n 112.

[384] Adoption application by T, above n 112.

[385] Adoption application by T, above n 112.

[386] G Coppenrath *La Délégation d'Autorité parentale: prélude à l'adoption en Polynésie Française* (2nd ed Haere po no Tahiti 1990).

ASIAN CULTURAL GROUPS

348 We are aware that the Asian population of New Zealand is increasing. We are interested to learn whether the Asian population has any concerns about the current adoption regime.

We are interested in receiving submissions about other cultural adoption practices, specifically from Pacific Islands and Asian groups.

13
Surrogacy

349 SURROGACY ARRANGEMENTS involve an agreement under which a woman agrees to become pregnant and to bear a child for another person or persons. She undertakes to transfer custody to those persons when the child is born.[387]

350 Such arrangements are often referred to as one of many emerging new or artificial reproductive technologies. However surrogacy differs in one important respect: it does not necessarily require the intervention of medical professionals. Surrogacy by way of natural intercourse with the commissioning father has occurred since biblical times, and is referred to in the ancient stories of Abraham, Sarai and the handmaid Hagar, and of Jacob, Rachel and their handmaid Bilhah.[388]

351 In more modern times, medical technology has allowed 'partial' surrogacy to occur without the need for natural intercourse, with the use of artificial insemination to achieve pregnancy. The surrogate mother's own ovum is fertilised with the commissioning father's sperm (or donor sperm). In cases of 'full' or 'gestational' surrogacy, ovum is extracted from a commissioning mother (or a donor) and is fertilised with the commissioning father's sperm (or donor sperm); the embryo is then transferred to the surrogate mother's womb. In most cases surrogacy provides the opportunity to create a child that is biologically related to at least one of the commissioning parents.

352 It is not within the scope of this review to discuss whether the practice of surrogacy arrangements is desirable, or how such arrangements should be regulated. What is within our brief is a consideration of whether adoption is the appropriate forum in which to regularise the outcome of a surrogacy arrangement.

THE LEGAL STATE OF SURROGACY

The regulatory arrangements

353 The Government made a policy decision not to regulate surrogacy arrangements when it drafted the Assisted Human Reproduction Bill 1997. Rather, providers of medically assisted surrogacy services submit themselves to a voluntary accreditation regime. This requires them to gain approval from the National

[387] New South Wales Law Reform Commission *Surrogate Motherhood* (NSWLRC DP18, Sydney, 1988) 9.

[388] Genesis 16: 1–16.

Ethics Committee on Assisted Human Reproduction (NECAHR) to assist in a surrogacy arrangement on a case by case basis. NECAHR is a ministerial committee established by the Minister of Health, which considers the ethical dimensions of new reproductive technologies proposed by providers of such technology.[389]

354 Surrogacy arrangements exist in a legal vacuum in New Zealand. When such arrangements do occur, the legal status and obligations of each participant and any resulting child must be determined in accordance with a range of family legislation that was not drafted with surrogacy in mind.

The status of the child

355 The legal status of the child in relation to each set of parents is defined by the Status of Children Act and the Status of Children Amendment Act. The latter legislation was enacted to address the needs of parties who achieved pregnancy with a donated sperm, donated eggs or both. Issues of legal status in surrogacy arrangements were not dealt with, but are affected by, this legislation.

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.[390]

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.[391]

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, 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.[392]

359 The commissioning parents in a surrogacy arrangement are likely to have no legal rights in relation to the child that is eventually born, even if that child is conceived with their genetic material.

SURROGACY AND ADOPTION

360 It is clear that, so long as surrogacy arrangements are not legally regulated, in order for an agreement to be effective an adoption of the resulting child by the

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[389] In May 1998 NECAHR issued draft criteria for non-commercial IVF surrogacy to be considered by the provider when assisting with a surrogacy arrangement.

[390] Section 5 Status of Children Act.

[391] Section 6(2) Guardianship Act. The father must apply to the Court under section 6(3) if he wants to become a guardian.

[392] Status of Children Amendment Act.

commissioning parents will be necessary. To date, two adoption cases involving surrogacy arrangements have been heard in the Family Court.[393]

361 As the present legislation was not designed to deal with surrogacy arrangements a number of issues arise that will need to be considered. We consider here whether surrogacy should be dealt with as part of a new Adoption Act, or whether surrogacy demands special legislative attention.

Similarities and differences

362 Surrogacy and adoption have a number of elements in common. Equally, however, there are a number of important differences. We consider here the extent to which the two might be linked together, or might warrant individual consideration.

363 Both surrogacy and adoption involve a woman giving birth to a child and giving that child to someone else to raise. The surrogate mother may experience some of the same difficulties that are experienced by birth mothers who relinquish a child. Where the surrogate mother is also the genetic mother, the situation is even closer to that of adoption. A child born of a surrogacy arrangement might be expected to experience similar issues to adopted children about identity and genetic heritage.

364 In contrast, however, surrogacy involves the deliberate creation of a child who is intended to be brought up by particular parents. In most cases, the child will be genetically related to at least one of the commissioning parents. The surrogate mother conceives the child knowing that she will be giving it up, and in the case of gestational surrogacy she will not be the genetic mother of the child. To this extent, it can be argued that surrogacy is quite unlike adoption.

Arguments against using adoption to confer status

365 The argument can be made that because of the differences between a surrogacy arrangement and an 'ordinary' adoption, it is inappropriate to subject commissioning parents to the adoption process where one or both of them are genetically related to the child. Adoption involves a consideration of the parenting capabilities of the proposed adoptive parents and of whether their appointment will promote the welfare and interests of the child.[394] This does not occur when people utilise other forms of assisted reproduction in order to create a family; for example, the Status of Children Amendment Act establishes that the donors of sperm and ova are not the legal parents in such cases, and the recipients of such assistance are automatically considered the legal parents of a resulting child.

366 We noted in paragraph 360 that there have already been two adoption orders made as a result of successful surrogacy arrangements. However, there are indications that there have been more than two completed surrogacy

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[393] *Re P* [1990] NZFLR 385 (FC); *In re* G (3 February 1993) unreported, District Court, Invercargill Registry, Adopt 6/92.

[394] See section 5 Adoption Act for Social Workers Report, which assesses the parenting ability of the adopters, and section 11(b) which states that the welfare and best interests of the child must be promoted when the court makes an adoption order.

arrangements in New Zealand,[395] and that adoption has not been used to regularise the status of the child. It is impossible to determine why adoption has not been used in these cases, but it may be that the commissioning parents are unwilling to subject themselves to the scrutiny that accompanies an adoption. The result is that there are children born of surrogacy arrangements whose status has not been confirmed by the court, or whose parents have achieved the legal status of parent by misrepresenting the facts.[396] If an alternative to adoption were offered, commissioning parents might be more likely to apply to have the status of legal parent conferred upon them.

Arguments for requiring a legal process

367 Surrogacy does differ from other fertility treatments as a third party carries and gives birth to the child. This requires a greater personal investment than is involved in the donation of sperm or ova. The conferment of legal parenthood upon the commissioning parents should not be automatic.

Alternatives to adoption

368 The United Kingdom has a simplified 'fast-track' procedure which allows commissioning parents who have received a child through a successful surrogacy arrangement to become the legal parents of their child. Section 30 of the United Kingdom Human Fertilisation and Embryology Act 1990 provides that the court may make an order "providing for a child to be treated in law as the child of the parties to a marriage" if:

- the child has been carried by a woman other than the wife as a result of the implantation of an embryo or sperm and eggs or her artificial insemination, and
- the gametes of the husband or the wife, or both, were used to bring about the creation of the embryo, and
- the conditions in subsections (2) to (7) are satisfied.

369 Subsections (2) to (7) establish a time limit for the application, create conditions as to domicile and age, set out the requirement for full and free consent to the order by the father[397] of the child where he is not the husband; and the woman who carried the child, and provide that the court must be satisfied no money or benefit other than for maintenance has been paid (unless payment is authorised by the court).

370 Where there is no genetic connection between the commissioning parents and the resulting child, an adoption application must be made in the usual manner.

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[395] See Department of Justice *New Birth Technologies: An Issues Paper on AID, IVF, and Surrogate Motherhood* (Wellington, 1985) 54; and articles in *The Dominion Sunday Times* (21 April 1991); *The Dominion Sunday Times* (2 June 1991); *More* (December 1990) 30; *New Zealand Woman's Weekly* (19 March 1990) 42; *New Zealand Women's Weekly* (21 May 1991) 36; *New Zealand Woman's Weekly* (27 May 1991) 36; *New Zealand Woman's Weekly* (17 May 1993) 24.

[396] For example, by applying for a step-parent adoption, or by the surrogate using the name of the commissioning mother and recording the names of the commissioning mother and father on the birth certificate as the parents of the child.

[397] Including a father who has that status via section 28 of the Human Fertilisation and Embryology Act 1990, which is similar to our Status of Children Amendment Act.

This is because such an arrangement amounts to a 'pre-natal' adoption agreement. Some consider that there is no difference to another adoption arrangement, except that it is agreed upon prior to conception.[398]

Difficulties

371 A recent enquiry[399] into the payments for and regulation of surrogacy in the United Kingdom considered that the restriction on payments was not effective, and has recommended that no section 30 parental order should be made unless the commissioning couple establish their compliance with the statutory limitations on payments. The Brazier Report recommended that the court have no jurisdiction to approve otherwise non-permissible payments.[400] In such cases, the commissioning parents would have to apply to adopt their child.

372 To ensure that the fast-track procedure is not abused, the Brazier Report recommended that the court should be able to order a DNA test so that it could ensure that one of the applicants is in fact a genetic parent of the child and that the child was not the child of the surrogate mother and her partner.

373 The United Kingdom law entrusts guardians ad litem with the responsibility of ensuring that the legislative requirements are fulfilled. The guardians ad litem are concerned that they are unable to check the criminal records of commissioning parents before they can report to the court. The Brazier Report concluded that:[401]

> While we judge that only rarely will couples prove to have such convictions, when the law is invoked to entrust a child to the commissioning parents, and to sever any links with the surrogate who gave birth to him or her, it is a fundamental pre-requisite of protection of the child's welfare to ensure that his or her prospective parents have no record of child abuse or related criminal conduct.

The Law Commission's tentative view

374 The current adoption legislation is a clumsy means of regularising the status of a child who is born pursuant to a successful surrogacy arrangement. It would appear that the current requirements may discourage commissioning parents from applying to adopt the child, for fear that the statutory criteria might be applied stringently or the courts will reverse their previous position. If status is not determined, the legal position of the child within its 'social' family is not secure.[402] This is an untenable situation.

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[398] M Brazier, A Campbell and S Golombok *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation – Report of the Review Team* (October 1998) 64 [Brazier Report].

[399] Brazier Report, above n 398.

[400] Above n 398, 60.

[401] Above n 398, 64.

[402] For example, the surrogate mother would still be the legal mother of the child and may attempt to exercise her legal rights at some future point. The same can be said for the legal father if the surrogate mother had a partner at the time of the conception and birth. The child would have no automatic rights of succession to the commissioning parents, and should the commissioning parents die the future care of the child would not be certain.

Should commissioning parents be able to apply for a 'parental order' to confer upon them the status of legal parenthood?

Should parental orders for surrogacy arrangements be provided for in adoption legislation, or should they be enacted as a separate piece of legislation?

375 The United Kingdom model, whilst not without its difficulties, appears to be a logical way to regularise the status of a child born as a result of a successful surrogacy arrangement when that child is genetically related to one or both of the commissioning parents. If this route were to be taken, decisions would have to be made about whether payments should be prohibited, whether the commissioning parents should be screened for certain types of convictions,[403] and whether DNA testing is required.

376 Adoption would still be required where there was no genetic connection between the child and the commissioning parents, or where a dispute between the surrogate mother and the commissioning parents arose.

377 Commercial surrogacy services are viewed by many as constituting baby farming, and as contributors to the commodification of human life. However, criminalising the making of payment for surrogacy services is not likely to stop payments from occurring, and it may still be in the best interests of the child to remain with the commissioning parents. This review offers the opportunity to prohibit the offering or receipt of payment for profit for a surrogate pregnancy.

Should it be an offence to offer or receive payment for the gestation of a child?

Should there be an exception for maintenance or pregnancy and birth related expenses?

Should the commission of an offence relating to payment make the commissioning parents ineligible for the proposed parental order?

378 Adoption legislation imposes restrictions upon advertising in relation to the adoption of a child.[404] This restriction, like that prohibiting payment, can be connected to society's condemnation of baby-farming and the commodification of children. We seek submissions as to whether advertising should be similarly restricted in relation to surrogacy, and whether this should have an effect upon the ability of the commissioning parents to apply for the proposed parental order.

Should advertising be restricted in relation to surrogacy arrangements?

Should the breach of a restriction on advertising make the commissioning parents ineligible for the proposed parental order?

[403] For example, child abuse and sex offences.

[404] Section 26 Adoption Act.

379 The Brazier Report considered that the State has a legitimate role in these circumstances to enquire as to whether the commissioning parents have convictions for child abuse or other related crimes. We seek submissions as to whether this is desirable, should a fast-track procedure be provided.

> Should commissioning parents be screened for criminal convictions before an order is made?

380 DNA testing could also be important in these cases, as the availability of a fast-track procedure is premised upon a genetic connection between the commissioning parents and the child. If there is no genetic connection it is difficult to distinguish the arrangement from an adoption arrangement. Caution should also be taken to ensure that the child is not that of the surrogate mother and her partner.

> Should DNA testing be required to confirm a genetic link to the commissioning parents?

Using adoption to regularise the arrangement – some issues

381 If the option set out above is rejected and adoption is to be used to regularise the status of the child and the commissioning parents, a number of issues must be addressed. Certain parts of the adoption legislation may need to be re-expressed in relation to surrogacy arrangements.

Payments

382 In two surrogacy cases the legality of payments made by the commissioning parents to the surrogate mother was questioned. It is an offence under the Adoption Act to give or receive, or agree to give or receive, any payment or reward in consideration of an adoption or proposed adoption. In *Re P* Judge McAloon found that the payments made were not for profit, but rather for maintenance, and therefore no offence was committed.[405]

383 If adoption continues to be used for these cases, consideration should be given as to whether it should be an offence to provide or receive payment for the gestation of the child, and as to the effect such an offence should have on the eligibility of the commissioning parents to adopt the child.

> Should payment for the gestation of a child, apart from maintenance or pregnancy and birth related expenses, be made an offence?
>
> What impact should the commission of the offence have upon the eligibility of the commissioning parents to adopt the child?

[405] Above n 393, 386.

Advertising

384 In *Re P* the prohibition placed by the Adoption Act upon advertising was also at issue. The commissioning parents had placed an advertisement "Adoption: Nelson couple desperate for child – can you help". Judge McAloon held that although a penalty is created by section 26 which could be pursued by the appropriate authorities, the commission of the offence does not invalidate any arrangement made pursuant to the advertisement.[406]

385 If adoption continues to be used to regularise the status of a child born as a result of a surrogacy arrangement, it is necessary to consider whether the restriction on advertising in relation to adoption should also apply in relation to surrogacy arrangements.

> Should advertising for surrogate mothers be prohibited?
>
> Should there be an exception for certified fertility clinics/providers?
>
> What impact should a breach of the restriction have on the ability of the commissioning parents to adopt?

The role of Social Welfare

386 Another contentious issue that arises is the role that Social Welfare should play in such arrangements. At present Social Welfare is required to authorise the placement of the child with the adoptive parents and to report to the court, as in any other adoption to legal strangers. Should Social Welfare still be compelled to approve placement and produce a report determining the suitability of the commissioning parents as adoptive parents? Should this occur before surrogacy arrangements are made (although this could only be controlled in the case of medically assisted surrogacy) or before an application to adopt?

387 In most cases at least one of the commissioning parents will be biologically related to the child that is eventually born. Parents without fertility problems who wish to have children are not assessed as to their suitability, nor are those who achieve pregnancy through artificial insemination of donor sperm. Surrogacy may be pursued because Social Welfare has already judged the couple unsuitable for adoption. If all parties consent to the adoption, why should Social Welfare play a role?

388 One way to resolve this issue might be to have a presumption that commissioning parents are suitable parents, unless they have been convicted for child abuse or like offences. In that event participating in a surrogacy arrangement, without the prior approval of Social Welfare (which probably would not be given) would constitute an offence. This would avoid unnecessary involvement of Social Welfare, but provide a degree of protection for the child.

> Should commissioning parents be deemed to be suitable parents for adoption unless they are shown to have convictions for child abuse?

[406] Above n 393, 387.

Best interests of the child

389 Another way of addressing the surrogacy issue could be to provide that in the case of adoption in the context of a surrogacy arrangement it should be presumed that placement with the commissioning parents is in the best interests of the child.

> Should it be presumed that in the case of adoption in the context of a surrogacy arrangement that placement with the commissioning parents is in the best interests of the child?

Possible relationship thresholds

390 In Chapter 7 we proposed that de facto couples might have to have been in the relationship for a determined period of time before an application for adoption could be considered, in order to assess the stability of the relationship. Bearing in mind that couples who can conceive naturally have no such restrictions placed upon them, should such a proposed requirement be waived in the case of a surrogacy arrangement?

> Should the prerequisite of relationship duration be waived in the case of an adoption involving a surrogacy arrangement?

Dispensing with consent

391 The Adoption Act provides that in certain circumstances the consent of the birth parents may be dispensed with in order that an adoption proceed. It may be that a breach of a surrogacy arrangement, particularly where the surrogate mother is not genetically related to the child, may be suitable grounds for dispensation with consent.

> Should breach of a surrogacy arrangement be grounds for dispensation of parental consent to adoption?
>
> If so, should such dispensation be restricted to situations where the surrogate parents are not genetically related to the child?

Succession rules

392 Earlier in the paper we suggest that an adopted child might be entitled to inherit from both its birth family and its adoptive family. Surrogacy arrangements involve slightly different circumstances that should perhaps be taken into account here. A child created as a result of a surrogacy arrangement is never intended to be the child of the surrogate mother. It is deliberately created to be the child of another couple. In some cases, the child may not be genetically related to the surrogate mother.

Should a child created as a result of a surrogacy arrangement be entitled to inherit from the surrogate mother as well as the commissioning (adoptive) parents?

Should there be an exception where the child is not biologically related to the surrogate mother?

Attaching conditions to the adoption order

393 Conditions could be attached to an adoption order in adoptions involving surrogacy as may be the case in other adoptions. A surrogate mother may be the biological mother of the child and wish to preserve some rights of access or contact, or the surrogate mother may have bonded with the child during pregnancy and have an interest in preserving contact.

Should it be possible to attach conditions to an adoption order in the context of a surrogacy arrangement?

Could such conditions be enforceable?

If so, how?

Access to information

394 Should children conceived as a result of a surrogacy agreement be governed by the same access to information provisions as a child adopted in ordinary circumstances? There may be no justification to create a different regime. Even if the surrogate mother is not the biological mother, she gave birth to the child and has an interest in the child's development. The child in turn has a legitimate interest in the surrogate mother that might warrant protection. These interests are heightened in situations where the surrogate mother is also the biological mother of the child.

Should adoptions involving surrogacy arrangements be subject to the same access to information regime as other adoptions?

14
Ancillary services

ADOPTION COUNSELLING

395 THE CURRENT LAW does not require prospective adoptive parents and the birth parents to undergo any counselling or assessment prior to the adoption of a child.[407] Social Welfare offers information sessions, but there is no legal obligation to participate. Where counselling does occur, Social Welfare and the court both benefit from a pre-adoption report that assesses the suitability of adoptive parents in respect of age, education, attitudes to adoption, and physical, mental and emotional health so far as it impacts on ability to nurture the child, as well as any other relevant considerations.

396 New Zealand is a signatory to the UNCROC. Article 21 requires State Parties to ensure that "the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary". It may be desirable to enact a requirement that a birth mother undergo counselling before the legal process of adoption is commenced, in order to explore fully all the available options and ensure that the birth mother understands the consequences of her decision. We might wish to consider whether counselling should be provided for the adoptee, where the child is sufficiently mature.[408]

397 An important question is whether counselling prior to adoption should be mandatory or optional. If it were mandatory then all prospective adopters would have to explore issues relating to the way in which they contemplate caring for the child and the effect that adopting may have on their lives. It could also help provide a framework for dialogue between the birth parent(s), adoptive parent(s) and child. Pre-adoption counselling could reap other benefits such as obtaining health information about the birth parents for the future benefit of the child.

Continuing counselling

398 The CYP&F Adoption Placements Manual cautions social workers that birth parents, particularly the birth mother, will need support for some time after the relinquishment of the child. Such support may not be sought immediately.[409]

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[407] Contrast this with section 3 of the Adult Adoption Information Act which requires that birth parents and adopted children be informed about the availability of counselling. A request under the Act will only proceed if the applicant either attends counselling or informs the Registrar-General that he or she does not want counselling.

[408] British Columbia children over the age of 12 years must be informed about a proposed adoption and must consent to adoption.

[409] Paragraph 3.6.

399 Birth mothers also have special needs that may require counselling after the adoption has proceeded. A recent New Zealand study reveals that few support services were available to birth mothers in the era of closed adoption.[410] When treatment was sought, the symptoms were treated but for many the underlying causes were not identified.[411] During the period when closed adoption was practised, birth mothers in the following years experienced depression, addiction, grief, relationship difficulties and subsequent parenting problems that they believed could be linked back to their experience of adoption.[412] Ann Weaver's study of birth mothers indicates that birth mothers who relinquished children during the era of closed adoption are more likely to be clients of mental health, relationship, and addiction services.[413]

Cost of counselling

400 Although the number of closed adoptions has declined over the last 15 years, adoption remains a profoundly distressing event for many birth mothers. Early intervention[414] is a key means by which birth mothers can access counselling to help them deal with issues relating to the relinquishment of their child. Weaver has stated that counselling services should not be regarded as an extra cost for the State.[415] Rather, provision of such services should be viewed as a means of avoiding the need for more resource intensive services at a later stage.[416] We should consider providing continuing counselling for birth mothers and others involved in the adoption process.

Which organisations should facilitate counselling?

401 At present Social Welfare provides information sessions for all persons involved in the adoption process. Some community-based organisations such as Barnados and private counsellors also provide adoption counselling services.[417]

> Should pre-adoption counselling and information sessions be mandatory or optional for adoptive and birth parents?
>
> Should counselling also be available to children and young persons who are to be adopted?

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[410] BA Kelly "The Role of the State and the Private Sector in the Provision of Placement and Long Term Support Adoption Services in New Zealand" (Master Social Sciences thesis, University of Waikato, 1998).

[411] 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) 53–61.

[412] Langridge, above n 16, 102–106; Palmer, above n 16; Winkler and van Keppel, above n 16.

[413] Above n 411.

[414] Early intervention is a strategy that recommends the early provision of services before the individual reaches a crisis point.

[415] Above n 411, 79.

[416] Above n 411, 79.

[417] Ann Weaver outlines a number of models for providing early intervention strategies to persons who need such support; see above n 411, 62–81.

Should counselling be available to adoptees?

Should post-adoptive counselling be provided?

To whom would this be available?

Which organisations would provide the counselling?

Should the State bear the cost of such counselling?

FAMILY GROUP CONFERENCES

402 It has been suggested that the family group conference process established by the CYP&F Act could be a useful adjunct to the adoption process, and might provide a forum for discussion and decision-making between the birth parent(s), wider family members and adoptive parents.[418] It would be particularly useful where the birth parents have decided to have the child adopted or placed in the care of family members or friends. If the birth parents sought to create an adoption plan, the family group conference might provide a constructive forum within which to negotiate such matters.

403 These conferences could be authorised at the court's discretion. In some cases it might not be appropriate to use a family group conference, particularly where the family is dysfunctional. This process might impose extra pressure on a young woman making the decision whether to adopt. Where the pregnancy is a consequence of rape it would plainly be inappropriate to involve the father of the child. It might also be inappropriate to mandate a family group conference in the face of the opposition of a birth parent.[419]

404 Whether the process is labelled a family group conference is also an important point to consider. Family group conferences conducted under the CYP&F Act have decision-making powers.[420] This might not be appropriate in the context of adoption, as in general the decision to adopt a child is a decision for the birth parents to make.[421] The structure would, however, suit the making of agreements regarding future contact between the birth and adoptive families.

405 An alternative option would be to provide for family meetings and counselling (where appropriate) before decisions are made about adoption, and convene a family group conference between the birth and adoptive families after the decision to adopt is made in order to resolve any issues of contact.

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[418] Above n 4.

[419] See *CMP v DGSW* [1997] NZFLR 1 (HC) where Elias J (as she then was) stated that it was inappropriate for the social worker to convene a family group conference against the stated wishes of the natural mother.

[420] See sections 29–36.

[421] However, many Māori would assert that such a decision should be made as a result of whanau consultation.

Should a procedure akin to a family group conference be available during the adoption process?

If so, what form should it take, and who should be entitled to be present?

Should a family group conference be available at any stage of the process or only once the birth parent(s) has made the decision to adopt?

Should family meetings and counselling be available prior to the adoption decision?

NEED FOR GREATER POWERS OF INQUIRY

406 When considering an adoption application, the Family Court must be able to inform itself. Although section 25 of the Adoption Act allows the Court to receive such evidence as it sees fit, it does not allow the Court to request that reports be commissioned.

407 The CYP&F Act[422] and the Guardianship Act[423] allow the Family Court (or Youth Court) to call evidence and commission reports from doctors, psychologists and social workers to help assess the physical and psychological wellbeing of the child. At times the expense of these reports is absorbed by the court, but often the parties will be asked to make a contribution towards the cost of the report.[424] It might be desirable that the same tools be extended to proposed adoption legislation.

Should the court be able to call for reports, where necessary?

COUNSEL FOR THE CHILD

408 Section 159 of the CYP&F Act and section 30 of the Guardianship Act gives the court the ability, if they consider it desirable, to appoint counsel for the child. This gives the child an advocate who can independently assess and represent to the court the best interests of the child. Counsel for the child is paid out of public money appropriated by Parliament for this purpose, although the court may order the parties to the proceedings to make a contribution to the costs of counsel for the child.[425]

409 To ensure that children's interests are represented in proceedings it may be desirable to give the Family Court the power to appoint counsel for the child in adoption proceedings.

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[422] Sections 17, 49, 52, 56, 128 and 178 CYP&F Act.

[423] Sections 28A, 29 and 29A Guardianship Act.

[424] Sections 58, 180 CYP&F Act; section 29A(6)(b) Guardianship Act.

[425] Section 30 Guardianship Act; section 162 CYP&F Act.

Should the court have the ability to appoint counsel for the child in an adoption application?

RIGHT OF REVIEW

410 The terms of reference require us to consider whether there should be a right of review for those persons refused permission to adopt. At present there is no formal right of review for applicants to whom Social Welfare refuses to assess as suitable to enter the pool of prospective adoptive parents.

Current review mechanisms

411 An ad hoc mechanism for review currently operates within Social Welfare. The AISU has a policy of telling applicants the reason for the refusal of permission to adopt. Some complaints are resolved once the applicants have been told the reason why permission was refused. A small proportion of applicants proceed to the complaints procedure whereby a panel is convened to review the decision-making process that led to the refusal. The panel comprises persons from within Social Welfare and from elsewhere. The actual result is not reviewed, just the process that led to the decision. Social Welfare processes approximately three or four formal complaints each year relating to permission to adopt.

412 Applicants have the right to apply to the court for a judicial review of Social Welfare's decision, but this can be prohibitively expensive. Judicial review does not evaluate the merits of the applicant's case.

413 Applicants may also request the Ombudsman to investigate the refusal. As a result of a complaint the Ombudsman may recommend to Social Welfare that:

- the matter be referred to the appropriate authority for further consideration;[426] or
- an omission be rectified; [427] or
- a decision be cancelled or varied; [428] or
- any practice upon which the decision was based should be altered; [429] or
- reasons for the decision be given;[430] or
- any other steps should be taken.[431]

414 Although the Ombudsman's recommendations are not binding, government agencies are loath to ignore them. The advantage of this process is that it already exists, the process is confidential and is not costly. Applicants could be advised of their right to apply to the Ombudsman in the event of an unfavourable decision from the AISU. The disadvantage is that the staff at the Ombudsman's office are not necessarily specialised in dealing with such matters.

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[426] Section 22(3)(a) Ombudsman Act 1975 (the 'Ombudsman Act').

[427] Section 22(3)(b) Ombudsman Act.

[428] Section 22(3)(c) Ombudsman Act.

[429] Section 22(3)(d) Ombudsman Act.

[430] Section 22(3)(e) Ombudsman Act.

[431] Section 22(3)(f) Ombudsman Act.

Should applicants who are rejected as prospective adopters be informed of their right to lodge an application for review with the Ombudsman?

Possible reform

415 We seek submissions on whether the current mechanisms for review are adequate.

416 An alternative option would be to create a formal review mechanism. The usual practice in the public sector is to provide an internal review panel and a right of review by an external arbiter. An external review board could be established, with members drawn from Social Welfare, specialists in the legal profession and a person from a relevant community group. This would have the appearance of being more independent, but has the disadvantage of potentially being more costly. Because of the low numbers of complaints filed annually, it would meet infrequently and consequently may not be able to form a comprehensive overview of the issues involved.

417 Alternatively, the Family Court might be given jurisdiction to review cases where persons were rejected as candidates for the AISU list of potential adopters. This proposal has several advantages. The Family Court is well established and has satellite courts in most parts of the country. The Judges specialise in family law and are independent of Social Welfare.

Should there be a statutory right to external review for those applicants who are rejected as prospective adoptive parents?

Who should review the decision?

Where should the costs lie?

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Access to adoption information

418 WHEN A FINAL ADOPTION ORDER IS MADE, a child's original birth registration is sealed and a new birth certificate is issued. This lists the adoptive parents as the child's parents, and a new name for the child is usually entered. There is nothing on the face of the reissued birth certificate to indicate that there is an original birth certificate.

THE DETAIL OF A BIRTH CERTIFICATE

Altering birth certificates

419 The sealing of original birth certificates after an adoption order has been made reinforces the secrecy that permeates the provisions of the Adoption Act. Over the last 20 years societal views regarding the perceived necessity for secrecy have changed,[432] and adoption is not viewed by society as much more than another facet of that person's identity. In 1986 Judge Mahon observed that:[433]

> There has been a marked change in community attitudes towards adoption in recent years with openness and lack of privacy being one of the hallmarks and with another being recognition that children require to know and require to be able to identify with their natural parents.

We might now ask whether is still necessary or appropriate for birth certificates to be altered in the way that they are at present.

420 Adoption raises significant privacy considerations in relation to all persons involved. Considerations include the extent to which an individual has the right to control access to knowledge about his or her adoption and the extent to which the State has the right to control the amount of information that individuals may seek about themselves. It also raises questions as to the type of personal information that others might legitimately seek.

The purpose of a birth certificate

421 The Births, Deaths and Marriages Registration Act is described in the long title as:

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[432] See discussion in paragraphs 71–74 and Parliamentary debate on the Adult Adoption Information Act (7 August 1985) 465 NZPD 6132–6158, 6306–6309, 6701–6712.

[433] *I and I v S* (1986) 2 FRNZ 112, 117 (FC).

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. [434]

A birth certificate is defined as a certificate that contains registered birth information relating to that person's birth.[435] A birth certificate records the date and place of birth, the names of the birth parents (to the extent that the father's identity is known) and the name of the child.

422 However, birth certificates have come to represent much more than a simple record of the fact of an individual's birth. Adoption and sexual assignment or reassignment provide grounds for altering a birth certificate.[436] Because a birth certificate reflects subsequent events in the life of a person, it is inaccurate to describe it as simply a certificate in relation to the birth of a person. It is perhaps more realistic to describe a birth certificate as representing a snapshot of an individual's life at a certain time. The question is whether this is an appropriate use of the birth certificate, or whether new forms of identity documents might better reflect the changing events in a person's life.

What is a birth certificate used for?

423 An individual needs to be able to prove entitlement to access benefits or services.[437] To establish entitlement, for most purposes it will suffice if a document can be produced attesting to an individual's age, gender and nationality and/or citizenship.[438] A birth certificate is the primary means by which this is done.

424 Birth certificates are also used as a means of identifying parenthood, for the benefit of both parent and child.[439] However, parenthood may be defined in several different ways, and with differing consequences. A legal parent might not necessarily be the genetic or custodial parent. Persons other than legal parents might be exercising guardianship rights in respect of the child. In bygone eras most of these factors would have coincided in the parent(s) or the adoptive parent(s), as listed on a birth certificate, but this does not necessarily hold true for life in 1999.

425 Except in the case of adoption, birth certificates presume that natural and legal parenthood coincide in the person(s) named on the birth certificate. In the

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[434] See sections 5–17, 23–27, 28–33, 63–71 Births, Deaths and Marriages Registration Act.

[435] Section 2 Births, Deaths and Marriages Registration Act.

[436] Sections 63, 64 Births, Deaths and Marriages Registration Act.

[437] Age and citizenship are the two factors which are commonly used to determine entitlement to services.

[438] For example when applying for a driver's licence or passport, or when starting school or tertiary training.

[439] Roman law provides the basis for the presumption that it is always clear who the mother is "mater semper certa est". Paternity can be established by a variety of means, in this context see section 8(1)(a) Status of Children Act.

case of adoption the original birth certificate records natural parenthood and the reissued birth certificate documents legal parenthood as if it were natural parenthood.[440] It may be desirable for the State to record a range of information to enable an individual to interpret the importance of such factors in their own life. Consideration may be warranted of what sort of information an individual might want, and legitimately need, to have access to, and how that information might be recorded and stored. People have differing needs at various stages of their lives and the value which they place on different types of information will vary. For example an individual might need to have access to information about his or her genetic parenthood for medical purposes. It is hard to state categorically whether it is more important for an individual to know who gave birth to him or her, from whom a person is descended or to know to who is legally responsible for the individual. It may be that all of this information is relevant, but for different purposes.

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 by an altered birth certificate?

Where artificial reproductive technology or a surrogacy arrangement is involved, should the names of the genetic parents/commissioning parents also appear on the birth certificate?

ACCESSING ADOPTION INFORMATION – ARE THE CURRENT PROCEDURES APPROPRIATE?

426 Prior to 1986 it was difficult to obtain a copy of an adopted person's original birth certificate. The Adult Adoption Information Act, which started life as a Private Member's Bill, enabled adoptees to discover their origins and for birth parents to find their child. After counselling, adoptees can obtain the original birth certificate. They can also ask Social Welfare to provide identifying information about the parent. Once Social Welfare has obtained the name and address, Social Welfare will approach that person to find out whether the birth parent is willing to meet his or her child. Conversely, birth parents who wish to make contact with their child can apply to Social Welfare to locate the adopted child. Social Welfare then finds out whether the adopted person is willing to have identifying information communicated to the birth parent.

[440] "Natural" parents may or may not be the birth parent or genetic parent(s) of the child. Adoptive parents are legal parents of the child and are substituted for the natural parents in the birth certificate.

427 It may be difficult for an adopted child to obtain information about a birth father. If the birth father's name does not appear on the birth certificate[441] an adopted person can only find out the name of the father if he or she can prove to the Registrar of Births, Deaths and Marriages that the birth father has died.[442] Access to such information is usually sought by an application under section 23 of the Adoption Act.

428 Birth parents who adopted out a child before 1986 can lodge vetoes to prevent an adopted child from seeking information.[443] Adopted persons, irrespective of when they were adopted may request that a birth parent is not given identifying information.[444]

Should the legislation be amalgamated?

429 Access to adoption information is currently governed by the Adult Adoption Information Act and section 23 of the Adoption Act. Other jurisdictions incorporate provisions relating to adoption information within the adoption legislation. Provisions relating to access to adoption information could be incorporated in a comprehensive adoption statute.

> Should the Adult Adoption Information Act be incorporated within the Adoption Act?

Age restriction

430 The title of the Adult Adoption Information Act establishes the Act's purported coverage. The Act applies to those over the age of 20.[445] When Jonathan Hunt MP introduced the Bill for its second reading, he drew an analogy between the adoption process and contract law.[446] The contract takes place between the birth parent(s) and the adoptive parents in respect of a third party (the child). In Hunt's view, when that third party reaches the age of majority, the adoptive person's rights in respect of the contract transcend the rights of the other adults involved in the process. Restricting access to information until the child reached the age of 20 served to assuage the fears of some adoptive parents that the natural mother would attempt to intervene in the relationship between the adoptive parents and child.

431 However, there is a growing recognition of the autonomy of young persons. As the Privacy Commissioner has observed, for most practical purposes the age of 18 years is the effective age of majority.[447] Consideration is warranted of whether the arguments justifying the existing age limit are compelling.

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[441] The father's name frequently does not appear on the birth certificate, but may appear in the adoption files.

[442] Section 9(3)(a)(b) Adult Adoption Information Act.

[443] Section 3 Adult Adoption Information Act.

[444] Section 7 Adult Adoption Information Act.

[445] Although coverage is not prohibited for those under the age of 20, neither is it mandated.

[446] (25 October 1983) 454 NZPD 3401.

[447] Submission of the Privacy Commissioner on the Adult Adoption Information Amendment Bill, 14 April 1994.

Should there be any age restriction at all on access to an original birth certificate?

At what age should an adopted child be entitled to further information about his or her identity?

Access to information by other family members

432 The Adult Adoption Information Act does not give other family members a right to search for an adopted relative, or the birth parent of an adoptive relative. In some cases family members have sought to use the Official Information Act and the Adoption Act to locate adopted siblings, half siblings and grandchildren who have been adopted.[448] For some Māori, the secrecy surrounding adoption and the practice of reissuing the birth certificate entails the "stripping of cultural identity".[449] Knowledge of one's background is essential to establish whakapapa, which defines the person as an individual and gives that person a place as a member of a particular social group.

433 Inevitably such applications involve balancing the individual's right to privacy against the family's desire to make connections. In other jurisdictions a compromise has been made, allowing relatives access to information where a birth parent has died.

Should other family members be entitled to seek information about relatives who have been adopted?

If so, should access be limited to certain classes of family member?

Should such access to information be limited to where the birth parent linked to that family has died?

The Assisted Human Reproduction Bill 1998

434 By way of contrast to the Adult Adoption Information Act, the Assisted Human Reproduction Bill 1998 proposes much wider access to information to donors, children born of donor gametes and the parents of children born of donor gametes.

435 The Bill provides for the collection of "general" information as well as information prescribed for the purposes of the Act. Providers[450] must inform donors that personal information prescribed for the purposes of the Act[451] will be gathered and retained. Some of the information will be forwarded to the Registrar-General of Births, Deaths and Marriages.

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448 *Re Adoption of S* [1996] NZFLR 552 (FC).

449 A Mikaere "Māori Women: Caught in the Contradiction of a Colonised Reality" (1994) 1 Waikato L Rev 125.

450 "Providers" refers to persons or organisations providing access to assisted reproductive technology.

451 Prescribed information will be set out in regulations.

436 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 Registrar-General's possession. A parent of a donor child under the age of 18 years is entitled to access information about the donor.

437 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).

438 A donor person over the age of 18 years may consent to the disclosure of identifying information to the donor. Until that time the provider/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/Registrar-General must give the donor access to any information about the child.

439 There is a residual discretion for the provider/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.

440 The Bill provides a statutory right of review for persons denied access to information or denied the right to amendment, deletion or destruction of the information held by the provider or Registrar-General.

> Should adoptees and birth parents be given rights of access to information similar to those proposed for children born of donor gametes?

Vetoes

Upon access to information

441 Where an adoption took place before the introduction of the Adult Adoption Information Act both birth parents and adoptees may veto access to identifying information from the birth register.[452] An adoptee can lodge a veto at any time. Every veto must be renewed 10 years after it was placed, or it will expire. Birth parents cannot place vetoes in respect of adoptions that have occurred after the introduction of the Adult Adoption Information Act.

442 Placing a veto does not prevent an adoptee or birth parent seeking further information about their child or parent, but simply restricts access to information on the register. Libraries around the country hold the register of births, deaths and marriages. Agencies such as Jigsaw provide guidelines to assist those attempting to find their birth parents. To this extent, the existing veto provisions provide a false sense of security.

443 The veto scheme was introduced when the Adult Adoption Information Act came into force. In 1986 birth parents and adoptees placed 3730 vetoes. By

[452] Section 3 Adult Adoption Information Act.

1996 a further 826 vetoes had been placed. Those vetoes placed in 1986 were due for renewal in 1996. Of the 3730 vetoes placed, only 489 were renewed.[453] 1996 saw a slight increase in an otherwise declining rate of new vetoes – some of these may be replacements for vetoes that had expired.

444 Vetoes placed by birth parents will continue to decline in importance. Birth parents cannot place vetoes in respect of adoptions that took place after 1986. Presumably, most persons who are eligible to place vetoes would have already done so, and any further vetoes are unlikely. We are unable to assess the importance of the right to lodge a veto for children who were adopted after 1986. These people will not be eligible to lodge vetoes until the year 2005.

Non-contact vetoes

445 In New South Wales a birth parent cannot place a veto upon information, but can place a non-contact veto. Where such a veto has been lodged, as a precondition of accessing information the adoptee or birth parent must agree to abide by the non-contact veto.

446 The non-contact veto prohibits contact by the searcher or by any other person with the person who has lodged the veto. It is an offence for anyone to harass or intimidate any protected person in relation to the adoption. It is not necessary for the Adult Adoption Information Act to contain penalties for harassment. The Domestic Violence Act 1995 (the 'Domestic Violence Act') provides protection from harassment by an adopted person or natural relative.[454] The Harassment Act 1997 protects citizens against harassment or intimidation by any person. This legislation encompasses the situation where a person is harassed or intimidated as a result of disclosure of adoption information. For this reason we do not contemplate recommending sanctions for harassment or intimidation within the adoption or access to adoption information legislation.

447 The non-contact veto has been criticised by those who argue that it is hard to believe that such a system would work. However, a review of the New South Wales system concluded that there has been a remarkably high level of compliance with the non-contact system.[455]

Purpose of vetoes

448 The existing information veto system does not necessarily prevent a person from accessing the relevant adoption information. At most, it makes it more difficult and time consuming to access the information.

449 Perhaps the focus in the veto debate should be on what the person lodging the veto is seeking to guard against. An enforceable non-contact veto with a penalty for breach might also afford a sense of security to birth parents or adoptees who do not wish to be contacted. We should give consideration to whether this option might be preferable to the existing information veto.

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[453] 1996 saw a slight increase in an otherwise declining rate of new vetoes – some of these may be replacements for vetoes that had expired.

[454] *W v B* (1997) 16 FRNZ 479 (DC). Judge Whitehead held that the blood tie between an adopted child and a natural parent establishes a domestic relationship for the purposes of the Domestic Violence Act.

[455] New South Wales Law Reform Commission *Review of the Adoption Information Act 1990* (NSWLRC R69, Sydney, 1992) 186.

Options for reform of the veto system

450 Several options for reform present themselves:

- We could maintain the status quo of information vetoes available to all adopted persons, and birth parents who adopted out children prior to 1986.
- A second option might be to introduce non-contact vetoes instead of information vetoes, and convert existing information vetoes to non-contact vetoes with the consent of the person who had lodged the veto. This system would apply to both adopted persons and birth parents. In accordance with the 1985 legislation, no person who adopted out a child after 1986 would be able to place a veto.
- A third option is a modified version of the preceding paragraph. This system would allow any adopted person or birth parent to lodge a non-contact veto even where such persons have not lodged an information veto under the current system.[456] This option might be seen as a retrograde step, because it would limit the current rights of persons adopted after 1986 to contact their birth parents.
- Alternatively information vetoes could be abolished.

Should non-contact vetoes be used instead of information vetoes?

Should adopted persons and birth parents be allowed to convert an existing information veto into a non-contact veto?

Should birth parents who adopted a child out after 1986 be able to place any type of veto?

Should information vetoes be abolished?

ACCESS TO SOCIAL WELFARE RECORDS

451 Adoption records that are held by Social Welfare fall within the purview of the Official Information Act 1982 (the Official Information Act). The information often replicates, but in many cases is more detailed than, the information contained in the court adoption files. Many adoptees and birth parents have sought access to these files in order to ascertain their origins. In some instances where relatives of the adoptee have applied for access to the records, Social Welfare has refused to give access to records. Section 27(1)(b) of the Official Information Act allows a decision-maker to refuse to disclose personal information if it would involve the unwarranted disclosure of the affairs of another person or a deceased person. This provision has been interpreted in such a way as to deny an adopted child access to information about its birth parents.[457] The authors of *Freedom of Information* question this interpretation of section 27, commenting that the ordinary definition of the word "affairs" militates against its including names.[458] The grounds commonly given for a refusal to allow access to records are generally that Social Welfare considers

[456] For example birth parents cannot lodge a veto in respect of a child adopted after 1986.

[457] 7 CCNO 224 (L J Castle).

[458] I Eagles, M Taggart and G Liddell *Freedom of Information* (OUP, Auckland, 1992) 529.

the refusal necessary to protect the privacy of the persons concerned, or that releasing the information would prejudice the maintenance of the law.[459]

452 The Ombudsman has interpreted section 6(c) of the Official Information Act as meaning that where legislation states that documents are not to be available except in certain circumstances, the Official Information Act should not be used to circumvent that restriction. Therefore the Ombudsman held that applications should not be made directly to Social Welfare for access to files, but to the court pursuant to section 23 Adoption Act.

ACCESS TO COURT RECORDS

453 Section 23 of the Adoption Act provides that adoption records shall not be open for inspection, except in certain defined circumstances[460] or by court order. The term "adoption records" refers only to those records held on the court file.[461] Court records are specifically excluded from the ambit of the Official Information Act, and can only be obtained through this section.

454 Persons applying for access to court records generally apply under section 23(3)(b)(ii) which allows the court to permit access to court records on any "special" ground. In the past the court has interpreted section 23 strictly, refusing most applications on the grounds that seeking knowledge about the applicant's origins or the identity of relatives cannot be regarded as a "special ground" but is in fact a quite normal emotional response to adoption.[462]

455 Some courts have been more lenient than others when considering these applications. Applications filed in Auckland have a much higher rate of success than those made in the South Island.[463] In Auckland, Wellington and other parts of the North Island Judges usually request a report from Social Welfare about a section 23 application.[464] In order to create a report Social Welfare usually needs access to the court file, Social Welfare files and the records of the Registrar-General. Judges find it useful to obtain a report on the application from Social Welfare, but are concerned that this practice is not authorised by legislation.

456 The Principal Family Court Judge, the Ombudsman and Social Welfare are currently seeking an amendment to extend the circumstances under which a section 23 application can be brought and to broaden the definition of the term "adoption records".

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[459] Correspondence held on file. See also sections 9(2)(a) and 6(c) Adult Adoption Information Act respectively.

[460] These circumstances include inspection by an executor, administrator, trustee for a purpose in connection with the administration of an estate or trust, inspection by a Registrar of Marriages or marriage celebrant for the purpose of investigating forbidden marriages, by a doctor who needs the information for medical purposes, or on the order of a Family Court, District Court or High Court for the purposes of a prosecution for making a false statement or in the event of a question as to the validity or effect of any interim order or adoption order.

[461] *D v Hall* [1984] 1 NZLR 727, 733 (HC).

[462] Above n *Re Adoption of S* [1996] NZFLR 552 (FC).

[463] Based on discussions with the Ombudsman and the AISU, Social Welfare.

[464] Correspondence held on file.

APPENDIX A

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 B

A snapshot of adoption law

ADOPTION

B1 ADOPTION IS A LEGAL PROCESS by which the birth parents of a child are replaced by adoptive parents. The birth parents cease to have legal responsibility for the child and adoptive parents are placed in their shoes. Original birth records are sealed and a new birth certificate is issued, as if the child was born to the adoptive parents.

B2 This appendix describes the legal processes and consequences of the Adoption Act and related legislation.

Jurisdiction

B3 Section 3 of the Adoption Act gives the Family Court/District Court the power to make adoption orders, on the application of any person, whether resident in New Zealand or not.[465]

Who may adopt a child

B4 Single persons[466] and two spouses jointly[467] are permitted to adopt. Birth parents may adopt their own children.[468] 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 child in which case they can adopt if they are over the age of 20 years.[469] No age limits apply to the adoption of a child by a birth parent.[470] 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.[471]

Adopting a child

B5 Any person under the age of 20 years may be adopted, including a married person.[472] A child[473] cannot be placed or kept in a home for the purposes of

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[465] Section 3(1) Adoption Act.

[466] Section 3(1) Adoption Act.

[467] Section 3(2) Adoption Act.

[468] Section 3(3) Adoption Act.

[469] Section 4(1)(a) and (b) Adoption Act.

[470] Section 4(1)(c) Adoption Act.

[471] Section 4(2) Adoption Act.

[472] See definition of "child" section 2 Adoption Act; see also *Re E* (1991) 7 FRNZ 530 (FC).

[473] For this purpose a child is a person under the age of 15.

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, or the child is in the home of a relative.[474] 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.[475] 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.[476]

Consent

B6 The birth mother and any other guardians are required to give consent to the adoption of the child.[477] A birth mother is not legally able to give consent until at least 10 days after the birth of the child.[478] Where a sole applicant applies to adopt a child, that applicant's spouse (if there is one) must also consent.[479]

B7 Where the Director-General of Social Welfare 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.[480] 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.[481]

B8 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, 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;[482] 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;[483] or a licence has been granted in respect of the child under the now repealed Adoption Act 1950 (UK).[484]

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474 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.

475 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.

476 Section 25 Adoption Act.

477 Section 7(2)(a) Adoption Act.

478 Section 7(4) and (7) Adoption Act.

479 Section 7(2)(b) Adoption Act.

480 Section 9(2) Adoption Act.

481 Section 9(1) Adoption Act.

482 Section 8(1)(a) Adoption Act.

483 Section 8(1)(b) Adoption Act.

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

B9 Where consent has been dispensed with, the parent or guardian may apply to the High Court within one month for revocation of that order[485] and the discharge of a resulting adoption order (if the adoption order is made within one month of the dispensation of consent).[486] The provisions of section 20, which govern the variance or discharge of adoption orders, apply in connection to such a discharge.[487]

Making an adoption order

B10 Before the court can make an interim adoption order, a social worker must provide a report to the court about the application.[488] This is not required where one of the applicants is a natural or existing adoptive parent of the child.[489]

B11 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;[490] and
- 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;[491] and
- any religious condition imposed by the parent or guardian is being complied with.[492]

B12 Where an application to adopt has been made, the court will usually first make an interim order.[493] An interim order has the effect of transferring custody to the adoptive parents, but does not cause the child's name to be changed.[494] 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.[495] On the application of any person the court may, in its discretion, revoke an interim order in respect of any child.[496] The interim order remains in force for 12 months unless it is sooner revoked, or an adoption order is made.[497]

B13 Where the court considers that there are special circumstances that render it desirable to make an adoption order in the first instance and all the conditions

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485 Section 8(6) Adoption Act.

486 Section 8(7) Adoption Act.

487 See paragraphs 264–269 for a discussion of discharging an adoption order.

488 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.

489 Section 10 Adoption Act.

490 Section 11(a) Adoption Act.

491 Section 11(b) Adoption Act.

492 Section 11(c) Adoption Act.

493 Section 5 Adoption Act.

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

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

496 Section 12(1) Adoption Act.

497 Section 15(1)(c) Adoption Act.

for an interim order have been complied with, the court may make an adoption order without first making an interim order.[498]

B14 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.[499] This will be automatically granted unless certain defined events have occurred.[500]

Effect of the adoption order

B15 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.[501] 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.[502] The adoption order must give the child a surname and a given name(s).[503] All family relationships are then determined in accordance with these provisions.[504] The adopted child acquires the domicile of the adoptive parents,[505] and any existing appointment as guardian of the child ceases to have effect.[506]

B16 Any affiliation or maintenance order made prior to the adoption order ceases to have effect when the adoption order is made,[507] unless the adopted child is adopted by his or her mother either alone or jointly with her husband.[508]

B17 Subject to the Citizenship Act 1977, the race, nationality and citizenship of the adopted child shall not be affected by the adoption order.[509] 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.[510] Therefore an adoption may not deprive an adopted child of other citizenship rights.[511]

B18 Where a testator or an intestate dies prior to the making of the adoption order, the changed relationships brought about by the adoption order have no impact on the adopted child's right to succeed.[512] Where the death occurs after an

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498 Section 5 Adoption Act.

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

500 Section 13(3) Adoption Act.

501 Section 16(2)(a) Adoption Act.

502 Section 16(2)(b) Adoption Act.

503 Section 16(1), (1a) and (1b) Adoption Act.

504 Section 16(2)(c) Adoption Act.

505 Section 16(2)(f) Adoption Act.

506 Section 16(2)(h) Adoption Act.

507 Section 16(2)(i) Adoption Act.

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

509 Section 16(2)(e) Adoption Act.

510 Section 7 Citizenship Act.

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

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

adoption order is made, for the purposes of succession the child is considered to be a member of the adoptive family.[513]

Discharging an adoption order

B19 The court in its discretion may vary or discharge an adoption order.[514] An application to discharge an adoption order can only be made with the prior approval of the Attorney-General,[515] 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,[516] or the discharge is expressly authorised by any other section of the Adoption Act.[517]

Recognition of Māori customary adoption

B20 Māori customary adoption practices were recognised in their own right by the legal system prior to 1909.[518] After the introduction of the Native Land Act, Māori customary adoptions ceased to have legal effect, unless they had already been registered in the Native Land Court.[519] After 1909 Māori who wished to adopt had to do so in accordance with the provisions of the Native Land Act.[520] Statutorily defined legal consequences of adoption flowed from the making of the order.[521] Customary adoption in the traditional sense no longer had legal effect. Section 19(1) of the Adoption Act reiterates that no customary adoption made after the introduction of the Native Land Act will have any legal effect.

Birth certificates and access to information

B21 After an adoption order has been made, a new birth certificate is issued with the adoptive parents entered in the place of birth parents.[522] There is no indication on the face of the birth certificate that the child is adopted.[523] The original birth registration of an adopted person is sealed until that child turns 20 and requests access to it under the Adult Adoption Information Act.[524]

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513 Unless there is express provision to the contrary.

514 Section 20(1) Adoption Act.

515 Section 20(3) Adoption Act.

516 Section 20(3)(a) Adoption Act.

517 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.

518 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.

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

520 Section 162–170 Native Land Act.

521 Section 168 Native Land Act.

522 Section 63 Births, Deaths and Marriages Registration Act.

523 Unless an adopted parent requests that the words 'adoptive parent' appear on the face on the birth certificate – s 23(d) Births, Deaths and Marriages Registration Act. The legal adviser to the Births, Deaths and Marriages Office suggests that this option is very rarely exercised.

524 Section 4 Adult Adoption Information Act.

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.[525]

B22 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 a particular birth parent, or both birth parents.[526] This means that the Director-General is not empowered to release identifying information about the adopted person to the birth parent.[527]

B23 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 child or a birth parent can be requested by either party.[528]

B24 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.[529]

B25 An alternative means of obtaining 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.[530]

Overseas adoption

B26 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.[531]

B27 A different regime is applied to intercountry adoptions between countries that are signatories to the Hague Convention.[532] The Adoption (Intercountry) Act implements the Hague Convention. 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 Hague Convention is to establish safeguards so that intercountry adoptions accord with the best interests of the child, that such adoptions only proceed when the birth parents give free and informed consent and that information about the child is collected for the child's benefit.

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

526 Section 7(1) Adult Adoption Information Act.

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

528 Sections 8 and 9 Adult Adoption Information Act.

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

530 Above n 461.

531 Section 17 Adoption Act.

532 Section 17(5) Adoption Act.

The role of social workers

B28 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 whether the welfare and interests of the child will be promoted by the adoption, social workers control the early stages of the process.

B29 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 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.

B30 A social worker must furnish a report on most[533] adoption applications before the court can make an interim[534] 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. At this point 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'?

B31 Guardianship is a legal term used to describe the rights and responsibilities associated with legal parenthood. 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.[535] Alongside these rights rest the usual responsibilities of parenthood,[536] for example, the responsibility to maintain and educate the child.

B32 'Testamentary' guardians may be appointed by the parents of the child in a will.[537] Such guardians do not have automatic rights to custody of the child,[538] however, they may, at the court's discretion, be given the responsibilities of a guardian upon the death of the child's parent(s).

B33 Any person may apply to the court to be appointed as a sole or additional guardian, either generally, or for a specific purpose.[539] An example of an appointment for a specific purpose might be where medical treatment is required

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[533] This does not apply where the applicant or one of the applicants is an existing parent of the child (section 10 Adoption Act).

[534] Or an adoption order without first making an interim adoption order (section 5 Adoption Act).

[535] Section 3 Guardianship Act.

[536] Section 3 Guardianship Act.

[537] Section 7 Guardianship Act.

[538] Section 3 Guardianship Act.

[539] Section 8 Guardianship Act.

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.[540]

How is guardianship different from adoption?

B34 Guardianship differs from adoption in two main respects. Adoption creates the 'status' of legal parenthood, ensures permanency, and creates new rights of succession.

B35 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 does not have the legal effect of deeming a person to be a parent. Guardianship also provides a less permanent legal status than adoption. The court has a broader discretion to remove a guardian than to discharge an adoption order.[541] In practical terms, an adoptive parent is also a guardian and their rights as a guardian can be terminated in this manner; they still retain the legal status of a 'parent' but are absolved of most parental responsibilities.[542] Guardianship terminates when the child attains the age of 20 years or marries under that age.[543] There is no comparable provision in the Adoption Act; adoption creates permanent family relationships.

B36 Guardianship does not carry with it automatic rights of succession as between the guardian and the child in the same manner as adoption.

B37 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".[544] 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

B38 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 enshrines 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.[545] The welfare and interests of the child are the first and paramount consideration when a care and protection decision has to be made.[546]

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[540] Section 10(2) extends the wardship jurisdiction of the High Court to the Family Court. For a discussion of wardship, see below paragraph B42.

[541] Compare section 10 Guardianship Act with section 20 Adoption Act.

[542] Although they would continue to be liable for child support.

[543] Section 21 Guardianship Act.

[544] Section 10 Guardianship Act.

[545] Long title CYP&F Act.

[546] Section 6 CYP&F Act.

B39 Where 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.[547] This is quite different to adoption which allows at the most, both birth parents, but often just the birth mother, to make decisions in relation to the adoption and/or placement of the child.

B40 Once a care and protection issue reaches the Family Court or Youth Court, the judge may call for social workers' reports, medical, psychiatric and psychological reports and cultural and community reports to provide assistance.[548] A barrister or solicitor can be appointed to represent the child,[549] and the child or young person can give evidence.[550]

B41 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,[551] or the court may make a guardianship order appointing another person as the guardian of the child.[552] Where a guardianship order is made by the court, existing guardianship rights are suspended.[553] Where a child is in need of care and protection, guardianship or adoption, whether by family members or other persons, may be a suitable option for the child.

Wardship

B42 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 rarely exercised by the court, and when it is exercised it is usually for a specific purpose. McGechan J has stated that[554]

> 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 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.

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[547] Sections 20–38 CYP&F Act.

[548] Sections 178, 179, 186 and 187 CYP&F Act.

[549] Sections 159–162 CYP&F Act.

[550] Section 167 CYP&F Act.

[551] Sections 101–109 CYP&F Act.

[552] Section 110 CYP&F Act.

[553] Section 114 CYP&F Act.

[554] *Berghan v Lambourn* (25 February 1991) High Court, Wellington Registry, M 67/91.

APPENDIX C

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. Sates 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 co-operation 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.

CHAPTER V — RECOGNITION AND EFFECTS OF THE ADOPTION

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 the .....day of .....19 ..... *, 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 D

Tables

TABLE 1: Adoptions to strangers and non-strangers

Year	A Adopted by strangers		B Adopted by birth parents		C Non-stranger or relative		D Total non-strangers		E Total known	F Unkn data	G Total adopt	H Adoption to strangers		I 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%
1956	424	59.5%	219	30.8%	69	9.7%	288	40.5%	712	175	887	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%
1958	1140	66.3%	393	22.9%	186	10.8%	579	33.7%	1719	48	1671	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%
1960	1327	73.9%	347	19.3%	122	6.8%	469	26.1%	1796	84	1880	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%
1962	1635	77.9%	368	17.5%	96	4.6%	464	22.1%	2099	546	2645	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%
1964	1941	74.8%	418	16.1%	236	9.1%	654	25.2%	2595	290	2885	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%
1966	2230	74.4%	504	16.8%	263	8.8%	767	25.6%	2997	465	3462	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%
1968	2617	75.3%	502	14.4%	358	10.3%	860	24.7%	3477	303	3780	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%
1970	2286	68.0%	739	22.0%	337	10.0%	1076	32.0%	3362	475	3837	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%
1972	2136	65.1%	801	24.4%	343	10.5%	1144	34.9%	3280	362	3642	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%
1974	1821	61.2%	903	30.3%	252	8.5%	1155	38.8%	2976	390	3366	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%
1976	1347	52.7%	913	35.8%	294	11.5%	1207	47.3%	2554	388	2942	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%
1978	1067	50.1%	782	36.7%	281	13.2%	1063	49.9%	2130	322	2452	1067	43.5%	1385	56.5%
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*	Vetoes placed			Vetoes renewed			Vetoes 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										

* 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.

Source: Births, Deaths and Marriages, Department of Internal Affairs.

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

All cells in this table have been randomly rounded to base 3.

Source: Statistics New Zealand.

[1] 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.

APPENDIX E

Rules relating to customary adoption and succession[555]

E1 Complete adoption would be where the child was taken in early infancy, and lived with its adopting parent up to marriage or manhood.

E2 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.

E3 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.

E4 The adopted child would almost invariably be a relative by blood of the adopting parent.

E5 If the adoption were made with the consent of the 'hapu' or tribe, and the adopted child remained with such tribe or hapu, it would be entitled to share the tribal or hapu lands.

E6 Under such conditions (as above mentioned) the adopted child would be entitled to succeed to the whole of the interest of the adopting parent.

E7 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.

E8 If there were near relatives, the adopted child would share in the succession.

E9 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 hapu, or tribe.

E10 The rights of adopted children, as above set out, might be modified if the adopting parent made an 'ohaki' (or verbal Māori will).

[555] Rules laid down in judgments of the 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.

APPENDIX F

Recognition of indigenous adoption practices in other jurisdictions

UNITED STATES

F1 THE 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.[556]

CANADA

British Columbia

F2 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.[557]

F3 The Act favours the adoption of Indian children by persons from their own family. Where this is not possible, adoption by other Indian persons will be considered. An Indian child will only be placed with a non-Indian family as a last resort.

F4 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.[558] 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.

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[556] BA Atwood "Identity and Assimilation: Changing Definitions of Tribal Power Over Children" (1999) 83 Minnesota Law Review 927, 929.

[557] Section 7 British Columbia Adoption Act 1996.

[558] Section 46(1) British Columbia Adoption Act 1996.

Nova Scotia

F5 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.[559]

Alberta

F6 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.[560]

AUSTRALIA

F7 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 a way in which kinship structures can be strengthened; the process leaves the adoptive parents indebted to the biological parents.[561] 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

F8 The New South Wales Adoption Act 1965 allows Aboriginal children to be adopted by Aboriginal couples living in a customary marriage.[562] Otherwise, there is no specific provision relating to adoptive placement of Aboriginal children.

F9 In 1997 the New South Wales Law Reform Commission released a research report entitled *The Aboriginal Child Placement Principle*.[563] 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

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[559] Section 68(11) Nova Scotia Children and Family Services Act 1990.

[560] Section 62 Alberta Child Welfare Act 1984.

[561] NSWLRC R7, above n 7, 39.

[562] Section 19(1A)(c)(i) and (ii) New South Wales Adoption Act 1965.

[563] NSWLRC R7, above n 7.

Aboriginal children should be cared for by family members. Where this is not possible they should be placed with other Aboriginal people.

Victoria

F10 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.

F11 The court may not make an adoption order unless the parent(s) have received counselling from an Aboriginal agency,[564] or have expressed a wish not to be counselled.

F12 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

F13 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. [565]

F14 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

F15 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.[566]

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[564] Aboriginal agencies are run by Aborigines, for the benefit of Aborigines, and have experience in child and family welfare matters.

[565] Section 11 Adoption Act 1988 (SA).

[566] Section 21 Adoption Act 1993 (ACT).

Northern Territory

F16 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.[567]

F17 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.

F18 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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[567] Section 13 Adoption of Children Act 1995 (Northern Territory).

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Index

References are to paragraphs in the main text of the report unless marked B (Appendix B); E (Appendix E) or F (Appendix F)

A

abduction 143

access order 251

access rights 259

addiction 399

adoptee B5
- *see also* adult adoption; communication and contact; consent; de facto relationships; extended birth family; Guardianship Act; legal rights; marriage; succession rights; welfare; whāngai
- access to information 33, 430–431, 451
  - *see also* information (access to)
- availability of 68, 70
- cancelling an adoption order 264–265, 267
- counselling for 396
- impact of consent period on 220, 222
- rights of E2

adoption 8, 58–59
- *see also* adult adoption; closed adoption; customary adoption; guardianship; informal adoption; intercountry adoption; intra-family adoption; open adoption; overseas adoption; statutory adoption
- abolition of 37–38, 42–43
- advertising for 384–385, B5
- as an institution 22, 37, 96
- as secondary option 42, 123, 213
- consequences of 28, 104
- guardianship and 36, 42–43
- legal effects of 24–32, 36, 104
  - *see also* legal rights; legislation
- opposition to 227
  - *see also* consent
- payment for 113, 143, B5
- purpose and effect of 5, 26–27, 33, 92, 121–122, 158
- role in contemporary society 5, 22, 39, 42, 48
  - *see also* social conditions (changes to); social needs and perspectives

Adoption Act 1955 1, 12, 13, 39, 116, 283
- access to records 336, 453–456
- adoption orders 119, 133, 234, 247, B3
- advertising for adoptee 384, B5
- consent 71, 216, 391
- contact between child and parents 251
- customary adoption B20
- extended family 88, 211
- Family Court 406
- family relationships 97, 100, 102
- incest and intra-family marriage 287–288
- maintenance orders 261
- Māori culture 329, 334, 339
- married adoptee 162
- mono-cultural nature of 336
- non-residency requirements 133, 135, 137
- open adoption 74
- overseas adoption 139, 148
- payment 113, 382
- religion of applicants 230
- reviews of 1, 3, 40
- succession rights 270–272
- whāngai placement 311, 324
- witness to adoption order 245–246

adoption agencies 109–113
- regarding intercountry adoptions 150

Adoption Amendment Bill (No 2) 148

adoption applications 110, 168–169, 227, B10

Adoption Information Services Unit 22, 110, 411

Adoption (Intercountry) Act 1997 137, 140, 143, 150, B26–27

adoption law *see* legal rights; legislation

Adoption of Children Act 1895 317

adoption order 36, 200, 238, 247, 250, B3, B7

see also Adoption Act; adoption plan; interim adoption order; right of review; surrogacy

attaching conditions to 119, 251,253, 393

see also adoption plan

cancelling/discharging an 264–269, B9, B19, B35

effect of 36, B15–18

failing to apply for 227, 233–237

for non-New Zealand residents 133–134

making an B10–14

preconditions 6

witness to 242

adoption plan 254–259, 340, 402

Adoption Practices Review Committee 86, 254

extended birth family and 90

adoption theory (criticism of) 131

adoptive family *see* adoptive parents; family

adoptive parents B1, B4

see also adoption; adoption applicants; communication and contact; counselling; de facto relationships; legal rights; male applicants; same-sex parenthood; screening of prospective adoptive parents; single parenthood; step-parent adoption; surrogacy

as guardians 249

consent period 221, 229

control of adoption process 252

eligibility of 141, 247, B4

registration of 99

selection of 18, 109, 115

support for 93

adult adoption 159, 166

see also married adoptee

age limit on adoptee 159–161, 164, 166

Adult Adoption Information Act 1985 2, 72, 74, 426, 429–430, 432, B21

advertising *see* adoption; Adoption Act; surrogacy

affinity (degrees of) *see* marriage

age *see* adult adoption

alternatives to adoption *see* adoption; guardianship

anxiety *see* adoptee; stress

applications *see* adoption applications

artificial reproductive technologies 9, 23, 184, 350–351, 353, 358, 365

see also Assisted Human Reproduction Bill

Asian adoption practices 348

assessment of prospective adoptive parents *see* right of review; screening of prospective adoptive parents

Assisted Human Reproduction Bill 1997 353

Assisted Human Reproduction Bill 1998 434

access to information 434–440

atawhai *see* whāngai placement

Australian adoption legislation 161, 175, 208, 228, 445

Australian Association of Social Workers 219

availability of children for adoption *see* adoptee

B

baby-farming 113, 337–338

Bethany 65, 109

see also adoption agencies

biological family *see* birth parents

birth father 83, B4

see also birth parents; information (access to); legal rights

consent to adopt 84, 216, 223–226

maintenance 260

birth mother

see also birth parents; legal rights; legislation; surrogacy

consent to adopt 171, 216–219, 241, 248, B6

contact with adopted child 252

see also communication and contact

counselling for 81–82, 396, 398–400

grief of 15

see also grief

relationship with birth father 225

withdrawing consent 227–229, 243

birth parents 15, 168, B1, B4
see also birth father; birth mother; communication and contact; consent; non-custodial parents; step-parent adoption; succession rights; surrogacy
access to information on 74, 397, 426, 441–442, 444, B21–25
see also Adult Adoption Information Act; information (access to)
adoption by 208–209, 215, 247
adoption orders and 251
adoption plan and 256, 259
Adult Adoption Information Act and 2
as guardians B37
cancellation of adoption order 268
extended birth family and 90
knowledge of 104
selecting adoptive parents 18, 109, 115
sense of loss 19, 131
status reserved for purposes of incest 283–284, 288, 291, B15
tracing 16, 426
birth records and certificates 72, 98–99, 418, 421–422, B1, B21–22
obtaining original 426
sealing 99, 419
uses of 423–425
Births, Deaths, and Marriages Registration Act 1995 98, 421
Brazier Report 371, 372, 373, 379
British Nationality and New Zealand Citizenship Act 1948 153

C

care and protection issues B38–41
Catholic Social Services 109
see also adoption agencies
Census 1996 11, 21
child *see* adoptee; legal rights; welfare
child abuse 267, 379, 388
see also neglect
Children, Young Persons, and Their Families Act 1989 29, 117–118, B38–41
family consultation 87–88, 210–211, 212
family group conference 402, 404
paramountcy principle 124
Children, Young Persons, and Their Families Adoption Placements Manual 398
child support 36, 160
see also Child Support Act; maintenance
Child Support Act 1991 160, 260, 262–263
citizenship 28, 152–153, B17
see also immigration laws; residency requirements
as motivation for adopting 22, 154–157, 159
Citizenship Act 1977 152, 153, B17
Citizenship Amendment Act 1992 152
closed adoption 14–15, 20, 71, 103–105
see also adoption; open adoption; secrecy
effects on birth mother 399
Commerce Select Committee 148
commissioning parent(s) 23, 35, 351, 359–360, 364, 373, 389
see also surrogacy
common law 31, 61
see also overseas adoption
communication and contact 396, 404–405
see also Adoption Act; birth mother; closed adoption; extended birth family; family group conference; non-contact veto; open adoption; surrogacy
agreement for 253–257
between adoptive and birth parents 17–19, 71, 85
between birth parents and child 17–19, 71–74, 104, B22
community interests 96, 108
see also social needs and perspectives
complaints relating to permission to adopt 411
see also right of review
consanguinity *see* marriage
consent 34, 71, 125, 396, 404
see also Adoption Act; birth father; birth mother; surrogacy
attaching conditions to 230–231
dispensing with 127, 216, 232, 241, 391, B8–9
for step-parent 209
in overseas adoption 151
invalid 233–237
lack of 143
of adoptee 163, 239–240
of spouse of applicant 238, B6
time period for 217–222, 229, 248

withdrawal of 227–229, 243, 249, B7
witness to 242, 244–246
contact *see* communication and contact
Contracting States 141
contract law 430
Convention on the Protection of Children and Co-operation 137
Convention States 142, 149
see also Hague Convention; non-Hague Convention countries
counselling 34, 82, 107, 132, 338
see also birth mother
for birth and prospective adoptive parents 93, 106, 395–396, 401, 405
for step-parent adoptions 108
mandatory vs optional 397
payment for 400
Crimes Act 1961 281, 289, 295
cultural diversity 21, 40
cultural practices and considerations 7, 21, 309–310, 337
see also Adoption Act; Asian adoption practices; customary adoption; customary succession; Māori; Pacific Islands adoption practices
consultation with tribe or band 335
of applicants 230
regarding extended birth family 86, 337
customary adoption 337, 342, B20, E1–10
see also Adoption Act; cultural practices and considerations; Māori
customary succession E1–10
see also cultural practices and considerations; Māori; succession

D

de facto relationships 9, 11–12, 40, 173
ability to adopt 168–169, 172, 174–176, 178
adoptee in 165, 166
surrogacy in 390
depression 399
see also emotional effects and implications; psychological implications
Destitute Persons Act 1910 69
Director-General (as guardian of child) 227, B7
disability (of parent) 232
discrimination 171, 182
disputes 259, 376
District Court 31, B3
divorce 199
DNA testing 372, 380
Domestic Proceedings Act 1968 69
Domestic Purposes Benefit 69
Domestic Violence Act 1995 446

E

eligibility 170
see also screening of prospective adoptive parents
emotional effects and implications 19, 131, 132
see also grief; psychological implications; stress
extended birth family 86, 89
see also birth parents; cultural practices and considerations; family; intra-family adoption; legal rights; Māori
contact with adoptee 256–257, 259
succession rights of child 276, 280

F

family 10–12, 210, 297
see also Adoption Act; adoptive parents; birth father; birth mother; birth parents; Children, Young Persons, and Their Families Act; extended birth family; family group conference; incest; information (access to); intra-family adoption; marriage; nuclear family; reconstituted family
alternative formulations of 11–12
consultation with members of 86–71, 211, 212, B39
extended 33, 86, 337
role of 29, 30, B38
Family Court 31, B3
commissioning reports 406–407
jurisdiction of 43–47
payment 407, 408
review of cases 417
family group conference 88, 257, 259, 338, 402–405, B39

Family Proceeding Amendment Act 1991 261

Family Protection Act 1955 206–207, 276

financial support *see* child support; Domestic Purposes Benefit; maintenance; state financial support

foster care 64

G

gay parenthood *see* same-sex parenthood

gender *see* discrimination; male adoption

genetic identity *see* identity

genetic parents *see* birth parents; surrogacy

grief 15, 131, 399
- *see also* emotional effects and implications; psychological implications

guardianship 36, B15, B31, B34–37
- *see also* birth parents; Guardianship Act; step-parent adoption; succession rights; wardship
- appointment of B33, B41
- instead of adoption 38, 42–43, 123, 156, 202–203, 205, 213
- rights of commissioning father in surrogacy
- testamentary 44, B32

Guardianship Act 1968 29, 125, 201
- *see also* legislation; paramountcy principle
- consent of adoptee 240
- family consultation 212
- married adoptee 162

H

Hague Convention 140, 141–142, 157, B27
- Romania and Russia 143

hapu 313, 315, 316, 333, E5, E9

harassment 446

Harassment Act 1997 446

homosexuality *see* same-sex parenthood

hormonal changes (birth mother) 80

Houghton Report *see* United Kingdom Houghton Report

humanitarian reasons for adoption 92

Human Rights Act 1993 182

I

identity 131
- *see also* Māori
- establishing sense of 16, 19, 78
- genetic 40, 363
- in surrogacy 363

illegitimacy 25, 63, 70, 71, 75
- Status of Children Act and 2

immigration laws 152, 154, 157
- *see also* citizenship

incest 281–282, 306
- *see also* birth parents; family; marriage
- between adoptive siblings 305
- family unit and 298–300, 304–305
- genetic effects of 292–296
- in adoptive family 284, 289–291, 299, 301–302, 305

Infants Act 1908 320

infertility 71, 92

informal adoption 61

information (access to) 420, 425, 429, B21–25, B27
- *see also* Adoption Act; Adult Adoption Information Act; Adult Information Services Unit; Assisted Human Reproduction Bill; birth parents; birth records and certificates; Social Welfare
- by adoptive family members 432–433
- harassment regarding 446
- non-contact veto 445–447, 449, 450
- prevention of (vetoes) 428, 441–444, 448–449, 450, B21, B22–23
- regarding birth father 427
- restricting 430–431, 448–449, B24

inheritance *see* succession rights

institutional care 64

intercountry adoption 22, 140–151, B27
- *see also* Adoption (Intercountry) Act; citizenship; Hague Convention; overseas adoption
- Hague Convention and 137, 142
- Russia and Romania and 143
- to gain citizenship 152

interim adoption order 227, 233–236, 247, 279–250, B5, B7, B30
- *see also* adoption order
- making an B10–14
- security of 248

inter vivos disposition 167
intra-fallopian gamete transfer 23
see also artificial reproductive technologies
intra-family adoption 42, 49, 156, 174, 402
invalid consent *see* consent
in vitro fertilisation 23
see also artificial reproductive technologies
iwi 315, 316, 332, 333, 341

L

Latter Day Saints Social Services 109
see also adoption agencies
Law Commission 1, 4
legal parenthood 45–46, 200, B34–35
legal relations 24, 27
legal rights 76, 100
see also adoption; Adoption Act; legislation; surrogacy
of adoptive parents 97–102, B1
of birth father 84, B1
of birth mother 80, B1
of child 31, 33, 78, 97–102
of commissioning parent(s) 23
see also surrogacy
of extended birth family 86–88
of non-custodial parent 200–201
paramountcy principle and 126
regarding adoption by birth parent 208–209
legitimacy 9, 13, 75
legislation 3–4, 9, 61, 116, Appendix B
see also adoption; Adoption Act; Children, Young Persons, and Their Families Act; Guardianship Act; legal rights; Māori; social legislation; surrogacy; whāngai placement
concept of family 12
inconsistency in policy 29
modification of 38, 40–41, 48
regarding birth mother 79–80
regarding contact between birth parents and child 85
regarding paramountcy principle 129
regarding welfare of child 130
regional and cultural variances 6
social perspectives and 62
lesbian *see* same-sex parenthood
life education 107
loss *see* birth parents

M

maintenance orders 69, 260–263, B16
see also birth father; child support; Child Support Act
male applicants 68, 170–171, B4
Māori
see also Adoption Act; cultural practices and considerations; customary adoption; customary succession; secrecy; whāngai placement
impact of adoption on family structures 320, 329, 334
lack of consultation during decision-making process 86, 329, 338
loss of identity 329, 331–332, 340–341, 432
New Zealand legal system and 311, 317–325
perspectives on adoption 7, 10, 49, 86
reasons for 315
recognition of adoption practices 21, 309–310, 342–343, B20
rights to land claims 318–319, 327, 332, E5
role of extended family 10, 86, 312, 333
system of caring for children 60, 312–314, 316
Māori Committee 49
Māori Land Act 1993 309
Māori Land Court 325
marriage 11
see also incest; Marriage Act
forbidden 282, 285–288
married adoptee 162, 164, 166, B5
see also Adoption Act; Guardianship Act
married adoption applicants 169, 177
within adoptive family 285–288, 295, 298, 300, 301, 303
Marriage Act 1955 282, 286, 287, 295, 303
mediation 259
Minister of Health 353
mother (interests of) 31
see also birth mother; unmarried mother

N

National Ethics Committee on Assisted Human Reproduction 353

nationality B17
see also citizenship

Native Claims Adjustment Act 1927 321

Native Land Act 1909 319, 321, 342, B20

Native Land Amendment Act 1927 321

Native Land Amendment Act 1931 322

Native Land Claims Adjustment and Laws Amendment Act 1901 318

Native Land Court 318, 320

neglect (of child) 127, 232, 267, B8

New South Wales Law Reform Commission 219, 221

New Zealand legal system *see* legal rights; legislation; Māori

Ngai Tahu 326

non-contact veto 445–447, 449, 450

non-Convention countries 143, 148, 150
see also Convention States; Hague Convention

non-custodial parents 200–202, 204

nuclear family 9, 169

O

Official Information Act 1982 432, 451, 452, 453

Ombudsman 413–414

open adoption 14, 17–18, 20
see also adoption; closed adoption
Adoption Act and 74
adoption plan and 255–256
benefits of 73
conditions of adoption orders 251
consequences of 19
increasing practice of 2, 40

opposition to adoption *see* adoption

overseas adoption 138, 143, 150–151, B26
see also citizenship; intercountry adoption
common law and 147
United Kingdom Adoption Act and 144–145, 147

P

Pacific Islands adoption practices 344–347

paramountcy principle 124–129, 232
as eurocentric 334

parens patriae jurisdiction 29, 251

parental responsibility 46, 101–102, B31

parental rights 45, 279, B37
see also legal rights; legal parenthood

parenting problems 399

payment *see* adoption; Family Court; surrogacy

period of consent *see* consent

permanence 48

post partum period 217, 219

privacy *see* information (access to)

private adoption 114

psychological implications 132, 399–400
see also same-sex parenthood; stress

public attitudes 2

R

race B17

Re Adoption by Paul and Hauraki 174

reconstituted family 9, 40
see also family

Re E 163

refused applicants *see* right of review

relatives *see* extended birth family; family

religion of applicants 230–231, 247, B11

Re P 382, 384

reproductive technologies *see* artificial reproductive technologies

residency requirements 133–136, B3
see also citizenship
in United Kingdom 135

Re T [adoption] 175

Re Valentines Settlement 147

Re Walker 273, 277

right of review 410–417, B9

rights *see* access rights; legal rights; parental rights; right of review

Romania 143

Russia 143

S

same-sex parenthood 9, 11–12, 40, 179, 181–182
- ability to adopt 168–169, 172, 180, 183–189, 197
- concerns regarding 190–196
- lesbian 184–187
- male (gay) 188

Samoan adoption practices 344

Scottish Law Commission 298

screening of prospective adoptive parents 111, 115, 150, 395, B28–30
- *see also* adoption agencies; counselling; right of review; Social Welfare; surrogacy

secrecy 13, 15, 71–72
- *see also* closed adoption
- effect on Māori adoptions 330, 332
- in overseas adoptions 143, 150–151
- sealing birth certificates 419

security 48

sex education *see* life education

sexual abuse 170

single parenthood 9, 11, 168–169, 174, B4
- *see also* unmarried mother

social conditions (changes to) 2, 3, 9, 62, 173
- *see also* adoption

social effects and implications of adoption 132
- *see also* adoption

social legislation 3

social needs and perspectives 3, 15, 48, 50, 62, 419
- *see also* community interests

Social Welfare
- *see also* surrogacy
- access to records 451–452
- birth mother and 81
- Director-General as guardian 227, B7
- information sessions 395, 401
- providing information on birth parents 426
- reviewing refused applicants 411–413, 416
- screening applicants 171, 410
- step-parent adoption 108

social workers B5
- Māori 339
- promoting open adoption 17–18, 105
- role of B28–30

spouse of applicant *see* consent

state financial support 69, 70

Status of Children Act 1969 2, 25, 70, 215, 355

Status of Children Amendment Act 1987 185, 355

statutory adoption 63

step-parent adoption 27, 42, 108, 198
- *see also* succession rights
- as guardians 201–204, 205
- birth parents and 208–209
- concerns regarding 199–200

stranger adoptions 15, 22, 316

stress (for birth mother) 80, 218
- *see also* psychological implications

succession rights 28, 36, 46, 58, 121, 166–167, 275, B17, B36
- *see also* customary succession; surrogacy; whāngai placement
- guardianship and 214, B36
- of adoptee in cases of adoption after death of natural testator or intestate 272–273, 276
- of adoptee in cases of adoption after death of testator or intestate 270–271, 274, 276, 277–278
- of birth parents 279
- step-parents and 205–207

suitability of parents (surrogate and adoptive) *see* screening; surrogacy

surrogacy 23, 37, 40, 75, 349–352
- *see also* commissioning parent(s); de facto relationships; legal rights (of birth mother); welfare of child
- access to information and contact 393, 394, 434–439
- adoption of surrogate child by commissioning parents 95, 360–361, 365–366
- advertising for 378, 384–385
- conditions of adoption order 393
- dispensing with consent 391
- elements in common with adoption 362–364
- establishing descendancy 372, 375, 380
  - *see also* whakapapa

government regulation of 353–354, 373, 374
legal status of birth mother 356–358, 369, 393
legal status of commissioning parents 359–360, 366–370
legal status of surrogate child 355
payment for 369, 371, 375, 377–378, 382–383
requiring adoption to regularise status 75, 352, 365–366, 374–376, 381, 385
role of Social Welfare in 386–388
same-sex couples and 188
screening commissioning parents 373, 375, 379, 386–388
succession rights 392

T

Tahitian adoption practices 345

Te Puni Kokiri 328

testamentary disposition 167

Te Ture Whenua Māori Act 1993 309, 324, 327, 328

Tongan adoption practices 345

tracing birth relations *see* birth parents; information (access to)

Treaty of Waitangi 21, 334

tribal relationships 7
see also cultural practices and considerations; Māori

turangawaewae 341

U

United Kingdom Adoption Act 1976 112, 144–145, 147

United Kingdom adoption legislation 161

United Kingdom Fertilisation and Embryology Act 1990 368–369

United Kingdom Houghton Report 8, 170
step-parent adoption and 199

United Nations 33
regarding family 297

United Nations Convention on the Rights of the Child 34–35, 91, 239

United Nations Declaration on Child Placement 33, 35, 122, 158
married adopters and 162
regarding counselling 396

unmarried mother 63–67, 216
see also single parenthood
maintenance and 69

V

vetoes *see* information (access to)

W

Waitangi Tribunal 334

wardship B42
see also guardianship

welfare of child 29, 30–32, 77, 178, 247, B11
as paramount 33, 34, 124–129, 334, B38
assessing 130, 407–409
in cancelling an adoption order 265
in overseas adoptions 151
in surrogacy 389
same-sex couples and 189, 196
step-parent adoption and 201–204

whakapapa 332, 340–341, 432

whanau 313, 316, 331, 333, 334

whāngai placement 7, 60, 61
see also cultural practices and considerations; Māori
New Zealand legal system and 61, 311, 324
succession rights and 276, 326–328, E5–10

wills *see* succession rights

withdrawing consent *see* consent

witness *see* adoption order; consent

Wolfenden Report 182 *see* same-sex parenthood

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