Adoption News and Views
December 2007

2007/3

This is the third issue of *Adoption News and Views* which aims to provide information about adoption of children and about any legal and policy developments affecting adoptees, birth parents and adopters. Future newsletters will be sent out at three monthly intervals or more frequently if important issues arise.

The main purpose of the newsletter is to provide up to date and accurate information on actual and proposed law and policy changes for people with an interest in adoption. It is hoped that it will also provide a forum for people to discuss adoption issues. Reviews of books and other publications touching on adoption are invited.

Adoption News and Views is sent to you because you are known to be a person interested in adoption. If you do not want to receive further issues you should reply to this email indicating this. If you know of others who would like to receive future issues or you or others would like to submit information or views for inclusion in the next issue you can reply to this email or ask interested others to do so.

While the aim of this newsletter is to provide an open forum for people interested in adoption issues the editors reserve the right to decline or abridge any contributions offered.

The snail's pace of adoption reform

Increasing clamour for adoption reform
There is an overwhelming consensus that the Adoption Act 1955 is in urgent need of reform. Mark Henaghan, a leading family lawyer, last year described the Adoption Act as an 'embarrassment' and in September this year an experienced Family Court Judge commented that 'The Adoption Act is well overdue for reform'.

Government assurance to United Nations Committee
The government assured the UN Committee on the Rights of the Child in 2003 that it intended to reform its adoption laws and this was welcomed by the Committee. Minister of Justice Phil Goff announced at a Child and Youth Law and Policy Conference in November 2003 that proposals for adoption law reform would be placed before Cabinet in early 2004. Later that year adoption reform was quietly dropped from the Ministry of Justice Work Programme.

A group of professionals with a special interest in adoption were encouraged to believe by the then Minister of Justice, Mark Burton, in May 2006 that adoption would be put back on the Ministry of Justice work programme, that considerable progress had been made in drafting new legislation, and that members of the deputation would be kept informed of progress with reform. Eighteen months later there has been no official statement as to progress and one cannot but wonder whether the silence is an indication that adoption reform continues to receive a low priority in the government's agenda.

Nature of proposed reform
The government has not revealed whether it intends major reform of the Adoption Act, along the lines proposed by the Law Commission, or a patch up of current legislation. It has given no clear indication whether the reform will take the form of a new Adoption Act or whether adoption legislation will be incorporated in the Care of Children Act 2004 as recommended by the Law Commission in 2000. A spokesperson for the Minister, was reported in a press item

"Government plays down gay adoption" *New Zealand Herald* 12 July 2006, as saying that government officials were reviewing the rules around who can adopt children. This statement was prompted by an announcement by Green MP Metiria Turei that, if successful in the ballot, she would introduce a private member's Bill that would allow gay and lesbian couples to jointly adopt a child. In the same report it was stated that other areas of reform government officials were looking at included:

- Pre- and post-adoption support services;
- Inter-country adoption;
- Recognition of overseas adoptions.

Another specific reform was agreed to by Cabinet in 2001 in order to facilitate compliance with the United Nations *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*. The proposed amendment would prohibit an intermediary from improperly inducing consent for the adoption of a child.

Information obtained from the Ministry of Justice under the Official Information Act in September 2007 indicated that Cabinet had not yet made decisions in relation to proposals for reform of adoption law and that the Minister of Justice had not yet issued drafting instructions to Parliamentary Counsel Office for an Adoption Bill. The Ministry advised that '(a)s part of the process of developing advice and to ensure that officials are able to be responsive to any future requirements of the Government, Parliamentary Counsel Office has started preliminary work on a draft Adoption Bill': letter dated 25 September 2007 from Policy Manager, Public Law, Ministry of Justice. It is unusual for the drafting of a Bill to be undertaken before the changes proposed have been approved by Cabinet.

Two other recent developments give cause for hope that adoption reform may at last be given priority. The Prime Minister in July 2007 gave assurances that law reform proposals put forward by the Law Commission would in future be considered in a timely fashion, and generally should result in legislation being introduced expeditiously**.** Progress with implementation of the Law Commission's recommendations will be reviewed annually by Cabinet: Address by Prime Minister's address at launch of 'Reflections of the New Zealand Law Commission: Papers from the 20th Anniversary Seminar' and see Cabinet Office Circular CO (O7) 04. The other development is that in a Cabinet reshuffle in October Annette King replaced Mark Burton as Minister of Justice. Annette King is an experienced Minister and was one of the architects of the Children, Young Persons and their Families Act back in 1989.

With the next election less than a year away it is vital that amending legislation should be introduced early in 2008 otherwise the reform process may be delayed for years.

Robert Ludbrook

The likely shape of adoption reform

The government had made no official statement on which of the changes proposed by the Law Commission it supports. However, a copy of the Ministry of Justice's initial response to the Law Commission's Discussion Paper *Adoption: Options for Reform* obtained under the Official Information Act discloses that there are a number of issues on which the Ministry gave tentative support to the Law Commission's proposals. These include:

- The effect of an adoption order should be reformulated to remove the legal fiction that an adopted child has been born to the adoptive parent(s). The effect of an adoption should be to shift full parental responsibility to the adoptive parents;
- Any new legislation should include a statement of its purpose and a set of guiding principles including the principle that decisions should be based on the best interests of the child as the paramount consideration;

- The age at which a child may be adopted should be lowered from 20 to18 years;
- The bar on a sole male applicant adopting a female child should be removed;
- Unmarried couples should be able to adopt a child although a requirement of three years cohabitation might be appropriate to avoid adoption by couples in a transient or temporary relationship;
- Step-parent adoptions should be restricted to situations where they are in the best interests of the child and where guardianship/day-to-day care orders would not be a more appropriate solution;
- A birth parent should not have to adopt his or her own child where step-parents seek to adopt their spouse or partner's child ;
- A parent as a sole applicant should not be able to adopt his or her own child;
- Birth parents should not be able to give a valid consent to adoption until seven days birth parents would have an unrestricted right to revoke their consent;
- The situations in which the consent of an unmarried birth father is required should be broadened to include situations where he has acknowledged paternity, has paid maintenance, or has been declared by a court to be the father;
- Birth parents should have a right to be notified by the Family Court or by a Ministry of Social Development social worker that an adoption order has been made;
- Consent of the child to his/her adoption should be required where the child satisfies a competency test which takes into account his or her age and maturity;
- Standard written material explaining the effect of an adoption and alternatives to adoption should be available but formal consents from birth parents should still be required and the consent should be signed in front of a barrister or solicitor who is independent of the adoptive parents. The lawyer should have to explain the effect of giving consent and the effect of an adoption order and also should advise the birth parents of their entitlement to apply for revocation of the adoption order;
- The Family Court should be given the power to attach an adoption plan to an adoption order including any agreement for future contact. Court-directed family group conferences might be an option for resolving disputes between birth parents and adoptive parents. An adoption order should not be invalidated by breach of an adoption plan;
- Any new adoption law should be framed in a way that allows Maori values to be taken into account. Open adoption plans could provide for continuing contact with the child's birth family/whanau;
- Pre-adoption information sessions should be available to natural and adoptive parents and children and young persons who are to be adopted. There Ministry expressed reservations about making participation in such sessions compulsory;
- The Family Court should have the ability to call for specialist reports and to appoint a lawyer for the child where appropriate;
- Potential adoptive parents should have a right to seek a Family Court review of a decision by Ministry of Social Development refusing to approve them as adoptive parents;
- The Adult Adoption Information Act should be incorporated into any new Adoption Act;
- The thrust of a new Adoption Act should be on openness. with the court able to approve open adoption plans. Accordingly, it would be inconsistent to set an age limit below which adoptees are unable to access information about their birth family. There may be circumstances where it is inappropriate for young children to know their birth history.
- There is a case for extending to other members of the birth family (eg grandparents, siblings, aunts and uncles) the right of access to information about family members who have been adopted. The right should not be extended too widely because of privacy considerations for adoptees and birth parents. information drawn from attachment to letter dated 22 February 2000 from Deputy Secretary for Justice (Public Law) to the Law Commission. These were only preliminary views expressed eight years ago but they do provide pointers to changes that can be expected in any new adoption legislation.

Robert Ludbrook

Move to seal birth, marriage and death records fails

In the August issue of *Adoption News and Views* concern was expressed at the Births, Deaths, Marriages and Relationships Bill which would have had the effect that copies of birth, marriage and death certificates could only be obtained by the person named and members of the immediate family.

This closing off of information from official records would have impacted negatively on adoptees wishing to trace their birth parents. Under the Adult Adoption Information Act adoptees, at the age of 20, can obtain a copy of their original birth certificate which will give the names and details of their mother and sometimes their father. Their mother may no longer be living at the same address and to locate her the adoptee may then have to check whether she has married. Once her married surname has been found the adoptee can then look for find her current address through electoral roles and telephone books. They may also wish to check whether their mother is still alive. Denying them access to marriage and death certificates would make their task exceedingly difficult.

Robert Ludbrook and Susan Marks appeared before the Government Administration Select Committee on 7th August 2007 arguing against this aspect of the Bill. The Bill ran into opposition from the media, community groups and adoption organisations and was not supported by the National party and some of the minor parties. The Select Committee on 23 November 2007 reported that it had been unable to reach agreement on the Bill and could not recommend that it proceed.

Robert Ludbrook and Susan Marks

Revocation of consent to adoption

Under New Zealand law a consent to adoption cannot be revoked by the parent who has given it. There is no revocation period. A revocation period is a period of time during which a mother can change her mind about adopting. The time frame can vary, however a minimum of 30 days is common in other countries.

When she first considers adoption, a pregnant woman has no idea what it might be like to hold her baby in her arms and look into her child's beautiful eyes. She isn't prepared for the hormones that kick in and ready her for the most important role of her life – motherhood. She is not a birth thing, she is a mother. She may be a teen but she shares the same feelings and emotions as any mother. She is no more capable of parting with her child than another older mother just because she is judged too young.

With any major decision we get advice, we have an 'out clause', we take our time and we certainly don't sign anything until we are 100% sure and have been presented with all the facts. Surely a decision which will have a lifelong effect on mother and baby should be appraised with the same consideration? There should be a minimum 30 day period during which a mother can withdraw her consent. it is the humane thing to do.
It is unethical for a mother to be coerced into making a lifelong decision when she is in the most vulnerable state a woman can be in – post natal with rampant hormones, prone to post natal depression, wondering how she is going to cope, no support in some cases, financial and other pressures like whether to adopt, pressure to adopt from her parents, from the child's father, from potential adopters and from society.

She has to be warned of future dire regret, she has to be told of the possible psychological damage for both her and her baby. A revocation period is vital as she has no idea once her baby has gone how it will impact on her.

By not giving the mother a minimum 30 day 'cooling off' period and failing to warn her of the well documented potential psychological risks to both her and the child is an act of negligence and is in breach of the state's duty of care towards vulnerable people. It can lead to post-traumatic stress disorder. Specialist counselling for the mother is essential. Warning her of the psychological effects, advising her of the services available to help her and how she can ensure information about and contact with her child, telling her the child can undergo genealogical bewilderment and many other psychological risks and protecting the child's' rights to remain with their family should all be put on the table before any consent is taken. If she decides to proceed with adoption she should be assisted to draw up an adoption plan ensuring that she will have future information about and contact with her child. She should be made aware that any adoption plan cannot be enforced and that the adoptive parents can back out at any time.

What if the mother's decision was financially based and she came into an inheritance or a family member or the father of the child offers financial assistance after she has given her consent?. Or maybe she simply has had change of heart as she finds it too unbearable without her child? If she was able to revoke her consent the mother would be able unconditionally get her child back.

The mother is the sole legal guardian of her child until the adoption order is made.
There should be time for her to revoke her consent and reclaim her baby, she is the natural mother and has that right to change her mind, and it is her child after all. There has never been a revocation period in New Zealand law yet it is standard in most other English-speaking countries.

All solicitation of babies for adoption should be outlawed. We don't solicit living people for their kidneys and we shouldn't solicit living people for their sons and daughters. To prevent disappointment for adopters they should not be allowed to solicit until the revocation period is up and she has made her decision, unbiased, unpressured and fully informed of her rights.

Providing childless couples with a child should never come at the expense of the emotional well being of the natural mother and child. Adoption has got to stop being the damaging system it has always been. It has been designed to harm. When society tampers with natural order, it should not be surprised at the harmful consequences.

The biological family is the cornerstone of society and it should be maintained and valued, not destroyed. Newborn children are rarely 'unwanted' by their mothers. And fathers, when given respect, can be the providers and protectors that nature intended them to be. In fact, many mums and dads who were forcibly separated from their children decades ago, through coercive adoption practice, are seeking to be reunited with them. Heritage is non-replaceable

Susan Marks

Adoption order made in favour of gay male applicant

An adoption order was made by the New Zealand Family Court in September 2007 in favour of a gay male applicant The application to adopt was made by an uncle who wanted to adopt his two year old nephew who had been in his care since birth. The applicant was not in a relationship at the time of the hearing. The case was described by the Judge as unique as it appeared to be the first application by a gay single male to adopt a child. The judge remarked that 'In 1955 [the year the Adoption Act was passed] it would have been beyond contemplation that firstly, gay males would publicly acknowledge their sexuality and, secondly, gay males would contemplate adoption'. The Judge referred to sections in the Human Rights Act and the New Zealand Bill of Rights Act that made discrimination on the grounds of sexual orientation illegal> He also considered overseas case law and research.

It has been suggested that the reluctance of successive governments to move to reform adoption law has been that they may not want get into a debate about adoption by same-sex couples: see Professor Mark Henaghan *Adoption: Time for Change* (2006) NZFLJ 131. If this is a concern, the reality is that same sex couples can already parent children in a wide range of situations:

- A gay male or a lesbian woman can under present law apply as a sole applicant to adopt a child and adoption orders have been made in favour of such persons both in New Zealand and overseas. The Adoption Act prohibits a male sole applicant from adopting a female child except in special circumstances. If the sole applicant is in a couple relationship, the partner can secure a legal status in relation to child by obtaining a guardianship order;
- Under the Human Assisted Reproductive Technology Act 2004 the same-sex partner of a person who conceives a child through in vitro fertilisation is deemed to be a parent of the child;
- There is no legal obstacle to two gay males arranging for the conception of a child by a surrogate mother using their sperm provided it is not a commercial transaction. There are instances where a gay couple has brought up the resulting child as part of their family;
- There is nothing to prevent a lesbian or gay couple from caring for a child and becoming joint legal guardians of the child. In considering whether to make a guardianship order, the Family Court cannot discriminate against applicants on the grounds of their sexual orientation: see s21(1)(m) Human Rights Act 1993, s16 New Zealand Bill of Rights Act 1990.

Robert Ludbrook

The Lie of the Law - The Practice of Open Adoption in New Zealand

New Zealand was one of the first countries to encourage Open Adoption but our adoption laws date back to a time when closed adoption was the norm. While they do not stop adoptive parents and birth parents entering into an open adoption arrangement they provide no means of recording or enforcing that arrangement. When the 1955 Adoption Act was passed birth parents were not given information about the placement of their child, and adoptive parents and adoptees were not given information about the birth parents.

Open Adoption practices of today encourage birth parents and adoptive parents to share information about the child and to maintain contact. However, the 1955 legal framework is still operative, and deems birth parents to have forfeited their rights by consenting to the adoption. In effect, an Open Adoption is 'open' only to the extent that the adoptive parents are willing to supply information and facilitate contact. Equally, it is only 'open' to the extent that birth parents or other family members are willing to maintain contact with the child. Open Adoption is therefore invisible in law, and as such there is no provision of certainty for the child that their relationship with their

birth parents (or birth family) will continue. Without a legislative framework for Open Adoption that gives legal recognition and weight to biological relationships, adopted children will continue to have insecure links to their family and their full and true identity.

Ideally, under the practice of Open Adoption all available birth family information is shared between the parties involved. The philosophy of Open Adoption is to assist adopted people to continue to have relationships with their natural families. After all, 'open' is the operative word in Open Adoption.

So how does Open Adoption work? In some cases there is minimal contact, such as a meeting between the natural parents and the prospective adoptive parents prior to the adoption and then no ongoing contact after the adoption order is filed - effectively this results in a 'closed' adoption outcome for the child. In other cases families maintain regular, open contact. And, perhaps rarer examples, the natural (also referred to as birth) parents and adoptive parents agree to co-parent. All of these arrangements are not legally enforceable – they are private arrangements agreed between the child's two "sets" of parents.

As noted, Open Adoption is not supported in legislation. As all New Zealand adoption orders are made under the Adoption Act 1955, an adoptee's birth details and parentage are not legally obtainable from the Ministries of Internal Affairs, Justice or Social Development (Child Youth and Family) by the adoptee from the time of their adoption until they are 20 years old. In that time a young person has built their identity, and for many adoptees that identity is marred with gaps and untruths. As a country we are coming to understand together what whakapapa means to Maori and the importance of establishing identity and connection. The preservation of adoptees' identities and biological connections are equally important, yet the law effectively replaces the factual birth details of all adoptees with legal fictions that are then validated through false (but legal) birth certificates.

The current Adoption Act does not acknowledge birth parents either, for even though their genes are carried by their child, the law renders the birth parents stripped of their parenthood and dispatched into legal oblivion.

The Adoption Act 1955 is out of alignment with the social climate of today, where children's rights are acknowledged under international treaties such as the UN Convention on the Rights of the Child. A new legal framework based on the philosophy of openness, honesty and integrity that is supportive of Open Adoption practice is required now. I believe this must happen so that we may better support our adopted people and birth parents and so that there are clear lines of understanding for all people that make up the adoption circle.

The 1955 Act does not give primacy to the child - why is this so in the social climate of today? How can we justify continuing to treat adoptees in law as property and not people? Do we not have a responsibility to adoptees when legalising their adoptions to be at least *truthful*? I believe so.

In the 1970s, adoptees and others in New Zealand began to call for openness in adoption. By the 1980s this began to occur in practice and the Adult Adoption Information Act was passed in 1985 which opened formerly closed records (where a veto had not been placed). Since the passing of that Act, in order to find the *truth* of their origins, more than 30,000 adopted people in New Zealand have requested their original birth certificates.

There have been a number of attempts to reform adoption legislation since the 1970s. In 2000, The Law Commission published a very valuable report - Adoption and Its Alternatives - in the area of Adoption Reform. I value greatly the principles of that report. Now, in 2007, it seems very little (if any) progress has been made. Early last year the Minister of Justice agreed to put

Adoption Reform back on the work programme - to date there is no progress report available. I know there is a wealth of experience and knowledge available in New Zealand to assist the lawmakers to deliver the much-needed changes.

Under the Adoption Act 1955, sadly, the concept of Open Adoption does not exist, and the Government is not prioritising the need to ensure the genealogical *truth* for adoptees and birth parents is protected in law.

Adopted people are the only group of people in our society who have the truth of their genetic family history sealed from the public, and from themselves, in law. We exist in law effectively as a legal fiction. The Adoption Act 1955 does not empower people involved in adoption to remain in contact. Nor is it a law based on openness, honesty and integrity. I hope, in the very near future there will be some real progress by the Government to reform the 1955 Adoption Act.

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Adoption hearings to be opened to the media

A Family Court Matters Bill introduced in August this year would open up adoption hearings to news media representatives. There are similar provisions in the Care of Children Act 2004. There has been a concern that current restrictions on attendance at and reporting of Family Court proceedings might be contributing to negative perceptions of the Court.

The Bill provides that adoption proceedings may be reported but that any report shall not include any name or particulars likely to lead to the identification of the child or the applicant(s) unless the presiding judge gives leave for these details to be published.

However, the child who is the subject of the adoption proceedings is free to publish a report of proceedings which includes names or identifying information without the need to obtain leave. The Bill is currently being considered by the Social Services Select Committee.

Robert Ludbrook

Meeting with Green Party, Maori Party and United First

A meeting chaired by Sue Bradford (Green Party) and attended by Harry Walker (Maori Party) and Judy Turner (United Future) was held on Thursday 29th November. Fiona Donahue, Julia Cantrell, Sue McTague, Susan Marks and Keith Griffith briefed representatives of the three parties on problems caused by our adoption laws and the impact of outdated laws on people involved in the adoption process. The issues will be discussed by the three parties represented at the meeting and it is anticipated there will be further discussions in the new year with a view developing strategies to unblock the present impasse.

6th December 2007