

**The Law Commission's Recommendations for the legislative reform
of the Adoption Act 1955: contained in its report
'Adoption and its Alternatives'**

In September 2000 the Law Commission published a comprehensive report following its review of the Adoption Act 1955. The review was informed by extensive research and consultation within New Zealand and internationally. The recommendations continue to reflect the current issues relating to adoption legislation in New Zealand and provide guidance and options to legislative reform of adoption law for New Zealand in the 21st century. The recommendations in full are:

CHAPTER 5 A CARE OF CHILDREN ACT

- WE RECOMMEND that the Adoption Act and the provisions of the Guardianship Act and the CYP&F Act relating to the placement of children be incorporated in a Care of Children Act.
- We recommend that the Care of Children Act contain a section describing the persons who are, in law, considered to be the parents of a child.
- We recommend that the legal effect of adoption should be the transfer of permanent parental responsibility from birth parents to the adoptive parents.
- We recommend that parental responsibilities and rights be specifically defined in the Care of Children Act.
- We recommend that adoption have defined mandatory consequences and that a parenting plan accompany the order
- We recommend that the role of “enduring guardian” be created to recognise the social status of a guardian who acts as a parent.
- We recommend that the provisions governing who is, who can apply to be, and who may be removed as a guardian be transferred from the Guardianship Act and the CYP&F Act to the Care of Children Act.

CHAPTER 8 GUIDING PRINCIPLES

- We recommend that the Care of Children Act state as a guiding principle that a placement within the extended family, where practicable, is preferable to a placement with strangers.
- We recommend that the fundamental purpose of adoption should be to provide a child who cannot or will not be cared for by his or her own parents with a permanent family life.
- We recommend that the welfare and interests of the child be the paramount consideration when considering any issue under the Care of Children Act.
- We recommend that the Care of Children Act provide a list of factors that should be considered when determining the best interests of the child in the context of an application for adoption.
- We recommend that the Care of Children Act set out the purpose of adoption in an objects clause.

CHAPTER 9 CULTURAL ADOPTION PRACTICES

- We recommend that where practicable⁵⁹⁷ a child should be placed within a family of the same culture as the child.⁵⁹⁸ If that is not possible, the court should be satisfied that the prospective adopter(s) will help foster the child's cultural, social, economic and linguistic heritage, and facilitate contact with that child's family.⁵⁹⁹
- We recommend that a Māori social worker provide the social worker's report in applications to adopt a Māori child.
- We recommend that, where practicable, the Māori social worker have iwi affiliations with the child.
- When considering cross-cultural adoption applications, the court should call for a report on cultural matters to ascertain the suitability of the placement and how the prospective adopters intend to foster the child's cultural heritage.
- We recommend that the guiding principles of the Care of Children Act require decision-makers to take into account the cultural heritage of the child in such a way as to ensure that the child has full access to the child's cultural, social and economic heritage.

CHAPTER 10 SUPPORT SERVICES

- We recommend that there should be mandatory pre-adoptive counselling for parents contemplating giving a child up for adoption. An adoption consent taken without counselling first being provided should be invalid.
- We recommend that there be a distinction between counselling given before and after the birth of the child, and that at least one counselling session be given to the birth parents after the birth of the child.
- We recommend that regulations set out an explanation of the legal and social effect of adoption expressed in plain English and translated into several languages.
- We recommend that a children's version of this explanation be created and issued to the child (or the adoptive parents where the child is an infant) for future use by the child.
- We recommend that it be mandatory for prospective adoptive parents to receive counselling and education about adoption before receiving a child for adoption.
- We recommend that before witnessing a consent to an adoption application the lawyer must certify having received a certificate from counsellors⁶⁰⁰ that the birth parents and prospective adoptive parents have received adoption counselling.
- We recommend that a "family or whānau meeting" be available to discuss issues relating to adoption.
- We recommend that a post-adoption family or whānau meeting or mediation be available to adoptive parents, birth parents, and adopted persons.
- We recommend that post-adoption counselling be available to adoptive parents, birth parents, and adopted persons.
- We recommend that counselling services be provided separately from adoption assessment services.
- We recommend that CYFS prepare an accreditation framework for the provision of private adoption counselling services.
- We recommend that only not-for-profit organisations be entitled to receive accreditation.
- We recommend that the AISU remain the sole assessor of the suitability of prospective adoptive parents.
- We recommend that:
 - All prospective adopters (including intercountry adopters) must be approved by CYFS;
 - CYFS must assess the particular "match" between the child and the prospective adopters; and
 - The birth parents retain their current role whereby they can select the parents whom they wish to adopt their child.
 - CYFS must provide the birth parents with a range of prospective adopters.
 - (Proposed step-parent and intra-family adoptions should be exempt from the last requirement.)
 - It should be an offence to place, receive or keep a child, or to facilitate the placement or receipt of a child, for the purpose of guardianship or adoption without a social worker's prior approval. CYFS should be specifically empowered to prosecute persons who fail to comply with this requirement.
 - Compliance with these procedures should be a condition that precedes the making of an adoption application.
 - Persons whom CYFS has rejected as prospective adoptive parents may have that decision reviewed by CYFS and, if necessary, may appeal that decision to the Family Court.
- We recommend that pre- and post-adoption services for adopted persons, birth parents and adoptive parents be State funded.
- We suggest that a cap might be imposed on the number of state funded post-adoption counselling sessions for adopted persons, birth parents and adoptive parents.
- We recommend that consideration be given to charging intercountry adoptive parents at least a portion of the cost of the counselling, education and preparation sessions.
- We recommend that CYFS be able to charge intercountry adoptive parents the full cost of disbursements payable in relation to the adoption.

CHAPTER 11 JURISDICTION, INTERCOUNTRY ADOPTION AND CITIZENSHIP

- We recommend that jurisdiction be limited to cases where:
 - the child is habitually resident in New Zealand or coming to reside in New Zealand; and
 - the applicants are New Zealand citizens or permanent residents who are resident, and have for three years been habitually resident, in New Zealand prior to the filing of the application to adopt.

- We recommend that section 17 apply only to adoptions made overseas by persons not habitually resident in New Zealand. Intercountry adoptions should be excluded from the coverage of this section.
- We recommend that intercountry adoptions be defined as “the adoption of a child habitually resident in another State, by a person habitually resident in New Zealand”.
- We recommend that procedures akin to those set out in the Hague Convention be applied to intercountry adoptions involving nonConvention States.
- We recommend that the Central Authority be responsible for negotiating acceptable intercountry adoption procedures with nonConvention States.

CHAPTER 12 WHO MAY BE ADOPTED

- We recommend that in most cases the upper age limit for the making of an adoption order be 16 years.
- The court should have discretion to make an order in respect of a person over the age of 16, but under the age of 20, in exceptional circumstances where it is clear that the welfare and interests of the young person require an adoption order to be made.

CHAPTER 13 WHO MAY ADOPT?

- We recommend that the prohibition against a single male adopting a female child be removed.
- We recommend that de facto couples be permitted to apply to adopt.
- We recommend that there be no prohibition against applications by same-sex couples to adopt a child.
- We recommend that the terminology of a new Act make it clear that de facto (including same-sex) couples may adopt.
- We recommend that in the case of step-parent adoption the judge must consider:
 - the degree of contact that a child has with the other birth parent and that birth parent’s extended family, and the effect that granting the adoption order might have on these relationships and the degree of contact;
 - whether enduring guardianship or guardianship would be a more appropriate option than adoption to regulate the status of the child in relation to a step-parent; and
 - whether the step-parent has lived with the child for not less than three years preceding the adoption application.
- We recommend that in all step-parent adoptions a social worker’s report should be called for.
- A parent whose spouse or partner is applying to adopt that parent’s child must consent to and support the spouse or partner’s application, but need not personally apply for an adoption order.
- We recommend that the Care of Children Act require a social worker to investigate the possibility of care within the family group before adoption to non-related persons is considered.
- We recommend that the Care of Children Act require the Family Court judge to inquire whether placement within the family group has been considered.
- We recommend enacting a section that requires a judge to consider:
 - the genealogical distortion that will result from the adoption order and the effect that might have on the child and other family members; and
 - whether enduring guardianship or guardianship would be a more appropriate option than adoption to regulate the care of the child by family members.
- We recommend that natural parents should not be eligible to adopt their own children.

CHAPTER 14 CONSENT TO AN ADOPTION APPLICATION

- We recommend that a birth parent must receive independent legal advice before signing a consent to adoption.
- We recommend that there be a set charge on the legal aid fund for the giving of independent legal advice regarding adoption to a birth parent and the witnessing of a birth parent’s consent to adoption.
- We recommend that the consent of a birth parent to the adoption of the child be valid only if it is given at least 28 days after the birth of the child.
- We recommend a legislative requirement that a social worker make reasonable efforts to identify and locate the putative father.

- We recommend that, save where dispensed with, the consent of both parents should be required in all cases, even where the birth father is not a guardian of the child.
- We recommend that the legislation state that once a valid consent has been signed:
 - birth parents are still guardians, but no longer entitled to custody of the child;
 - adoptive parents are entitled to custody and temporary guardianship of the child.
- We recommend that a consent should lapse if:
 - an application for an adoption order is not made within two months of signing;
 - an application for a final adoption order has not been made within six months of the granting of an interim adoption order;⁶⁰¹
 - an adoption order is not granted.
- We recommend that if a consent lapses, the social worker should (with the agreement of the birth mother) be required to convene a family or whānau mediation with birth parents and the prospective adoptive parents (and other family members if that is appropriate) to consider the child's future placement options.
- We recommend no extension of the current law relating to revocation of consent, provided that a longer consent period is enacted and provision is made to ensure the giving of informed consent.
- We recommend allowing a birth parent to apply to revoke consent where the consent is obtained by fraud or duress.
- Where it is claimed that the consent was obtained by fraud or duress, the court should resolve such matters before hearing the adoption application.
- We recommend that regulations set out in plain English the circumstances in which consent can be withdrawn.
- We recommend that new legislation refer simply to incapacity when setting out grounds for dispensing with the consent of a parent to adoption.
- We recommend replacing the current section 8(1) with a section that states:
- Where a parent has abandoned, neglected, persistently failed to maintain or persistently ill-treated the child, or is incapable of or has failed to discharge parental responsibility, the court may dispense with that parent's consent to adoption.
- We propose that an objective test of the child's interests and whether they are being met, or can be met, by the parent should be applied.
- We recommend that there be provision for the court to dispense with a birth father's consent where a social worker has been unable to confirm his identity or location.
- We recommend that the Care of Children Act recognise that where practicable, CYFS should facilitate the involvement of birth parents in choosing the adoption placement for their child.
- We recommend that a child's views relating to his or her adoption must be ascertained, where that child is capable of forming his or her own views, those views being given due weight in accordance with the child's age and maturity.

CHAPTER 15 ADOPTION ORDERS

- We recommend that the court appoint counsel for child in an application for an adoption order, unless to do so would fulfil no useful purpose.
- We recommend that the court be able to call for reports when making any type of order under the Care of Children Act
- We recommend that the court make a final adoption order in the first instance, unless there are good reasons to make an interim order only.
- We recommend that where an interim order is made, parties be required to apply for a final order within six months, or the interim order and consent will expire.
- We recommend that applications for the discharge of an adoption order should be made directly to the Family Court.
- We recommend that the circumstances in which an adoption order may be discharged should be extended to allow an adopted person to apply in special circumstances, where:
 - the person applying is an adult; and
 - the adoptive relationship has undergone a significant and irretrievable breakdown.
- If the adoption order is discharged and the application is supported by the birth parents, the adopted person will become a member of the natural family as if the adoption had not occurred.

- If the adoption order is discharged and the adopted person is not supported by his or her natural parents, the adopted person will become a legal orphan, with no legal relationship to the adoptive family or natural family.
- We recommend that consent obtained by fraud or duress or material misrepresentation should give the court jurisdiction to discharge the adoption order on application by a birth parent or adopted child.
- We recommend that the court should consider the extent to which the adoptive parents were aware of or participated in the fraud or duress.
- We recommend that an application for discharge of an adoption order on the grounds of consent obtained by fraud or duress be allowed only up until two years after the adoption order was made.
- We recommend that birth parents be notified if a major disjuncture occurs in the placement of the adopted child, and unless CYFS considers it inappropriate, be given an opportunity to be involved in decision-making regarding the child's future.

CHAPTER 16 ACCESS TO ADOPTION INFORMATION

- We recommend that upon registration of an adoption order, an adopted person automatically be provided with two birth certificates, a post-adoption birth certificate that only shows the adoptive parents, and a full birth certificate that lists all details of the person's birth and subsequent adoption.
- We recommend that access as of right to the full birth certificate be restricted to the persons named on the certificate. Others must establish that they have adoptee's permission or that the adopted
- person is dead, or must demonstrate to the Family Court that they have sufficient and proper personal interest in seeking access.⁶⁰²
- We propose a three year period after which no new vetoes may be placed (although existing vetoes can be renewed at 10-year intervals until the death of the veto placer).
- We do not recommend retention of sections 5(2)(a)–(d) and 6(a)–(d) of the Adult Adoption Information Act which provides separately for counselling prior to access to adoption information.
- We recommend that adoption records (including court records and Department of Social Welfare records) be open to inspection as of right by adoptees, adoptive parents and natural parents.
- We recommend that persons who have permission from the adoptee or who can establish that the adoptee is dead, or who can demonstrate to the Family Court a sufficient and proper interest in inspecting such records should be able entitled to have access to adoption records.
- We recommend that where a veto has been lodged under the Adult Adoption Information Act, that veto should be extended to restrict access to all adoption records, (whether held by the Court, the AISU, private agencies or National Archives).

CHAPTER 17 FORBIDDEN MARRIAGE AND INCEST

- We recommend that the adoptive parent–child relationship should be deemed to be a relationship of consanguinity for the purpose of the Marriage Act 1955 .
- All other adoptive relationships should be treated as relationships of affinity, for the purposes of the prohibited degrees of marriage.
- We recommend that an adopted person may apply to the Family Court to marry an adoptive relative deemed to be related within the degrees of affinity, and if, had the adoptive family been the adopted person's natural family, the relationship would be considered to be a relationship of consanguinity, the court must consider:
 - the age at which the child was adopted;
 - the other party's role and degree of participation in the family unit; and
 - the need to protect the sanctity and integrity of the family relationship;
 in order to determine that the proposed marriage is not repugnant to public interest.
- We recommend that in the case of birth relationships, liability to conviction for incest be unaffected by the making of an adoption order; and that in the case of adoptive relationships the crime of incest be limited to the adoptive parent–child relationship.

Endnotes.

- 597 This guideline needs to be given a common sense interpretation. A child should not languish in care because there are no suitable adopters available from that child's cultural group. As with all other provisions in the proposed legislation, this provision would be exercised in accordance with the overriding principle that the welfare and interests of the child are paramount.
- 598 And in a Māori context preferably with a whānau member or member of the same hapu or iwi.
- 599 This was supported by the Ministry of Women's Affairs in their submission.
- 600 See paras 231–233 for a discussion of accreditation for counsellors.
- 601 Where the court has decided to make an interim order first, rather than a final order in the first instance. See paragraphs 453–454 for a discussion of our proposals regarding interim and final orders.
- 602 This test mirrors r 66 HCR. This test was favoured by the members of the Family Court bench and Social Welfare who attended the Adoption Symposium, as it allows more flexibility than a rigid prescription of categories of persons who may apply for access to information.