

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

HRRT 020/11

UNDER THE

HUMAN RIGHTS ACT 1993

IN THE MATTER OF

**A CLAIM OF DISCRIMINATION UNDER
PART 1A OF THE HUMAN RIGHTS ACT
1993**

BETWEEN

ADOPTION ACTION INCORPORATED

PLAINTIFF

AND

THE ATTORNEY-GENERAL

DEFENDANT

REPORT OF THE CHILDREN'S COMMISSIONER
(Section 12(1)(g) Children's Commissioner Act 2003)

18 November 2013

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Introduction

1. I issue this report to the Human Rights Review Tribunal ('the Tribunal') under section 12(1)(g) of the Children's Commissioner Act 2003 ('the CCA').
2. Section 12(1)(g) of the CCA provides me with the following function :
"if there are issues in proceedings before any court or tribunal that relate to the Convention¹ or to the interests, rights, or welfare of children generally, to present reports on such issues to the court or tribunal, at the request of—
(i) the court or tribunal; or
(ii) counsel representing any party to the proceedings; or
(iii) counsel representing any child who is the subject of the proceedings;
or
(iv) counsel assisting the court or tribunal."
3. My report responds to a request from the Plaintiff, Adoption Action Incorporated ('Adoption Action') on 23 July 2013 to provide the Tribunal with such a report for the purposes of these proceedings. Counsel for the Human Rights Commission has subsequently made a formal request to my Office dated 17 October 2013 for the purposes of s12(1)(g)(ii).
4. I agreed to issue this report as I consider that aspects of these proceedings require consideration of the rights of children under the UN Convention on the Rights of the Child ('UNCROC')².
5. At the outset, I wish to state that many aspects of the Adoption Act 1955 – such as the lack of any requirement to obtain consent from a prospective adopted child, regardless of their age – are out of step with contemporary children's rights principles, legal frameworks and social values.

¹ Meaning the UN Convention on the Rights of the Child – s4(1) CCA

² This is relevant to my general function under the CCA to advance and monitor the application of the Convention by departments of State and Crown instruments Children's Commissioner Act 2003, s12(1)(f)

6. I further note that the Law Commission's report "*Adoption and Its Alternatives: A Different Approach and a New Framework*", issued in 2000, followed extensive research and public consultation and set out an exhaustive list of recommendations for reform.
7. However, the proceedings in this case are limited to consideration of whether certain parts and functions of the Adoption Act 1955 and the Adult Adoption Information Act 1985 constitute unlawful discrimination under Part 1A of the Human Rights Act 1993.

Focus of my report

8. I have therefore focused my report on the aspects of the claim that allege unlawful discrimination against children aged below 18 years. These are:
 - Part A - That section 4(1) of the Adult Adoption Information Act 1985 prevents persons aged under 20 from obtaining a copy of their original birth certificate, thus unlawfully discriminating against young persons aged between 16-19 years, on the grounds of their age (paragraph 9.5.2 of the Amended Statement of Claim).
 - Part B - That section 16(2)(a-c) of the Adoption Act 1955 does not enable recording of a Maori child's whanau, hapu and iwi affiliations, thus unlawfully discriminating against Maori children, on the grounds of their race or ethnic origin (paragraph 9.3.1 of the Amended Statement of Claim).
9. Pursuant to my function under s12(1)(g), my report considers the above matters against the relevant UNCROC (and UNCROC related) criteria.
10. In doing so, I have not attempted to draw any conclusions as to whether these aspects of the claim should succeed or not. Nor have I sought to analyse the respective legal and evidential arguments of the parties to this proceeding.

Part A: The right of children to access to original birth certificate

11. Section 4(1) of the Adult Adoption Information Act 1985 provides that any adult (defined as a person aged 20 year or older) may apply to the Registrar-General for a copy of their original birth certificate containing information about their birth parents.
12. Consequently, there is no lawful authority for persons aged under 20 years of age to have access to their original birth certificate.
13. I consider that UNCROC clearly provides children with the right to access information about their birth parents, as far as is possible and in consideration of their best interests. I have come to this view after consideration of:
 - The relevant UNCROC Articles, most notably Article 7
 - Other international instruments
 - The UN Committee on the Rights of the Child's assessment of New Zealand's implementation of UNCROC
14. I have also given consideration to:
 - The 2000 report of the Law Commission
 - The related provisions of the Privacy Act 1993
 - Matters related to the welfare and best interests of the child

Relevant UNCROC Articles

15. Article 21(a) of UNCROC concerns State Parties' specific obligations concerning adoption³. It provides:

*States Parties that recognize 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 authorized 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

16. The most important aspect of Article 21(a) is that it establishes that the best interests of the child are the *paramount consideration* in any adoption process⁴.
17. The Adoption Act 1955 notably does not use the term *paramount consideration*. It instead provides that the “*welfare and best interests of the child will be promoted by the adoption*” and that “*due consideration*” is given to the wishes of the child, subject to their age and understanding.⁵

³ Articles 21(b-e) concern inter-country adoption and are thus outside the scope of this aspect of the proceedings

⁴ Article 21(a) is stronger than the general obligation under Article 3.1 of UNCROC to consider the best interests of the child as a primary consideration. In *Ye v Minister of Immigration* [2010] 1 NZLR 104 the Supreme Court drew a distinction between a “primary consideration” and a “paramount consideration” as follows:

‘A primary consideration does not mean the primary consideration, much less the paramount consideration. There is no basis in reading in...the Care of Children Act 2004 standard of “first and paramount consideration”...The words “a primary consideration”... do not denote how this ranks against any other relevant considerations such as the public interest.’

⁵ Section 11(b) Adoption Act 1955

18. Article 21, however does not directly address the right of the child to information about their birth parents. This right is most directly reflected in Article 7 of UNCROC, which provides:

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... 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*

19. When considering Article 7, the UN Committee on the Rights of the Child ('the UN Committee') has expressed concern about countries whose adoption laws limit the entitlement of children to access information about the identity of their birth parents⁶. The UN Committee has consistently recommended that adopted children are informed of their genetic parentage⁷.
20. Furthermore, Articles 8.1, 9.3 and 13.1 of UNCROC establish general rights of the child which may be interpreted to support a child's entitlement to access information about their birth parents, or have contact with their birth parents. These are:
- The right of the child to preserve his or her identity (Article 8.1)
 - The right of the child to maintain personal relations and contact with parents from whom they have been separated, unless contrary to their best interests (Article 9.3)

⁶ Unicef (2007), *Implementation Handbook for the Convention on the Rights of the Child*, Geneva, p106 - eg. France CRC//C/15/Add.240 para 23, Russian Federation CRC/C/RUS/CO/3 paras 40 and 41

⁷ Unicef (2007), *Implementation Handbook for the Convention on the Rights of the Child*, Geneva, p106, 107

- The right of the child to seek, receive and impart information, subject to respect for the rights and reputation of others (Article 13.1).

Other international instruments

21. Article 9 of the UN Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally⁸ (UNDSLIP) supports the right of the child to know their birth parents. It provides that:

“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”

22. Against the context of Article 7 of UNCROC, which provides the right of the child to know their parent “as far as is possible”, UNICEF has interpreted Article 9 of the UNDSLIP in the following terms:

“...it is clear that children’s right to know their parentage could only be refused on the grounds of best interests in the most extreme and unambiguous circumstances, and children should be given the opportunity for this decision to be reviewed at a later date.”⁹

The UN Committee’s assessment of New Zealand

23. In its periodic reviews of New Zealand’s implementation of UNCROC, the UN Committee has given specific attention to the right of the adopted child to access information about their birth parents.
24. In its second periodic review of New Zealand, made in 2003, the UN Committee recommended that the New Zealand government ensure that

⁸ Adopted by General Assembly resolution 41/85 of 3 December 1986

⁹ Unicef (2007), *Implementation Handbook for the Convention on the Rights of the Child*, Geneva, p 107

adopted children have the right, “as far as possible”, to access information about their birth parents:

*The Committee welcomes the State party’s intention to reform its legislation on adoption, although it is concerned that planned amendments do not fully conform to the principles and provisions of the Convention...*¹⁰

*In particular, the Committee recommends that the State party... (b) ensure the right of adopted children to access, as far as possible, information about their biological parents.*¹¹

25. In its third and fourth periodic review of the New Zealand in 2011, the UN Committee reiterated the 2003 position as follows:

*The Committee regrets that a child’s consent is not required for domestic adoptions and that the review of adoption legislation is currently on hold. The Committee notes with regret that in cases of adoption that are not “open adoptions”, the adopted child does not have access to his/her file, with the name of its biological parents, until the age of 20.*¹²

26. The UN Committee accordingly recommended that the New Zealand government lower to at least 18 years, the age at which adopted children are entitled to access information about their birth parents¹³.
27. The UN Committee’s 2003 and 2011 recommendations regarding New Zealand’s adoption laws are consistent with those it has issued to other countries where similar restrictions exist¹⁴.

¹⁰ CRC/C/15/Add.216. 3 Oct 2003. Para 33

¹¹ CRC/C/15/Add.216. 3 Oct 2003. Para 34(b)

¹² CRC/C/NZL/3-4, 4 February 2011, Para 32

¹³ Ibid, Para 33

¹⁴ Cf. Paragraph 19 above, n6

Position of the New Zealand Law Commission

28. In its major review of New Zealand's adoption laws, produced in 2000, the Law Commission recommended that:

“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”¹⁵

29. The Law Commission noted that many of the submissions they received as part of their review of adoption laws, expressed dissatisfaction with the current birth certificate system and the restrictions placed on access to information¹⁶.
30. The Law Commission proposed that access to the full birth certificate setting out the details of the adopted person's birth parents be restricted to the adopted person, the birth parents and the adoptive parents. The proposal was supported by the Privacy Commissioner and the Department of Births, Deaths and Marriages as satisfying privacy concerns¹⁷.

Access to information under the Privacy Act 1993

31. The Privacy Act 1993 provides all people, regardless of their age, with the presumptive right to access information held about them by an agency¹⁸. This places New Zealand's information privacy laws at odds with the current restrictions on accessing birth information under the Adult Adoption Information Act 1985.

¹⁵ Law Commission (2000), *Adoption and its Alternatives: A Different Approach and a New Framework*, NZLC RC 65, para 482

¹⁶ *ibid*, para 477

¹⁷ *ibid*, para 482

¹⁸ Privacy Act 1993, Information Privacy Principle 6(1)(b)

32. This right is qualified in respect of children aged under 16, who may be refused access to information by an agency in cases where disclosure of that information would be contrary to the child's interests.¹⁹
33. This qualification reflects the legal autonomy a young person acquires upon reaching the age of 16²⁰. At age 16, a young person is legally able to make a number of important decisions regarding themselves without prior consent of their parent, guardian or caregiver.²¹

Impact on welfare and best interests

34. I am of the view that, in most cases, access to birth information is unlikely to compromise the welfare and best interests of the adopted child.
35. Studies undertaken following the implementation of the Adult Adoption Information Act 1985 found that adopted children and adults can successfully integrate two or more families into their lives and that this often resulted in strengthened relationships.²²
36. A desire to know ones genetic parents has also been established in psychological literature as "*an understandable, common and part of healthy adaptation for adopted persons*"²³ A study of American adopted adolescents found that 72 percent wanted to know why they were adopted, 65 percent wanted to meet their birth parents, and 94 percent wanted to know which birth parent they looked like²⁴.

¹⁹ Section 29(1)(b)

²⁰ Further reflected by the restriction of age discrimination criteria under the Human Rights Act 1993 to persons aged 16 years or older

²¹ Such as consent to medical treatment – s36 Care of Children Act 2004; legal standing to challenge the decision of a guardian – s46 Care of Children Act 2004

²² Griffith, Keith C (1991) *The right to know who you are: reform of adoption law with honesty, openness and integrity*.

²³ Brodzinsky, Schechter and Henig, *A Psychosocial Model of Adoption Adjustment* - http://www.americanadoptioncongress.org/reform_myths.php

²⁴ Search Institute (1994) "*Growing Up Adopted*." - http://www.americanadoptioncongress.org/reform_myths.php

37. In New Zealand, it is notable that most adoptions are now “open adoptions” where contact remains between the adopted child and the birth parents following the adoption process.²⁵
38. New Zealand has been described as one of the world-leaders in the practice and promotion of open adoption²⁶. However, the Courts have had difficulty reconciling the practice with the Adoption Act 1955 which has been described as a “statutory guillotine” severing the legal ties between the child and their birth parent²⁷.
39. The Courts have commented that the current closed system under the Adoption Act 1955 reflects the stigmas of infertility and illegitimacy that existed at the time it was enacted.²⁸ Social values in New Zealand have clearly shifted considerably since then.

Part B: The right of adopted Maori children to information recording whanau, hapu, iwi affiliations

40. Section 16(2)(a-c) of the Adoption Act 1955 does not provide any basis for recording of a adopted Maori child’s whanau, hapu and iwi affiliation.
41. I consider UNCROC and related international instruments establish the right of the Maori adopted child, and adopted children from other ethnic minorities, to this information or similar information regarding their cultural background.
42. In addition to related matters set out in Part A above, I have considered:
- Relevant UNCROC Articles
 - The UN Declaration on the Rights of Indigenous People
 - Recognition of cultural continuity in New Zealand

²⁵ Law Commission (2000), *Adoption and its Alternatives: A Different Approach and a New Framework*, NZLC RC 65, para 28

²⁶ *ibid*

²⁷ *ibid* para 29

²⁸ *Re Adoption of PAT* [1995] NZFLR 815, at 817 per Blanchard J

Relevant UNCROC Articles

43. In addition to the Articles set out above in paragraphs 15-20 above, the UNCROC rights of Maori and ethnic minority children to know and enjoy their cultural identity is specifically provided by Articles 8.1 and 30 respectively:

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 recognized by law without unlawful interference.*

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***

44. The concept of a child's 'identity' under Article 8.1 has been interpreted broadly to include cultural and ethnic affiliations²⁹. Following on from this, the duty upon the State to "preserve" the child's identity has been described by UNICEF as implying:

"...both the non-interference in identity and maintenance of records relating to genealogy, birth registration and details relating to early infancy that the child could not be expected to remember. Some of these are beyond that scope of the State, but measures should be taken to enforce detailed record keeping and preservation of records...where children are refugees, abandoned, fostered, adopted or taken into the care of the State."³⁰

²⁹ Unicef (2007), *Implementation Handbook for the Convention on the Rights of the Child*, Geneva, p 115

³⁰ Ibid

45. Article 30 of UNCROC is less specific in its application to the issue of adoption than Article 8.1, being instead concerned with the maintenance of cultural rights in a broad sense.
46. However, it underpins the rights of indigenous and minority culture children to enjoy and maintain their cultural identity and, in the New Zealand context, reinforces the rights of Maori children under Article 2 of the Treaty of Waitangi³¹.
47. In addition, Article 20.3 of UNCROC provides a specific duty upon States Parties to pay due regard to the cultural and ethnic background of any child permanently or temporarily deprived of their family background, including cases of adoption.
48. These Articles were all considered by the UN Committee on the Rights of the Child, in its Day of General Discussion on the Rights of Indigenous Children held in 2003. The UN Committee's recommendations that followed included that States Parties:

"...ensure the full implementation of articles 7 and 8 of the Convention for all indigenous children³²

...take all necessary measures to ensure that indigenous children enjoy their own culture and can use their own language.³³

...take effective measures to safeguard the integrity of indigenous families and assist them in their child-rearing responsibilities...For the purpose of designing such policies, the Committee recommends that States parties

³¹ For example, the right of Maori children to know and maintain their cultural identity was also recognised by the 1994 Ministerial Committee on Assisted Reproductive Technologies as consistent with the Treaty of Waitangi.

³² UN Committee on the Rights of the Child, *Day of General Discussion on the Rights of Indigenous Children*, 34th session, 3 October 2003, para 15

³³ *Ibid* para 16

*collect data on the family situation of indigenous children, including children in foster care and adoption processes.*³⁴

*...due regard shall be paid to ensuring continuity in the child's upbringing and to his or her religious, cultural, ethnic and linguistic background*³⁵.

UN Declaration on the Rights of Indigenous People

49. The UN Declaration of the Rights of Indigenous People (UNDRIP), signed by the New Zealand Government in 2009, further reinforces a positive obligation on States Parties to ensure that mechanisms are in place to protect indigenous people, including children, from being deprived of their cultural identity. Article 8.2(a) of UNDRIP provides:

States shall provide effective mechanisms for prevention of, and redress for...any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.

Recognition of the importance of cultural continuity

50. I note that the need to ensure that children maintain cultural continuity and connection following family separation has also long been reflected by New Zealand's child protection laws. The Children, Young Persons and their Families Act 1989 provides for the principle that children removed from their families should be entitled to a placement:

*"in which he or she can develop a sense of belonging, and in which his or her sense of continuity and his or her personal and cultural identity are maintained."*³⁶

51. This importance of cultural identity and continuity was also recognised by the Law Commission in its 2000 report. The Commission noted that:

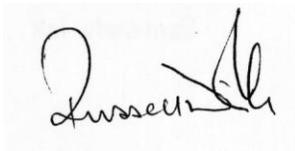
³⁴ Ibid para 17

³⁵ Ibid

³⁶ Children, Young Persons and their Families Act 1989, s13(f)(iii)

“ much of the criticism levelled by Māori and other cultural groups at the Adoption Act relates to lack of input into decision-making and the restrictions placed upon access to information.”³⁷

52. The Law Commission accordingly recommended that, where possible, children are adopted by a family with the same cultural background. Where that is not possible, the Law Commission recommended a requirement that a court be satisfied that prospective adopters can foster a child’s cultural and linguistic heritage.³⁸
53. In summary, the international standards contained in UNCROC and the UNDRIP uphold the right of an adopted Maori or ethnic minority child to knowledge of their cultural heritage. This right is reflected in New Zealand’s contemporary social values, related legislation and legal policy settings.



Dr Russell Wills
Children’s Commissioner

³⁷ Law Commission (2000), *Adoption and its Alternatives: A Different Approach and a New Framework*, NZLC RC 65, para 214

³⁸ *Ibid*, page 89