ADOPTION ACTION INC

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Aotearoa New Zealand

Adoption News and Views December 2016

Adoption News and Views is an occasional e-newsletter produced on behalf of Adoption Action Inc. It aims to provide information about adoption of children and about any legal and policy developments affecting adopted children, parents who surrender a child for adoption, and people who adopt a child. It also provides progress reports on any proposed changes to adoption law, and on efforts by individuals and groups pressing the government to give a higher priority to enacting new legislation. Adoption developments overseas are also covered. It is hoped the newsletter will provide a forum for people to discuss adoption issues.

Contributions are invited, including reviews of books, films, and so on touching on adoption. While the aim is to provide an open forum, the editors reserve the right to decline or abridge any contributions submitted.

Adoption News and Views is sent out several times each year. It is sent to you because you are believed to be a person interested in adoption. If you do not wish to receive further issues, please email Robert Ludbrook at: r_ludbrook@hotmail.com

Back issues can be viewed on the Adoption Action website: www.adoptionaction.co.nz

If you would like to become a member of Adoption Action Inc, please complete and return the application for membership at the end of this Newsletter.

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ADOPTION ACTION NEWS

Minister's disappointing response to Human Rights Tribunal Decision

In our last newsletter we reported the outcome of our claim to the Human Rights Review Tribunal under Part 1A Human Rights Act. The claim was filed in July 2011 and heard over a period of ten days in November 2013 and January 2014. The Tribunal agreed that six provisions in the Adoption Act discriminated against certain classes of people on the grounds of their sex, marital status, sexual orientation, disability or age, and that one provision in the Adult Adoption Information Act discriminated on the grounds of age. Our claims were supported by the Human Rights Commission, and the two heads of claim affecting children and young people were supported by the Children's Commissioner.

The Tribunal in its decision dated 8 March 2016, made seven declarations that the statutory provisions were inconsistent with the important right to freedom from discrimination assured by the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The declarations required the Minister of Justice to report to Parliament on the action the Minister intended to take to remedy the discriminatory provisions. The only remedy was to pass legislation to amend or repeal the discriminatory provisions. The Crown had 30 days to appeal the Tribunal decision, but chose not to do so.

The report to Parliament of the Minister, Amy Adams, merely repeated the mantra of her two Ministerial predecessors that "adoption reform is not a priority".

Adoption Action is deeply disappointed at the delays and the deficiencies in the Part 1A process and with the Minister's report:

- The Human Rights Review Tribunal (HRRT) took more than two years after the hearing of the claim to hand down its decision. Adoption Action was advised that the delay was the result of lack of resourcing of the Tribunal and the fact that the Chairperson and the other two Tribunal members hearing the claim were all part-timers.

- The Minister's report to Parliament indicated that she disagreed with two of the seven findings of discrimination made by the Tribunal, although the Crown had not exercised its right of appeal against either of those findings.

- Section 92K(2)(b) of the Human Rights Act states that the Minister must report to Parliament with advice on the government's response to the declarations of inconsistency. It is surely implied that the response to Parliament must indicate what the Minister intends to do to repeal or amend the provisions of the Act that the Tribunal has found to be discriminatory. Otherwise, the Part 1A procedure (which was intended to make government entities subject to anti-discrimination laws which bind ordinary citizens and private entities) is a pointless exercise.

- Adoption Action is greatly appreciative that the Human Rights Commission supported its claims and instructed a leading human rights barrister to present arguments at the hearings. If the government is able to totally ignore the Tribunal's decisions, there is a concern that the HRC may in future be less willing to provide that kind of support for claimants.

- It is ridiculous and a waste of taxpayers' money that the Crown, having fought Adoption Action's claims every inch of the way (despite the Ministry having told former Ministers and Cabinet in 2000 and 2006 that provisions in the Adoption Act were discriminatory, and having had Parliamentary Counsel Office draft an Adoption Bill in 2006), can then tell Parliament that it has no plans to repeal or remove the discriminatory provisions. The cost to the government of fighting the claim must have amounted to hundreds of thousands of dollars, including the fees of three Crown Counsel who attended the hearings and a huge deployment of MOJ staff time in discovery of documents and briefing counsel, etc. There were also substantial costs to Child, Youth and Family and to the Human Rights Commission and the Children's Commissioner. If the Ministry is able to ignore with impunity the seven findings of breaches of basic human rights, why did it so strenuously defend the proceedings?

Where to from here?

Adoption Action is considering filing a complaint with the United Nations Committee on the Rights of Persons with a Disability on the "disability discrimination" ground on which its claim succeeded. There is also an Optional Protocol that would enable Adoption Action to file a personal complaint under the International Covenant on Civil and Political Rights, on the "sex discrimination" ground (articles 2 and 24) and the "equality before courts and tribunals" ground (article 141).

Adoption Action's meeting with Chief Human Rights Commissioner

Members of the Adoption Action Committee met with the Chief Human Rights Commissioner, David Rutherford, on 8 November 2016 to express their concerns at the Minister's negative response to the Human Rights Review Tribunal declarations, and to seek the Commission's support in challenging the Minister's refusal to take action. The Commission had formally joined the proceedings as intervenors and had retained a specialist human rights lawyer, Ms Frances Joychild, as an advocate supporting the claims. A senior HRC staff member, Michael White, attended the hearings.

Adoption Action expressed deep concern that the complex and lengthy process of obtaining a declaration of inconsistency could prove to be a waste of everyone's time and resources if it was permissible for the Minister responsible simply to respond that the Ministry was not going to do anything to amend or repeal the discriminatory provisions. Her attitude raised questions as to the effectiveness of the Part 1A procedure, which was intended to require government entities to comply with the anti-discrimination provisions in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. These provisions were binding on ordinary citizens and commercial and other non-government organisations.

The Chief Commissioner had advised the Minister of the Human Rights Review Tribunal's decision on the day it was handed down, and had added that the Commission believed it was timely and appropriate for a strong message to be sent about the New Zealand government's commitment to addressing discriminatory law and practice.

There were discussions with the Commissioner about what actions might be taken to put pressure on the Minister and the government to give urgent priority to adoption reform. Mr Rutherford proposed that Adoption Action and others with a specialist knowledge of, and interest in, adoption law should work together to draft new adoption legislation. Adoption Action has agreed to assist in that process.

Adoption Action Symposium - 2017

What does it take?

Successive New Zealand governments have heard from numerous national and international agencies, bodies and individuals about the need to reform New Zealand's adoption legislation.

The call for reform has come from the NZ Human Rights Review Tribunal, the Law Commission, the Human Rights Commission, UNICEF New Zealand, Adoption Action, numerous political parties and individuals in New Zealand.

The call has been consistent, coherent and considered.

In 2016, two further calls were made. The first from the Human Rights Tribunal that supported seven of Adoption Action's claim that the current Adoption Act 1955 is discriminatory. The second came from the United Nations Child Rights Committee's (UNCRC) in October which recommended, yet again,[1] that the New Zealand Government promptly review its adoption legislation to ensure it aligns with the Convention and that:

[1] See the UNCRC previous recommendations CRC/C/15/Add.216 of 2003, para. 34 and CRC/C/NZL/CO/3-4 of 2011, para. 34.

- the best interests of the child are a paramount consideration
- the child's views are heard
- adopted children have a right to access information about their biological parents, their culture and their identity.

In its report the UNCRC welcomed the NZ Human Rights Review Tribunal decision of March 2016 declaring the Adoption Act 1955 and the Adult Adoption Information Act 1985 discriminatory on the grounds of age, sex, marital status, and disability.

So why has there been no action from successive governments, despite calls for reform that began over 40 years ago?

What more can we do to ensure the rights, needs and interests of vulnerable children are adequately protected and represented in adoption law, and that adoption legislation is not discriminatory, not out of step with our international obligations or with other child protection legislation in this country?

With the burgeoning body of evidence and support for reform, there is no better time than now to drive through change.

Next year Adoption Action is hosting an Adoption Law Reform Symposium to continue discussions on these matters with interested agencies, parties and individuals.

Report on New Zealand by United Nations Committee on the Rights of the Child

In October 2016, the United Nations Committee on the Rights of the Child handed down its Concluding Observations on New Zealand's 5th periodic report. These included concerns over this country's lack of progress with the reform of its adoption laws. The report states:

> "**Adoption**
> 29. The Committee welcomes the New Zealand Human Rights Review Tribunal decision of March 2016 declaring the Adoption Act 1955 and the Adult Adoption Information Act 1985 discriminatory on the grounds of age, sex, marital status, and disability. Recalling its previous recommendations (CRC/C/15/Add.216 of 2003, para. 34 and CRC/C/NZL/CO/3-4 of 2011, para. 34), the Committee recommends that the State party:
> (a) Promptly review the adoption legislation, on hold since before 2003, to align it with the Convention;
> (b) Ensure that the best interests of the child are a paramount consideration in all adoption cases;
> (c) Ensure in practice that the child's views are heard and consent is required, in accordance with the child's evolving capacities in adoption processes;
> (d) Ensure the right of adopted children to access information about their biological parents, their culture and identity."

In considering New Zealand's report, the UN Committee took into account submissions filed by:

- NZ Human Rights Commission
- Action for Children and Youth Aotearoa (ACYA) a non-government organisation
- New Zealand Law Society.

These submissions are set out below. They all stressed the urgent need for adoption reform.

Submission by the Human Rights Commission to UN Committee on Rights of the Child

70. **The Committee may wish to consider including the following questions in its List of Issues for the New Zealand Government:**

- **What additional measures does the Government intend to take to reduce the prevalence of violence and abuse against children – particularly those aimed at reducing family stressors?**
- **What measures does the Government intend to take to evaluate the impact of new policies, such as the Children's Action Plan, on reducing the prevalence of violence and abuse against children?**
- **What steps has the Government taken to systematically collect data on violence and bullying in schools; monitor the impact of the student mental health and well-being initiatives recently introduced in schools on the reduction of the incidence of violence and bullying; and assess the effectiveness of measures, legislative or otherwise, in countering violence and bullying?**

6. Family Environment and Alternative Care

Adoption

Relevant provision of the CRC: Article 21

CO 2011: The Committee recommends that the State party take steps to ensure that a child's consent is required, as appropriate, for domestic adoptions. The Committee also recommends that the State party resume its review of adoption legislation and revise it, as appropriate, in order to bring it in line with the Convention as well as with the 1993 Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption. The Committee further recommends that the State party lower to at least 18 years the age at which adopted children have the right to have access to their files.

71. The Adoption Act 1955 is long overdue for reform. However, there has been no substantive progress made since 2011 in reforming the Act and adopting the Law Commission's recommendations made in 2000. Private Member's Bills have been developed by Members of Parliament[33] but have not attracted the Government's interest. Adoption numbers are at historical lows with only around 100 registered adoptions taking place in 2014.

[33] https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-865/what-the-politicians-say

Submission by Action for Children and Youth Aotearoa to UN Committee (ACYA)

ACYA is the non-government organisation that has filed independent "shadow" reports to the UN Committee on the Rights of the Child on each of the four occasions that the Committee has considered and reported on New Zealand's performance in meeting its obligations under UNCROC. In its latest report to the Committee it stated:

> **Preservation of Identity (Article 8)**
> 66. Despite numerous calls for reform, adoption law has not been updated and the legal fiction that a child's connection with his or her birth family is severed by adoption continues. Other arrangements can be used to provide security of care whilst preserving appropriate family connections. Use of these is variable and the implications for children's identity not well articulated.

ACYA also filed an updating submission that had more detail about the need for adoption reform which stated that:

> ***Civil rights and freedoms***
> **Adoption**
> In March 2016, the Human Rights Tribunal declared adoption legislation discriminatory on the grounds of age, sex, marital status, and disability. The Minister of Justice is now required to advise Parliament of the declaration so that Parliament may consider what steps should be taken to remedy the discriminatory provisions. The Minister has not yet given any indication of the Government's intentions regarding such reform. The decision adds to longstanding calls for reform to replace the out-of-date Adoption Act 1955 and other adoption-related laws to bring them into line with other Aotearoa NZ legislation and children's rights instruments where children's best interests are paramount. This includes the UN Convention on the Rights of the Child (CRC), the Hague Convention on Inter-Country Adoption, the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990.
>
> Concerns have been raised by members of the Māori community about the monocultural nature of the Adoption Act and the fact that Māori children who are adopted by non-Māori have their family and cultural links with members of their whānau, hapū and iwi severed by the adoption order, thus denying the child access to information about their ancestors (tipuna) and tribal identity (whakapapa). Three separate claims have been made to the Waitangi Tribunal on this issue.
>
> Currently, no moves have been made to remove the discriminatory provisions of adoption legislation and to bring adoption laws into line with Aotearoa NZ's obligations under the CRC.
>
> The Adoption Act 1955 is 61 years old and is contrary to current attitudes and values. In particular, adopted children can have their legal and family ties with their natural family severed by an adoption order made without their knowledge or consent and can thus have their personal and cultural identity irreparably damaged. Children do not have to be advised of or give their consent to an application for their adoption. They are not a party to adoption proceedings and have no right to a say or legal representation on the proposed adoption. Despite a series of reviews starting with a comprehensive review by the Law Commission in 2000, and followed by detailed Ministry of Justice reviews in 2003 and 2006 and a draft Adoption Bill prepared by Parliamentary Counsel in 2006, no progress has been made with adoption reform. For more information including a chronology of calls for reform please see http://adoptionaction.co.nz
>
> The 2000 Law Commission report *Adoption and Its Alternatives* made a number of recommendations for adoption law reform that continue to reflect the current issues relating to adoption legislation and provide guidance and options for legislative reform.

Submission by New Zealand Law Society

The New Zealand Law Society took the unprecedented step of submitting a "shadow" report to the UN Committee on the Rights of the Child. The report deals with various areas of NZ family law that do not comply with the Convention on the Rights of the Child. In particular, it described the Adoption Act 1955 as being "overdue for reform" and stated that the Act does not comply with the Convention in a number of significant respects (ie articles 3, 8, 9(1), 9(2), 9(3), 12, 20, 21, 21(a), 24(1) and 30). More specifically, it pointed out that under the 1955 Act:

- The process of adoption does not take into account the cultural and ethnic background of a child being deprived of family background. Children should not be denied the right to enjoy their own culture and use of their own language, and should be able to trace their own lineage (articles 8, 20, 21 and 30).
- The legal fictions created by adoption deny children the right to know their genetic and medical background and as a result they may not be able to have the highest attainable standard of health (article 24(1)).
- The adopted child's original birth certificate cannot be accessed before the age of 20 years. This deprives the child of knowledge of their natural parents and other family members and therefore the right to maintain personal relations and direct contact with both parents and family members (article 9.3).
- The Act does not contain the paramountcy principle ie that the welfare and best interests of the child shall be the paramount consideration (articles 3 and 21).
- There is no mechanism in the Adoption Act to appoint a lawyer to represent the child and therefore give the child an independent voice in respect of that child's views and the opportunity to be heard (article 12).
- For an adoption to proceed, the birth mother must give her consent, as must the birth father (if known). There are no provisions that require the consent of the child to an order for his/her adoption. Other family members are not given an opportunity to participate in the proceedings or to make their views known (article 9.2).

LEGAL ISSUES AND COURT DECISIONS

Parents and family/whanau members are able to apply for order for contact with their child

The Care of Children Act 2004 (COCA) came into force on 1 July 2005. It provides for a parent or any other member of the family or whanau of an adopted child to obtain, with the leave of the Family Court, an order for contact with the child. Section 47(1)(e) of the COCA gives "any other person" the right to apply for leave to apply for a parenting order. Section 47(1)(d) gives a person who is a member of the child's family, whanau or other culturally recognised family group the right to apply for this leave. If leave is granted, an application can be made under s 48(3) for direct or indirect contact with the child. Direct contact is defined as "face to face" contact; indirect contact encompasses contact by letters, phone calls, email and Skype: s 48(3)(a). The Family Court can also make orders about the frequency and timing of contact and the arrangements necessary to facilitate it: s 48(3)(b) and (c).

Earlier Family Court decisions had indicated that the Adoption Act was a Code, and it was not open to birth parents or birth family members to apply for contact, as they no longer had any legal connection with the child. Justice Duffy in *Gordon v Campbell* [2015] NZHC 1264 [8 June 2015] decided that the words "any other person" in s 47(1)(e) must include a birth parent seeking contact with her or his child, despite the birth parent's parental ties with the child having been severed by adoption. Her Honour

endorsed the Family Court decision in *Masters v Spencer* [2013] NZFC 5325, agreeing with the Family Court Judge that it would be nonsensical to exclude a birth parent from applying under s 47(1)(e) when any other person could make such an application. Her Honour also agreed with the view that the requirement for leave in s 47(1)(e) provided sufficient protection against unmeritorious cases.

The paramount consideration will be the welfare and best interests of the child in his or her particular circumstances: s 4(1) Care of Children Act 2004. In assessing whether a contact order will promote the child's welfare and best interests, the Court must take into account the principles in s 5 of the Act, which include in s 5(e) that the child should continue to have a relationship with both his or her parents and that his or her relationship with his or her family group, whanau, hapu or iwi should be preserved and strengthened. The fact that a parent has signed a consent to adoption of the child does not disqualify her or him from having contact, particularly if there has been an open adoption agreement and the relinquishing parent has had actual direct or indirect contact with the child or has otherwise been involved in the child's care and upbringing.

If the child has been the subject of an open adoption agreement between the birth parents and adoptive parents, the Court is more likely to grant leave, particularly where the parent seeking contact has used the opportunities for contact to build a relationship with the child.

INTERNATIONAL NEWS

Adoption of children living overseas in countries that are not parties to the Hague adoption Convention

A number of Pacific countries that have a close relationship with New Zealand (including Samoa, Tonga, Raratonga and Niue) are not parties to the Hague Convention on Intercountry Adoption. This means that the courts are not bound by its provisions in considering an application for adoption of a child who is habitually resident there. It is, however, Child, Youth and Family policy to apply the provisions of the Convention in dealing with adoptions from non-Convention countries. Article 4 states that a Convention adoption shall take place only where the authorities in the child's State of origin have determined, after possibilities of 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. This is sometimes called the "principle of subsidiarity".

Difficulties can arise when adoption decisions have to be made in situations where the Court must take into account cultural considerations and practices in the child's state of origin. These are illustrated by the carefully considered decision of Judge Strettell in *Application by LL & IL* [2016] NZFC 6920 [22 August 2016]. The two children concerned had been born in Tonga and were living with their parents there. Their parents had six other children living with them. The application to adopt the two children was made by the sister of the natural mother and her husband, both of whom lived in New Zealand and had New Zealand citizenship. The reasons for the proposed adoption were that the biological parents were struggling financially, and the female applicant wanted more children but was unable to conceive. The applicants had been supporting the two boys financially since their birth. The Court heard that it was common practice in Tonga for children to be given to a family member to care for, a practice that had been described in *Dradler v Minister of Social Development* [2005] NZFC 1477 as "puisiaki". A guardianship order in favour of the applicants had been made in respect of the two boys by the Supreme Court of Tonga, and that order had changed the children's surnames to that of the applicants. The Child, Youth and Family social worker report opposed the making of an adoption order, expressing the view that "to move them to another country to meet the needs of the adults involved would cause the boys unnecessary trauma, loss and grief". The social worker had not spoken to the boys and, at the time of writing her report, was unaware of the evidence of a Tongan lawyer who had interviewed the boys, and reported that they viewed themselves as the children of the applicants and expressed strong wishes to be with them in New Zealand.

The Court was satisfied that the applicants were fit and proper persons to have the care of the boys, and that the purpose of the adoption was not to give the boys immigration status in New Zealand but was motivated by strong family feelings and a genuine wish to retain links with family members living in

Tonga. Judge Strettell acknowledged that, if an adoption order was made, there would be a period of adjustment, with both boys having to come to terms with new schools, a new language and a new environment. He saw that as being a situation many immigrants have to face and could see nothing to indicate that they were unable to meet that challenge. Interim adoption orders were made.

In the course of the hearing it emerged that the Department of Internal Affairs Guidelines stated that Tongan law differentiates between adoption and guardianship, and that Tongan guardianship orders could not be recognised as adoption orders under s 17 of the Adoption Act and did not give the children the right to citizenship by descent. However, specialist evidence was placed before the Court from a former Chief Justice of Tonga that a Tongan guardianship order is equivalent to an adoption order and should be treated as such. In the light of that evidence it would have been open to the applicants to apply under s 17(1) for recognition of the overseas order, rather than apply for a New Zealand adoption order.

CHRISTMAS GREETINGS AND THANKS

Everyone at Adoption Action sends their best wishes for Christmas and the New Year to all our members.

Adoption Action is greatly appreciative of the assistance and support given by many people over the years since its incorporation in September 2010. Our convenor, Fiona Donoghue, and committee members: Robert Ludbrook, Dr Anne Else, Prof Bill Atkin, Mary Iwanek, Charlotte von Dadelszen and Louise Brazier have devoted a huge amount of their time and energy to the cause. Others who have given significant assistance are Susan Atkin and Betty-Ann Kelly.

Labour Party Member of Parliament Jacinda Ardern (who is the Party's spokesperson for Justice and Children) has been supportive of Adoption Action's campaign for major reform of NZ's adoption legislation and has asked questions in Parliament.

Kevin Hague, former Green Party Member of Parliament, undertook the massive task of drafting a new Care of Children Bill covering adoption and surrogacy. Adoption Action worked alongside him in drafting the Bill. It was unfortunate that it was not successful in the Private Member's ballot and so did not get to be debated in the House. Kevin retired from Parliament in November 2016. It is unclear whether another Green Party MP is willing to place the Bill back in the ballot. Adoption Action is very grateful for Kevin's hard work and commitment.

This year Members of the Victoria University Wellington Community Justice Project again did some useful work on what new adoption legislation should look like. We thank Fady Girgis, Vivian Tan, Rebecca Scoular-Sutton, Anna Huang, Sherlene Ho and, Michelle Trustin for their good work.

APPLICATION
FOR MEMBERSHIP OF
ADOPTION ACTION INCORPORATED

Please post the completed form and fee to: **Adoption Action Inc, PO Box 30-397, Lower Hutt**

❑ I wish to apply for membership / renew membership of Adoption Action Incorporated

❑ I have enclosed a cheque made out to Adoption Action Inc (or cash) for the membership fee of $10 for the period ending 31 March 2018

OR

❑ I have made a direct credit to the Adoption Action Inc bank account **12 3140 0410806 00** for the membership fee of $10 for the period ending 31 March 2018

NAME: _____

ADDRESS: _____

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EMAIL: _____

PHONE OR MOBILE:

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_____

SIGNATURE:

_____

DATE: _____

Optional:

My interest in adoption is as an adopted person / natural parent /adoptive parent / academic / other professional / other (please specify):

_____

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If you do NOT wish to receive this newsletter, please tick the box below.

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