Adoption Action

Adoption Law Reform **June 2021**

ISSUE PAPER 1
Options for statutory reform of adoption legislation

The Adoption Act 1955 was developed many years ago, when attitudes to children, relationships and families were very different from today. It is monocultural and contains many assumptions and provisions that are unacceptable today. A number of its provisions have been found by the Human Rights Review Tribunal to be discriminatory and in breach of the Human Rights Act and the NZ Bill of Rights Act.

For a comprehensive historical account of the 1955 Act's formation and its effects in practice see: Else, A. (1991), *A Question of Adoption: Closed Stranger Adoption in New Zealand*, 1944-1974, Bridget Williams Books; and Keith C Griffith, *New Zealand Adoption History and Practice, Social and Legal, 1840-1996.* For a broader review of traditional adoption law, see Noel Arnold "Reimagining adoption" (2019) 49 Fam. Law 3.

The whole context of adoption has changed since 1955. The number of New Zealand children becoming available for adoption by unrelated strangers has dropped sharply over the last four decades. Mothers parenting alone have options which mean they do not feel forced to place their child for adoption. Many adoptions are now in-family adoptions by step-parents or members of a birth parent's family. Childless individuals or couples can now conceive as a result of assisted human reproduction through egg or sperm donation or embryo donation. They may also have recourse to a surrogate mother to gestate and give birth to the child. Births through surrogacy require transfer of the child from the surrogate mother to the commissioning parents through adoption.

The attached Chronology charts the long history of calls for major reform of the 1955 Act. The Adult Adoption Information Act 1985 is now also over three decades old and would need to be revised in the light of new legislation dealing with adoption.

OPTIONS FOR STATUTORY REFORM OF THE ADOPTION ACT 1955 AND RELATED ACTS

Option 1: Follow the recommendations of the Law Commission in its report *Adoption and its Alternatives: A different approach and a new framework* (Report 65), published in 2000, and incorporate all laws relating to the care, upbringing and protection of children and young people in a new Act, with common objects and principles. The new Act would encompass at one end of the spectrum the temporary care of children by people other than their birth parents, and at the other end the permanency of (reformulated) adoption.

Law Commission Report 2000

The Commission recommended that the provisions relating to the placement of children in the Guardianship Act 1968 (now the Care of Children Act 2004) and the Children, Young Persons, and Their Families Act 1989 (now the Ministry for Children Oranga Tamariki Act 1989) be incorporated in a new Care of Children Act. Its main reasons were that this "would enable child placement issues to be dealt with coherently so there would be a continuum of care options from temporary care to permanent placement" (Ch 5, paras 86-89).

Ministry of Justice policy paper 2007

The Ministry of Justice's detailed 94 page paper on *Adoption Law Reform* for the Cabinet Policy Committee (2 July 2007), prepared after broad consultation with many organisations with an interest in adoption and discussion with representatives of the Maori and Pasifika communities, did not support the Law Commission's recommendation to merge the Adoption Act with other child care legislation. The Ministry had got as far as instructing Parliamentary Counsel Office in 2006 to prepare a first draft of a Care of Children (Adoption and Surrogacy Reform) Bill (referred to in these papers as Ministry of Justice early draft Bill 2007) that proposed to integrate adoption law with the Care of Children Act 2004. It also included changes to the 2004 Act to deal with surrogacy issues. There was no attempt to integrate adoption law with Child Protection statutes. This government Bill was never made public.

Kevin Hague Bill 2016

This Private Member's Bill, *Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill,* was entered in the Private Members' Ballot by former Green Party MP, Kevin Hague, but never drawn. The Bill aimed to integrate the current provisions in the Care of Children Act 2004 with the three adoption statutes, and added some new provisions relating to surrogacy. It extended the current provisions relating to access to information by birth parents and adoptive parents. It also dealt with contentious issues around the use of adoption law: provisions relating to children conceived and born as a result of surrogacy arrangements. Importantly, it also envisaged that adoption would no longer legally extinguish the child's relationships with his or her birth family.

Other jurisdictions

Other English speaking countries with adoption legislation have continued to treat adoption separately from other child care options, recognising that it has special features (e.g. the UK, Scotland, all Australian States and Territories, and most US states). The unique feature of adoption, as currently provided for, is that it changes the child's legal parenthood and imposes on the child a new set of family relationships, severing all previous ones. In this respect it differs from guardianship, day-to-day care and care options available in the child protection system. Furthermore, an adoption order can be varied or discharged only in rare circumstances, whereas other care options can be varied or terminated where the best interests of the child require this.

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Arguments in favour of one comprehensive statute

The same objects and guiding principles would clearly be common to all provisions for the care and upbringing of children. The Law Commission saw a comprehensive statute as removing the disjunctions between child protection law, guardianship, child custody and access law, and child protection law. It saw reformulated adoption as being at one end of the spectrum, and temporary care arrangements for child protection at the other end. This proposal was supported by the majority of submitters to the earlier Law Commission Discussion Paper.

Potential difficulties

Some commentators see difficulties in drafting a statute that would amalgamate the three current adoption statutes (Adoption Act 1955, Adult Adoption Information Act 1985 and Adoption (Intercountry) Act 1997) with laws dealing with guardianship and the care of children, child protection and youth justice laws. For example, they consider it would be difficult to merge adoption law with the child protection and youth justice provisions now contained in the Ministry for Children Oranga Tamariki Act 1989 (formerly the Children, Young Persons, and Their Families Act 1989). Child protection proceedings are the responsibility of the State and of Oranga Tamariki Ministry for Children, while guardianship and day-to-day care disputes are between private parties and fall under the Ministry of Justice. Adoption law is the responsibility of the Ministry of Justice, but most administrative matters fall under Oranga Tamariki.

Option 2: A new Adoption Act be designed to replace the Adoption Act 1955, the Adult Adoption Information Act 1985 and the Adoption Intercountry Act 1997.

There are a number of advantages in combining in one Act the three Acts currently dealing with adoption. The new Act would contain introductory Purpose and Objects sections, including an overarching principle that the best interests of the child shall be the paramount consideration, as required by the UN Convention on the Rights of the Child.

Overseas jurisdictions

This is the approach taken by the UK and in the three Australian states and territories that have passed new adoption laws since 2000. Adoption Acts in New South Wales, Queensland and Australian Capital Territory all incorporate provisions relating to adoptees' and birth parents' access to information about and/or contact with the birth parents, and also intercountry adoption issues. These Acts do not deal with guardianship, care of children, child protection or youth justice issues.

There seems to be little point in continuing to keep the three Adoption Acts separate from each other, given that they all deal with what are fundamentally issues regarding birth parents, adoptive parents and adopted persons (both as children and as adults), and therefore require a common approach clearly based on the same principles.