

### ISSUE PAPER 5

#### Who should be able to adopt a child?

##### Who can adopt a child?

Currently an adoption order can be made on the application of:

- (i) any person as a sole applicant, whether or not s/he is domiciled in NZ: s3(1)
- (ii) two spouses jointly: s 3(2)
- (iii) the mother or father of a child either alone or jointly with his or her spouse: s 3(3)

The specific jurisdiction for a birth parent to adopt his/her own child may seem odd, but the reason was that in 1955 a child born to unmarried parents was "illegitimate" (a bastard) and suffered legal disadvantage as well as social opprobrium. It was not unusual for a birth mother to adopt her own child, so as to remove the "stain" of illegitimacy, or to pretend that she had not given birth as a single woman.

The Courts have recognised that community attitudes and values have changed significantly since 1955, and have shown a willingness to extend the categories of people who can obtain an adoption order to include:

- Opposite sex unmarried couples in a long-term committed relationship
- Same sex unmarried couples in a long-term committed relationship
- Same sex couples whose marriage has been dissolved and who are not living together, where they have cared for the children jointly before their separation and continue to do so.

##### Other restrictions on who can adopt

The 1955 Act places several restrictions on the class of persons who can adopt a child.

**Step-parents:** A birth parent and step-parent who are married can apply jointly to adopt the birth parent's child.

**Same sex partners:** The Adoption Act specifies that only "spouses", which had long been taken to mean a married opposite sex couple, may jointly apply to adopt.

### ISSUE PAPER 5 – Who should be able to adopt a child? - continued

#### 1. **AGE OF APPLICANT(S):**

Section 4(1) AA states that, except in special circumstances, an adoption order cannot be made in respect of a sole applicant (or one of two joint applicants) who is below the age of 25 or is at least 20 years older than the child. If the applicant is a relative of the child or the birth parent of the child, he or she must be at least 20 years old.

#### **Care of Children Act 2004 and Oranga Tamariki Act 1989**

There is no restriction on the basis of age on the making of a guardianship order or parenting order under the Care of Children Act, or making care and protection orders under the Oranga Tamariki Act

#### **Human Rights Review Tribunal: *Adoption Action v Attorney General 2016***

The Tribunal found that s 4(1) of the Adoption Act 1955 discriminated on the grounds of age and made a declaration of inconsistency with the Human Rights Act.

#### **Kevin Hague Bill 2016**

An adoption order cannot be made in favour of an applicant aged under 18, unless exceptional circumstances apply: s 167(1) & (2).

#### **Ministry of Justice draft Bill 2007**

Under-18s cannot adopt without parental consent, unless they are married or in a civil union or de facto relationship s 12(1).

#### 2. **SEX OF APPLICANTS**

A male applicant cannot adopt a female child as a sole applicant, unless there are shown to be “special circumstances” which justify the making of the order: s 4(2)

#### **Law Commission Report 2000**

The Law Commission noted that there was no equivalent restriction on the basis of gender and marital status in relation to guardianship and parenting orders under the Care of Children Act 2004, and (at paras 336-338) favoured a general principle that persons are not disqualified from eligibility to adopt a child whether they are single, married, or in a de facto or same sex relationship. The Marriage Act 1955 has now been amended (Marriage (Definition of Marriage) Amendment Act 2013) to extend the definition of marriage to mean the union of two people, regardless of their sex, sexual orientation, or gender identity. However, civil union couples were not mentioned in the report.

### ISSUE PAPER 5 – Who should be able to adopt a child? - continued

#### **Human Rights Review Tribunal: *Adoption Action v Attorney General 2016***

The Tribunal found that the restriction on a single male adopting a female child as a sole applicant discriminated against males on the grounds of both their sex and their marital status, and was accordingly in breach of the Human Rights Act and the NZ Bill of Rights Act.

#### 3. **STEP-PARENT ADOPTIONS**

Joint adoption of a child by a parent and step-parent severs the adoptee's relationship with the child's other birth parent (or adoptive parent under an earlier adoption) and all other family members traced through the step-parent. In such situations, partners of a parent are alternatively able to obtain a guardianship order which gives them equal parental rights and responsibilities, but does not extinguish the parental status of the birth parent.

#### **Law Commission Report 2000**

The Commission noted that nearly all submitters favoured an adoption order being made in favour of the spouse or partner of a parent only where the Court considered that adoption was clearly preferable to additional guardianship. It recommended that a step-parent adoption be granted only after the Court had taken into account:

- (i) the degree of contact the child had had with the other birth parent and his/her family/whanau and the effect adoption might have on these relationships and future contact
- (ii) whether guardianship would be a more appropriate option
- (iii) whether the partner of the parent had lived with the child for not less than 3 years: para 375.

#### 4. **RELATIONSHIP STATUS OF JOINT APPLICANTS**

Section 2(1) of the Marriage Act defines marriage as "the union of 2 people regardless of their sex, sexual orientation or gender identity", so same-sex partners who are married can now apply jointly to adopt a child. Civil union couples (same sex or opposite sex) seemingly cannot adopt a child jointly, and their legal position needs to be clarified.

#### **Human Rights Review Tribunal: *Adoption Action v Attorney General 2016***

The Tribunal found that the Adoption Act 1955 discriminated in this respect on the grounds of both sex and marital status.

#### **Kevin Hague Bill 2016**

This would provide that any person, or 2 persons jointly who are spouses or partners, and are over the age of 18 years, may apply to adopt a child, unless an applicant (or his/her spouse or partner) is a birth parent of the child: s 167(1). The restriction on birth parents adopting their own child can be waived if the adoption is deemed to be in the best interests of the child.

### ISSUE PAPER 5 – Who should be able to adopt a child? - continued

#### 5. DOMICILE OF APPLICANT(S)

Applicants need not be domiciled in New Zealand: s 3(1) AA.

##### **Law Commission Report 2000**

The Commission noted cases where the ability of people not domiciled in New Zealand to adopt a child domiciled elsewhere had been misused. It recommended that the jurisdiction be limited to cases where:

- (i) the child is habitually resident in New Zealand or is coming to live in this country;
- (ii) the applicants are NZ citizens OR permanent residents who have been habitual residents in NZ for 3 years before filing the adoption application: see: paras 291/292.

#### 6. ADOPTION BY A BIRTH PARENT OF HIS OR HER OWN CHILD

Children born outside marriage were deemed “illegitimate” and suffered social and legal disadvantage until the Status of Children Act 1969 gave all children equal status. As explained above, a single woman would sometimes adopt his or her own child to avoid this. In some cases, one birth parent wanted to extinguish the other biological parent’s parental status by adopting her or his own child.

##### **Law Commission Report 2000**

The Commission recommended that a biological parent should not be eligible to adopt his or her own child: para 390. Both the Hague Bill and the Ministry of Justice Bill included this recommendation. Adopting one’s own child is clearly unacceptable in today’s world.

##### **Ministry of Justice draft Bill 2007**

Several provisions exclude adoption applications by (i) birth parents of the child; (ii) a person in an inappropriate relationship with the child (defined to include persons who are or have been involved in child protection, Domestic Violence Act or Care of Children Act proceedings or criminal proceedings); (iii) a person who has been convicted of a criminal offence involving harm to a child, whether physical or sexual abuse, ill-treatment, neglect or child pornography offending.