

ISSUE PAPER 6

Consents to adoption

1.	Whose consents to adoption should be required (e.g. both birth parents, spouses or partners of birth parents, siblings, whanau/family members, young person to be adopted)?
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3.	What should be the period after the birth of a child that birth parents are able to give consent to adoption?
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5.	On what grounds should the consent of the parent(s) or guardian(s) of a child be able to be dispensed with?

1. **Whose consents to adoption should be required (e.g. both birth parents, spouses or partners of birth parents, siblings, whanau/family members, young person to be adopted)?**

Adoption Act 1955

The consent of the birth mother is always required (s 7 AA Adoption Act), unless her consent is dispensed with (s 8). The consent of the natural father is not required unless he was married to the mother or is a guardian of the child: s 7(3)(a) & (b). The consent of the person to be adopted is not required, regardless of that person's age.

Law Commission Report 2000

The Commission recommended that, unless dispensed with, the consent of the child's birth father be required, and that there be a statutory requirement that a social worker make all reasonable efforts to identify and locate the child's father: paras 412 to 414.

The Commission also proposed that the views of the child to be adopted must be ascertained when he or she is capable of forming views, and that those views shall be given due weight in accordance with his/her age and maturity: paras 447-440. The Court hearing an adoption application must appoint counsel for the child unless such appointment would serve no useful purpose: paras 450, 451.

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

The Tribunal found that the current provisions re father's consent discriminated on the grounds of sex and marital status.

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2. What provisions are required to ensure that all consents to adoption are fully informed and freely given?

Adoption Act 1955

As many commentators have noted, the consent provisions in the Act do not meet the conditions now recognised as necessary for fully informed and freely given consent. For example, the birth parent giving consent is not required to make a declaration that (i) s/he has been fully informed about giving consent; (ii) s/he has had independent legal advice and counselling; (iii) s/he fully understands the consequences of giving consent and is consenting free of any form of coercion.

The Act does not include requirements that any or all these conditions be met before consent is signed. Instead, s 7 (9) states that “the form of the document signifying consent to an adoption shall contain an explanation of the effect of an adoption order, and shall have endorsed thereon a certificate by the witness that he has personally explained the effect of an adoption order to the person who is giving the consent”. Under the 1955 Act, the lawyer who witnesses the signature on the consent form is not usually acting for the consenter.

Law Commission Report 2000

The Commission recommended that a birth mother must receive independent legal advice before signing a consent to the adoption of her child: paras 391-396. It also recommended that she must receive counselling before giving consent, with at least one counselling session taking place after the birth of the child, the costs being met by Legal Aid: paras 391 –396.

UN Convention on the Rights of the Child (UNCROC) 1989

Article 21(a) requires that the consent of a parent to adoption of his/her child must be given after “such counselling as may be necessary”.

Ministry of Justice draft Bill 2007

The draft Bill required that a consent giver must have received independent legal advice about the adoption (cl 26(1)(b)), and must have been provided by a social worker with information about options other than adoption for providing for the care of the child, and the social and emotional effects of giving up a child to adoption.

Kevin Hague Bill 2016

This provides that a birth parent or guardian is not able to give a valid consent to an adoption order unless the parent or guardian has received information and counselling, from a qualified or accredited adoption counsellor or adoption social worker, in relation to:

- (i) the legal effects of an adoption order on the relationship between the parent or guardian and the child

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(ii) the effect on the child of severance of that relationship

(iii) the effect that placing a child for adoption may have on the relinquishing parent or guardian.

Information must also be provided on alternative placements other than adoption that are or might be available for the care of the child, and on the financial and other support that is available to the parent or guardian if he or she chooses to care for the child.

3. What should be the period after the birth of a child that birth parents are able to give consent to adoption?

Adoption Act 1955

The Act currently provides for the minimum period at which consent may be given to be 10 days after the birth of the child: s 7(7). This is the shortest time after which a birth mother can give an irrevocable consent to the adoption of her child, compared with any other overseas jurisdiction.

Law Commission Report 2000

The Commission recommended that the consent of a birth parent to the adoption of his or child should be valid only if it is given 28 days after the birth of the child: paras. 404 to 406.

Ministry of Justice draft Bill 2007

A valid consent can be given no earlier than 28 days after the birth of the child: cl 26(1)(a).

Kevin Hague Bill 2016

A birth parent or guardian is not able to give a valid consent to an adoption order unless the child is at least 28 days old at the date of the execution of the consent document.

4. Should it be possible for a consent to be withdrawn once given, and in what circumstances?

Adoption Act 1955

Prior to 1955, the birth mother had still to be consenting at the time the adoption order was granted. The 1955 Act appears to provide for withdrawal of consent (s 9), but in practice it is worded in a way that makes it almost impossible for withdrawal attempts to succeed (see A Else, *A Question of Adoption* (1991), pp. 126-8).

Law Commission Report 2000

The Law Commission cites evidence that as many as two-thirds of women who have considered placing their child for adoption change their minds after the birth of the child. It recommends that there be at least one counselling session after the birth of the child: para 236.

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Ministry of Justice draft Bill 2007

Section 26 states:

When consent may be given

A birth parent who consents to the adoption of his or her child may not do so before-

(c) a social worker has provided the birth parent with information since the birth about-(i) options other than adoption for providing care for the child; and (ii) the social and emotional effects of adoption.

Kevin Hague Bill 2016

Makes no specific provision for withdrawal of consent.

5. On what grounds should the consent of the parent(s) or guardian(s) of a child be able to be dispensed with?

Under s 8 of the Adoption Act, the consent of a parent or guardian to the adoption of a child may be dispensed with in any of the following situations:

- the Court is satisfied that the parent/guardian has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child or failed to exercise the normal duty and care of parenthood: s 8(1)(a); or
- the Court is satisfied that the parent/guardian is unfit, by reason of any physical or mental incapacity, to have the care and control of the child and that that unfitness is likely to continue indefinitely: s 8(1)(b).

Law Commission Report 2000

The Commission recommended that the incapacity ground be altered and that there be an objective test based on the child's best interests: para 437.

UN Convention on the Rights of Persons with Disabilities

Disability organisations have argued that the power to dispense with a parent's consent on the grounds of physical or mental incapacity is discriminatory and in breach of the UN Convention on the Rights of Persons with a Disability. A complaint on this breach to the UN Committee under the Optional Protocol to the Convention has been drafted.

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

The Tribunal found that s 8(1)(b) discriminated on the grounds of disability and made a declaration of non-compliance with the Human Rights Act in relation to that subsection.