

ISSUE PAPER 8

Children's rights and best interests in adoption

Under the Adoption Act 1955, the welfare and interests of the child to be adopted are one of several matters on which the court must be satisfied, but not the paramount or even a primary consideration: s11(b). Should children (especially older children and young adults) have the right to have a say in adoption proceedings, to be a party to the proceedings, and/or to be legally represented at the hearing?

In 1955 children were under the authority and control of their parents or caregivers until they reached the age of majority. If they did not behave they could be corrected by physical punishment.

1. **Welfare and interests of the child**

Under the Adoption Act, an adoption order can be made not only in respect of children but also of young adults aged 18, 19 and (in some situations) 20 years. Social worker reports provided to the court under s 10 do not specifically require the report to advise the court on matters relating to the welfare and best interests of the child, let alone the views of the child - they are required only to report to the Court "on the application". Under s 11(b) of the Adoption Act, the child's interests are only a consideration, not the paramount or even a primary consideration.

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

Article 21 obliges parties to the Convention that permit adoption (including New Zealand) to ensure that the best interests of the child shall be the "paramount consideration". This provision recognises that in the case of adoption, particular care must be taken to ensure that the best interests of the child, rather than the wishes of the adults concerned, should be paramount. It is the strongest statement regarding this principle in the Convention. The wider principle in Article 3(1) requires that in other matters the best interests of the child shall be a "primary consideration".

Law Commission Report 2000

The Commission recommended (at para 172) that the welfare and interests of the child, both in childhood and in later life, must be the paramount consideration in all adoption matters.

Care of Children Act 2004

Section 4(1) makes the welfare and best interests of the child the paramount consideration in decisions and court proceedings under the Act.

Ministry of Justice draft Bill 2007

The welfare and interests of the child are to be the paramount consideration: s4(a).

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Ministry of Justice Cabinet paper 2007

This paper warned that the “welfare and interests of the child” provision in s 11(b) of AA “is not so strongly expressed as that in the Care of Children Act and that adoption case law indicates that it is sometimes ignored”. It proposes alignment of the interests and welfare provision with s 4(1) of the Care of Children Act and with Article 21 of UNCROC: see paras 18 & 20 of MOJ Cabinet paper.

Kevin Hague Bill 2016

The welfare and interests of the child are to be the paramount consideration: s 165.

2. **Adoptee’s consent to an adoption order and entitlement to be heard at the hearing**

Under the Adoption Act, the consent of the child, young person or young adult to an adoption order is not required, nor do they have the right to have their views ascertained and placed before the Court, to appear at the hearing of the adoption application, or to appeal against the decision. Unlike other care of children options, an adoption order cannot be varied or discharged except on very limited grounds.

UNCROC 1989

Article 12 gives all under-18s the right to express their views freely in all matters that affect them, and to be heard either directly or through a representative in any judicial proceedings.

New Zealand Bill of Rights Act 2000

Every person has the right to observance of the principles of natural justice in respect of any court or authority that has the power to determine their rights or interests: s 27.

Law Commission Report *Adoption and its Alternatives* 2000

This report refers (at para 173) to a New South Wales Adoption Bill which provides that children must be given an opportunity to express their views freely, and that their views are to be given due weight in accordance with their developmental capacity and the circumstances.

Committee on the Rights of the Child 3rd & 4th periodic report on New Zealand 2011

The Committee expressed regret that the consent of the child is not required to domestic adoptions, and recommended that New Zealand take steps to ensure that the child’s consent is required for domestic adoptions.

Ministry of Justice draft Bill 2007

Children should be given the opportunity, either directly or through a representative, to express views on matters affecting them, and those views must be taken into account: cl 5(b).

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Ministry of Justice Cabinet paper 2007

MOJ proposed a principle that the child shall have the opportunity to express views on matters affecting them either directly or through a representative, and those views must be taken into account: para 23.

Kevin Hague Bill 2016

Section 165(c) provides that “adoption law and practice in New Zealand must comply with New Zealand’s obligations under the United Nations Convention on the Rights of the Child, and other relevant treaties and international arrangements”.