

ISSUE PAPER 9

Who can be adopted?

1.	Should there be a cut-off age after which no one can be adopted?
2.	Residency and domicile status of person to be adopted
3.	Should adoption of a human embryo be permitted?

1. Age of person to be adopted

Under the Adoption Act, an adoption order can be made in respect of a person under 20 years, irrespective of whether s/he is domiciled in NZ: ss 2, 3(1).

If an interim order is made in respect of a 20 year old, s/he may be 21 at the date of the final order. In New Zealand care and protection law, “child” means those under the age of 13. Those aged 13 to 17 are defined as “young persons”. Those aged 18 or over are regarded as “adults”.

Some countries allow adoption of adults. There appears to be no support for adoption of over 20s in New Zealand, and no precedent for adult adoption in English speaking countries.

There are persuasive arguments that the maximum age at which a child can be adopted should be lowered to 16 years or even less. At the age of 16, young people can marry (with parental consent and court approval) or enter a civil union or de facto relationship. They have the power to make their own decisions at an age below 16 years if they have attained an appropriate level of maturity: see common law as set by House of Lords in *Gillick* decision and s 16(c) Care of Children Act 2004. Although the age for consent to sexual intercourse is 16, a number of under-16s give birth to children in New Zealand. The Adoption Act allows any birth parent to sign consent for the adoption of their child, regardless of how young that parent is.

Care of Children Act 2004

Guardianship rights and responsibilities cease when a child reaches the age of 18 years or, at an earlier age, marries or enters into a civil union or de facto relationship. There are accordingly good reasons why married or partnered children should not be able to be adopted. There is a NZ decision in which a 17 year old who was engaged to be married had been adopted by her stepfather without her knowledge or consent. The adoption order was discharged.

Law Commission Report 2000

The Commission recommended that the upper age limit for the making of an adoption order should be 16 years, with the discretion to make an order in respect of a young person aged 17 to 19 years in exceptional circumstances, where an adoption order would clearly promote the welfare and interests of the young person: paras 128, 129.

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Ministry of Justice Cabinet Paper 2007

The Ministry of Justice recommended that the maximum age be lowered to 17 years, to be consistent with the definition of “child” in UNCROC, but excluding 16 and 17 year olds who are married, or in a civil union or de facto relationship.

Ministry of Justice draft Bill 2007

This Bill defined “child” to mean a person who is not and has never been married, or in a civil union, or in a de facto relationship with the consent of his or her parents, and is:

- (a) under the age of 18 years; or
- (b) under the age of 19 years and in respect of whom an interim order is in force.

Kevin Hague Bill 2016

The Bill proposed (s 166(4)) that an adoption order cannot be made where:

- (a) the child is over the age of 17 years; or
- (b) the child is or has been married or in a civil union or de facto relationship; or
- (c) the child is himself or herself the parent of a child.

Adoption Act 2000 (New South Wales)

Under s 24 (1), an adoption order can be made in respect of:

- (a) a child less than 18 years; or
- (b) a child who is or has been cared for by the applicant(s) prior to the child’s reaching the age of 18 years.

Adoption Act 1993 (Australian Capital Territory)

Under s 9, an adoption order can be made in respect of:

- (a) a child under the age of 18 years; or
- (b) a child over that age who has been reared, maintained or educated by the applicant(s).

Adoption and Children Act 2002 (UK)

Under s 48, an application for an adoption order can be made only in respect of a child aged under 18 years.

2. **Residency and domicile status of person to be adopted**

There is currently no restriction on the residency or domicile status of the child to be adopted. An applicant resident or domiciled in any overseas country can apply for an adoption order in respect of

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a child, notwithstanding that the child and/or the adoptive parents are neither resident nor domiciled in New Zealand: s 3(1) Adoption 1955.

Law Commission Report 2000

The Commission raised the concern that such unfettered jurisdiction might result in New Zealand being used as a clearinghouse for overseas adoptions. It gave examples and noted that such adoptions may not be recognised overseas. It recommended that adoptions be restricted to cases where (i) the child is habitually resident in New Zealand, and (ii) the applicants are New Zealand citizens or permanent residents and have been resident here for at least 3 years before the adoption application is made: paras 287- 292.

Ministry of Justice Cabinet Paper 2007

The Ministry of Justice noted that there are currently no geographical restrictions on who can adopt and who can be adopted in New Zealand, and that the NZ courts might be used to circumvent more restrictive requirements in the adoptive parent's country of origin. It recommended that New Zealand jurisdiction should be restricted to applicants who are habitually resident in New Zealand indefinitely, under the Immigration Act 1987, and children who are habitually resident in New Zealand and entitled to remain or reside here indefinitely: paras 131- 133.

Ministry of Justice draft Bill 2007

Does not deal with this issue.

Kevin Hague Bill 2016

The Bill proposed (s 166) that the Court be able to make an adoption order in respect of a child where (i) the applicant(s) are habitually resident in New Zealand and entitled to remain here indefinitely, and (ii) the child is habitually resident in New Zealand and is entitled to remain here indefinitely or enters New Zealand for the purpose of adoption with the prior approval of the relevant state authorities. It added that the Court should have the power to waive these requirements where it is satisfied that an adoption order will promote the welfare and best interests of the child or where there are exceptional circumstances.

Special rules would apply where the child is born as the result of an overseas surrogacy arrangement: see s 4 Human Assisted Reproductive Technology Act 2004.

3. Adoption of an embryo

It is understood that some other countries permit adoption of an embryo. This issue seems not to have been discussed in the New Zealand context.