

ISSUE PAPER 15

Adoption and prohibited marriages and incest

1.	What should be the effect of adoption on laws regarding forbidden marriages?
2.	What should be the effect of adoption on the criminal law as to incest?

1. What should be the effect of adoption on laws regarding forbidden marriages?

Adoption Act 1955

The proviso to s 16(2)(b) Adoption Act has the effect that an adopted child shall not cease to be the child of his or her natural (i.e. birth) parents on the making of an adoption order in two exceptional situations:

- any enactment relating to forbidden marriages or civil unions;
- the crime of incest.

In all other respects, the adopted child is deemed to be the child of the adoptive parent(s) as if born to them, and the child's other relationships shall be traced through the adoptive parents and not the birth parents: s 16(2)(b) &.c).

Marriage Act 1955 and Civil Union Act 2004

Marriages of persons within any the 20 Prohibited Degrees of Relationship are void: see s 15(2) and 2nd Schedule of the Marriage Act 1955. Under s 9 of the Civil Union Act 2004, two people who are within the 15 prohibited degrees of civil union set out in Schedule 2 of that Act are prohibited from entering into a civil union. Both Acts make a distinction between relationships of *consanguinity* (blood relationships) and relationships of *affinity* (relationships by marriage).

These requirements place the onus on all persons, including adopted persons, to search their own relationships of affinity and consanguinity to ensure that they do not marry or enter into a civil union with a person who is within the many prohibited degrees of relationship listed in the Second Schedule to the Marriage Act 1955. These provisions have caused problems for adopted people, resulting in court cases.

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Affinity

A person who wishes to marry someone to whom he or she is related by affinity is able to apply to the Court for its consent to the marriage or civil union. Under the Marriage Act the Court can give its consent to the marriage of persons related by affinity, provided neither party to the proposed marriage has, by his or her conduct, caused or contributed to the termination of that party's previous marriage: s 15(2) Adoption Act. In these times it seems bizarre that, before approving the proposed marriage, the High Court will have to delve into any previous marriage of each proposed spouse to assess whether their conduct caused or contributed to the breakdown of the earlier marriage.

In *Re Thomson and Thomson* [1958] NZLR 580, an adopted son, having failed to obtain the consent of the Court under s 15(2) Marriage Act 1955 to enable him to marry his sister by adoption (to whom he was not related by blood), had to have the adoption discharged by a special Act of Parliament: Thomson Adoption Discharge Act 1958. The High Court had declined jurisdiction to grant consent to the marriage on the reasoning that s 16 Adoption Act, particularly subsection (2)(c), meant that the natural and adopted child were brother and sister, and therefore related not by affinity but by consanguinity (even though they had no actual blood relationship).

By contrast, in *Re Application by Barlow and Hohaia* [1986] 2 NZLR 714, a man sought the consent of the High Court under s 15(2) Marriage Act 1955 to marry his niece by adoption, as she was the adopted daughter of his sister. The Judge held that under s 16(2)(b) of the Adoption Act, the intended bride remained a child of her birth parents for the purposes of the law of forbidden marriages, and that there was no restriction on the proposed marriage.

The confused state of the law was discussed by Andrew Horne in "Consanguinity and the Marriage of Adopted Relatives" (1992) 3 FLB 67. The author preferred the approach of the Courts in *Re Woodcock and Woodcock* [1957] NZLR 960 (CA) and *Re Hoskin and Pearson* [1958] NZLR 604, that people related by adoption would be treated as persons within the prohibited degrees of affinity and could marry with the consent of the High Court.

Keith Griffith, in his epic work *New Zealand Adoption History and Practice – Social and Legal*, 2006, wrote: "Where parties to a marriage are related to one another within the prohibited degrees of consanguinity or affinity, whether through whole blood or half-blood, the marriage is void ab initio whether or not an order declaring it to be void has been granted, if the parties are within the prohibited degrees of relationship and no order is in force dispensing with the prohibition."

Griffith made the point that while the onus to ascertain whether the intended spouse or civil union partner is not within the prohibited degrees is on the person planning to marry, they are often unable to access the necessary information, as a result of the limitations on access to adoption records. Marriage celebrants can access adoption records, but where (as is often the case) there is no birth father's name or any details of the birth mother's family relationships, it is almost impossible to identify prohibited relationships. An inevitable consequence of adoption secrecy is that some

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adopted persons innocently enter into incestuous and/or prohibited marriage or prohibited civil union relationships.

Consequences of entering prohibited relationships

The chances of adopted persons entering a prohibited marriage relationship are small, but the social and legal consequences are extremely serious. If an adoptee in ignorance marries or enters into a civil union with someone within the prohibited consanguineous blood relationships, or within the prohibited degrees of affinity, without the Court's consent, the marriage is void from the start. This has significant effects on their children and on their rights of inheritance.

Law Commission Report *Adoption and its Alternatives* 2000

The Report dealt with forbidden marriages and incest in some detail. It remarked (at para 493) that case law demonstrates considerable confusion about whether s 16(2) of the Adoption Act means that both adoptive parents and natural parents are considered parents for the purposes of any enactments relating to forbidden marriages or the crime of incest, or whether the subsection applies only to natural parents and not adoptive parents.

The Commission (at para 506) recommended that the adoptive parent–child relationship should be deemed to be a relationship of consanguinity for the purpose of the Marriage Act 1955, while all other adoptive relationships should be treated as relationships of affinity for the purposes of the prohibited degrees of marriage.

The Commission further recommend that an adopted person be able to apply to the Family Court to marry an adoptive relative within the degrees of consanguinity, and on such application the Court should be able to determine whether the proposed marriage is repugnant to the public interest, taking into consideration (i) the age at which the child was adopted; (ii) the other party's role and degree of participation in the family unit; and (iii) the need to protect the sanctity and integrity of the family relationship,

Ministry of Justice Draft Bill 2007

The draft Bill prepared by Parliamentary Counsel Office contained sections on prohibited marriages and civil unions. These closely followed the recommendations of the Law Commission.

s17 Effects of adoption order for the purposes of marriage and civil union

- (1) An adopted person and his or her adoptive parent are prohibited from marrying or entering a civil union with each other.
- (2) An adopted person and any person (other than his or her adoptive parent) are prohibited from marrying or entering a civil union with each other, except as provided in s18, if they are, as the effect of an adoption order, in a family relationship that would be

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within a prohibited degree of consanguinity (other than that of child and parent) or affinity, were it a family relationship through birth.

(3) In this section, degree of consanguinity and degree of affinity have the same meaning as in the Marriage Act 1955 and the Civil Union Act 2004.

s18 Order dispensing with prohibition on marrying or entering civil union

(1) Two persons who, in terms of section 17(2), are prohibited from marrying or entering into a civil union with each other, may apply to the Family Court for an order under this section.

(2) On an application under subsection (1), the Court may make an order dispensing with the prohibition in s17(2), if satisfied that the marriage or civil union would not be repugnant to the public interest, by considering-

- (a) the age at which the adopted person was adopted; and
- (b) the intended spouse or partner's role and degree of participation in the family unit; and
- (c) the need to protect the sanctity and integrity of the family relationship.

(3) Nothing in this section permits the marriage or entering into civil union of 2 persons contrary to section 17(1).

(4) This section overrides s 15 of the Marriage Act 1955 and ss 9 and 10 of the Civil Union Act 2004.

Kevin Hague Bill 2016

The draft Bill adopted the proposals of the Law Commission and dealt with prohibited degrees of relationship in the following manner:

s194 Prohibited degrees of relationship

(1) For the avoidance of doubt, the rules relating to prohibited degrees of marriage and civil union set out in the Marriage Act 1955 and the Civil Union Act 2004 apply to all relationships created by an adoption order.

(2) Despite the existence of an adoption order, the birth mother, birth father, and other members of the birth family continue to fall within the prohibited degrees of relationship as if the adoption order had not been made.

(3) An adopted child or adopted person may apply to the Family Court to marry or enter into a civil union with an adoptive relative deemed to be related within the degrees of affinity for the purposes of the Marriage Act 1955 or the Civil Union Act 2004.

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(4) In deciding an application under subsection (3) in order to determine whether the proposed marriage or civil union is contrary to the public interest, the court must consider—

(a) the age at which the child was adopted; and

(b) the other party's role in and degree of participation in the family unit; and

(c) the need to protect the sanctity and integrity of the family relationship.

Issues relating to the crime of incest are dealt with in cl 195 of the Bill.

2. What should be the effect of adoption on the criminal law as to incest?

Crimes Act 1961 (as amended in 2005)

s130 Incest

(1) Sexual connection is incest if— (a) it is between 2 people whose relationship is that of parent and child, siblings, half-siblings, or grandparent and grandchild, and the person charged knows of the relationship.

(2) Everyone of or over the age of 16 years who commits incest is liable for imprisonment for a term not exceeding ten years.

Law Commission Report *Adoption and its Alternatives* 2000

The Commission recommended that only birth parent-child relationships should be susceptible to prosecution and conviction for the crime of incest: para 508

Ministry of Justice Draft Bill 2006

s19 Crime of incest

Section 130 of the Crimes Act 1961 applies to relationships arising from birth and adoption, and continues to apply even if an adoption order is later discharged.

Kevin Hague Bill 2016

s195 Incest

“(1) Section 130 of the Crimes Act 1961 applies to all relationships between adoptive parents and the person whom they have adopted, and any other relationships created by the adoption.

“(2) Despite the existence of an adoption order, the birth mother, birth father and other members of the birth family continue to fall within the relationships set out in section 130 of the Crimes Act 1961 as if the adoption order had not been made.

“(3) Nothing in this Act limits the operation of section 130 of the Crimes Act 1961.