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Te Kāhui Ture o Aotearoa

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16 August 2022

Adoption Law Reform
Ministry of Justice

By email: adoptionlaw@justice.govt.nz

Re: A New Adoption System for Aotearoa New Zealand

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa thanks the Ministry of Justice (the **Ministry)** for the opportunity to provide feedback on '*A new adoption system for Aotearoa New Zealand*' (the **Discussion Document**).

2. The questions posed in the Discussion Document have been answered in our previous submission, provided to the Ministry on 31 August 2021. That submission is **attached** for your convenience.

3. The only additional comments we provide is in respect of:

   (a) the legal effect of adoption and succession law; and

   (b) the adoption of tamariki Māori.

Legal effect of adoption and inheriting property

4. The Discussion Document[1] states that the purpose of adoption should be that it:

   - is a service for the child, and is in their best interests.
   - will create a stable, enduring, and loving family relationship.
   - is for a child whose parents cannot or will not provide care for them.

5. This purpose is a description of mechanisms already available to look after a child's welfare under the Care of Children Act 2004 (COCA) and the Oranga Tamariki Act 1989 (the OT Act).

6. In respect of legal effect, the Discussion Document[2] states the option currently being considered is that after an adoption, both the birth parents and the adoptive parents are recognised as legal parents of the child. Adoptive parents become the guardians of the child, including all associated duties, powers, rights, and responsibilities (including providing day-to-day care for the child), and are financially responsible for the child. Birth parents are no longer guardians of the child and are no longer financially responsible for the child. However, the child can inherit citizenship from both their birth parents and adoptive parents.

7. In terms of succession law, the Discussion Document[3] states that the government is not likely to make changes to the way adopted people inherit property as part of this reform. It accepts

1 At page 42.
2 At page 42.
3 At page 44.

that reform in succession law is required but this would be a significant programme of longer-term work that would need to be balanced against other government priorities.

Law Society's submissions

8. We refer the Ministry to paragraphs 6.37 to 6.47 of our previous submission.

9. There are two major elements to adoption: the legal effect of the adoption, and succession rights. Adoption severs the legal relationship with the birth parent(s) and creates a new legal relationship that replaces the birth parent(s) relationship. From a succession law perspective:

    - If there are orders under COCA and/or the OT Act, the caregiving adults (including if they are guardians) have no succession law duties. Succession law rights and duties continue as between the child and his or her birth parents.
    - Under current adoption law, the child has inheritance rights only in relation to their adoptive parent(s). The birth parent(s) can make provision for the child in their will(s), but the child does not have enforceable inheritance rights.
    - If the option in this discussion document is applied, both the birth parent(s) and adoptive parent(s) will have succession duties, and the child will have a right to succeed from both.

10. The Law Society remains of the view set out in our previous submission, for the reasons provided. We consider that the legal effect of adoption should not change. The birth parent(s)'s rights, responsibilities, and obligations should cease once a final adoption order has been made and should then be passed to the adoptive parent(s). This ensures the law is clear in terms of the legal rights, responsibilities and obligations of both birth and adoptive parent(s), including in relation to succession law, regardless of how 'open' the adoption is.

11. In our previous submission, we identified that some of the suggested options have the potential to create confusion in terms of parental rights and responsibilities, as well as for succession law and child support obligations. In respect of the options set out in this Discussion Document, we remain of that view. We do not agree that a child should have a right to succeed from both birth parent(s) and adoptive parent(s).

12. As mentioned above, the Discussion Document states that the government is not likely to make changes to the way adopted people inherit property as part of this reform. In the Law Society's view, this is unfortunate. Succession rights are one of the two major elements of adoption law. Changes to the legal effect of adoption will impact succession law, and should be addressed in the primary reform of adoption law. As the Discussion Document notes, this also has a particular impact on adopted Māori. It should not be left unaddressed.

Te Tiriti o Waitangi and the adoption of tamariki Māori

13. We refer the Ministry to paragraph 2.4 and paragraphs 3.13 to 3.15 of our previous submission.

14. The recent High Court decision of *McHugh v McHugh*[4] addressed an application for special guardianship under the OT Act and discussed the impact of such orders on tamariki Māori. The Law Society considers the reasoning of the Court in this case is directly relevant to the approach that should be taken with respect to the adoption of tamariki Māori.

15. The special guardianship provisions were a new concept when they came into force on 30 June 2016 and are conceptually seen as a quasi-adoption. The orders are designed to be permanent orders for the balance of the child's childhood and are essentially about the re-ordering of

[4] [2022] NZHC 1174.

legal relationships. Addressing how this should be approached for tamariki Māori, Justice Doogue stated:

> *… the Court should substantively apply the principles enshrining te ao Māori values rather than merely recognise and respect them…*[5]

16. Further:

> *A highly compelling reason should therefore be required before a special guardianship order is made in respect of tamariki Māori where it may have the effect of damaging or severing whānau connections.*[6]

17. *McHugh v McHugh* therefore explains and highlights the obligation to:

- consider and apply te ao Māori values.
- adequately research a child's whakapapa.
- utilise tools such as cultural reports considering the application of tikanga.
- respect the concept of mana tamairi in matters impacting tamariki Māori.

18. From a Te Tiriti perspective, it follows that there is no support for tamariki Māori to be adopted unless the obligations of Te Tiriti o Waitangi are not only met but met in a meaningful and substantive way. In the Law Society's view, such an approach must be reflected across any adoption law reform.

Further contact

19. We trust that the Ministry finds the above helpful. The Law Society remains available to respond to any questions in respect of these comments and/or our previous submission. Contact can be made via Aimee Bryant, Manager Law Reform and Advocacy: aimee.bryant@lawsociety.org.nz.

Nāku noa, nā

Frazer Barton
Vice President

Encl**:** NZLS Submission of 31 August 2021

5 *Ibid*, at para [116].
6 *Ibid*, at para [118].

Enclosure 1: Law Society Submission of 31 August 2021

New Zealand Law Society
Te Kāhui Ture o Aotearoa

Adoption in Aotearoa New Zealand

Submission on the Ministry of Justice's Discussion Document

31 August 2021

Submission on the Ministry of Justice's Discussion Document: Adoption in Aotearoa New Zealand

1 Executive Summary

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa welcomes the opportunity to provide comment on the Ministry's discussion document (the Discussion Document) "Adoption in Aotearoa New Zealand." Adoption reform advocates have dedicated many years to bring about change, and with the current Act being 66 years old, a review is overdue. We support many of the Ministry's proposals, in particular the move to a child-centred approach, which puts the welfare and best interest of the child at the forefront of the adoption process.

1.2 The traditional view of a family as being a mother, father, and children (a "nuclear family") is now significantly less relevant in Aotearoa New Zealand's society. The Law Society believes that the current Adoption Act should be repealed and replaced with legislation that reflects the values and attitudes of today's society.

1.3 The Law Society considers that any new adoption legislation must include the following:

(a) In all aspects in the adoption process, the rights of the child must be the first and paramount consideration. This consideration should not be limited to the period of childhood but should reflect "whole of life" considerations in recognition that adoption can have significant and lifelong effects. These effects may be more pronounced where a child is adopted outside their culture.

(b) Explicit reference to the rights contained in the United Nations Convention on the Rights of the Child.

(c) Incorporation of New Zealand's obligations under Te Tiriti o Waitangi, as well as ensuring that the practice of whāngai remains outside of adoption law.

(d) The principle of children's participation in the adoption process and legal representation for children.

(e) The right of wider family and whānau to be involved and able to participate in adoption proceedings.

(f) A statutory requirement for a social work report in all adoption proceedings, including the requirement for the report to address cultural issues in respect of the child to be adopted and the adoptive parent(s). A new Act could also include a requirement for birth parents to provide information about culture and heritage when they place their child for adoption.

(g) Confirmation of New Zealand's commitment to the process set out in the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Convention), so that it is applicable to all adoptions involving children from outside of New Zealand.

(h) Equal treatment of children adopted under the Hague Convention for citizenship purposes within New Zealand.

1.4 The Law Society's comments are set out below, following the Discussion Document. They have been prepared by the New Zealand Law Society's Family Law Section.

2 What is adoption?

2.1 Adoption is a legal construct. In terms of closed or secret adoptions, it creates a legal fiction that now sits uneasily with the needs and requirements of 21st century Aotearoa New Zealand.

2.2 One of the objectives of reviewing adoption law is to ensure that New Zealand meets all its international obligations, particularly those in the United Nations Convention of the Rights of the Child (UNCROC).[1]

2.3 However, the Discussion Document appears to be suggesting amendments to the Adoption Act 1955 rather than new legislation. The Law Society strongly recommends that the Act be replaced, rather than amended, to better reflect the values and attitudes of today's society.

Te Tiriti o Waitangi

2.4 Section 7AA of the Oranga Tamariki Act 1989 illustrates the way the principles of te Tiriti o Waitangi should be recognised within legislation and in legal processes within New Zealand. The Law Society proposes that the principles of the Treaty are similarly incorporated into any new adoption legislation.

Purpose of Adoption

2.5 The Adoption Act does not currently define what adoption is or when it should be used. The Discussion Document states that, in the absence of a definition, it can be unclear when an adoption should happen. It suggests specifying the 'purpose' of adoption in the legislation.

2.6 The Law Society does not favour the inclusion of a prescriptive purpose statement. The Discussion Document itself lists numerous examples of why adoptions have occurred in the past,[2] demonstrating that the reasons can be many and varied. Concerns around when an adoption should happen are better addressed through the substantive provisions of the legislation (see below).

2.7 The new Act should be drafted in accessible, clear English.

3 Who is involved in adoption?

Children's rights in the adoption process

3.1 The Law Society agrees with the Ministry's view that current adoption laws are adult focussed and do not clearly promote children's rights. The promotion of children's rights and focussing the adoption laws on the welfare and best interests of the child is the single most important issue to be addressed in this reform. The person most affected by the making of an adoption order is always the child.

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1 Page 6 of the Discussion Document.

2 Page 11 of the Discussion Document.

3.2 In all aspects (administrative and substantive), the rights of the child must be the first and paramount consideration. This consideration should not be limited to the period of childhood (however that may be defined) but extended to reflect "whole of life" considerations. This is because adoption can have significant and lifelong effects which may be more pronounced where a child is adopted outside of their culture.[3]

3.3 Any statutory provisions should carefully consider, and reflect, the provisions of UNCROC whether in the context of provision, protection, or participation rights. We agree explicit reference to the Convention in the new legislation is desirable.

3.4 We recommend below the mandatory appointment of a lawyer to represent any child who is the subject of an adoption application and note the recent passage of the Family Court (Supporting Children in Court) Legislation Bill. The Law Society endorses the amendments to section 5 of the Care of Children Act 2004 (COCA), incorporating the principle of child participation in proceedings, and considers a similar principle should be introduced into adoption proceedings.

3.5 We also support the provision of age-appropriate information to the child about the effect and implications of adoption. The issues paper contains an excellent, well-researched and balanced summary of the position regarding Te Tiriti and the relationship between the Crown and Māori. Our comments are based on the information contained in the paper.

Who can adopt?

3.6 Having regard to the general principle that an adoption order should only be made in circumstances where no alternative option is appropriate/suitable, having regard to the child's welfare and best interests, we favour an inclusionary, rather than an exclusionary, approach to eligibility to adopt.

3.7 This will build on the High Court decision in *Re AWM*,[4] the Marriage (Definition of Marriage) Amendment Act 2013, and the Family Court decision in *Re Pierney*.[5]

3.8 The Law Society agrees that step-parents and relatives should remain able to adopt, provided their suitability is assessed on a case by case basis.

3.9 We consider there should be no discrimination on the grounds of sex, marital status, sexual orientation, disability, or age.[6] As society continues to evolve, restrictions on who can adopt will inevitably create anomalies. The focus should be on an individual's suitability to care for and adopt a child. In turn, that assessment will focus on the welfare and best interests of the child, taking into account their ethnic, cultural, linguistic, and heritage needs. When considering who can adopt a particular child, due weight should be given to whether the individual(s) wanting to adopt can meet the particular child's needs, including whether there are any extended whānau, hapū, or iwi connections.

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3 Page 4 of the Discussion Document.

4 [2010] NZFLR 629.

5 [2015] NZFC 9404.

6 Such discrimination could breach section 19(1) of the New Zealand Bill of Rights Act 1990, and/or section 21 of the Human Rights Act 1993.

3.10 A 1987 Working Party[7] proposed reducing the minimum age at which a person can adopt a child. This approach must consider the age discrimination provisions in the Human Rights Act 1993, and the decision of the Human Rights Review Tribunal in *Adoption Act Inc v Attorney-General*.[8] In the Law Society's view, the minimum age should be the same as the legal definition of an "adult," acknowledging that this may change over time.

Birth family and whānau

3.11 It is imperative that wider family and whānau are involved and able to participate in adoption proceedings. The attitudes and values reflected in the Adoption Act 1955 are based on the concept of the nuclear family and focus on the rights of the parents and caregivers, to the exclusion of the rights and considerations of the child. This approach also excludes the family and whānau, hapū, and iwi to which a child belongs.

3.12 Today, we accept that a child has a right and need to have knowledge of and connection with their whānau, hapū, and iwi. Having regard to Te Tiriti obligations, the involvement and participation of whānau, hapū, and iwi is a legal requirement.

3.13 A child's best interests are served by broader considerations of the concept of family and whānau. This is illustrated in section 7AA of the Oranga Tamariki Act 1989, where regard must be paid to mana tamaiti (tamariki), the whakapapa of Māori children, and the whanaungatanga responsibilities of their whānau, hapū, and iwi.

3.14 It is now generally agreed within society that placement of a child within their biological family should be fully considered before placement outside the biological family is contemplated. The Law Society considers that this approach should be reflected in any reform.

3.15 In *Re Bartha*,[9] Rogers J referred to the effect of an adoption order in creating a new parent/child relationship between the adoptive parents and the adopted child, extinguishing the child's relationship with their birth parents and all other birth relatives. In considering the adoption of Māori tamariki by non-Māori individuals, Rogers J referred to the inconsistency between the European concept that responsibility for a child lies with the parents alone, and the Māori concept of a child being the child of their whānau and hapū, and referenced the words of Puao-te ata-Tu:[10]

> *The Māori child is not to be viewed in isolation, or even as a part of a nuclear family, but as a member of a wider kin group or hapu community that has traditionally exercised responsibility for the child's care and placement.*

3.16 What should be borne in mind throughout this reform are the consequences that monocultural thinking and closed adoptions have had on individuals throughout their lifetime. The Law Society supports a change from this adult-focussed approach to a focus on the child's welfare and best interests for the "whole of life".

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7 Adoption Act 1955: A Review by an Interdepartmental Working Party: Proposals for Discussion (Department of Justice, January 1987, chapter 2.31.

8 [2016] NZHRRT 9.

9 [2016] NZFC 7039.

10 *Ibid*, at [21], referring to Puao-te ata-Tu, Report of the Ministerial Advisory Committee on a Māori perspective of the Department of Social Welfare, September 1988, page 29.

3.17 The point in adoption proceedings where a social worker is appointed to provide a report is the optimal time at which to involve whānau. Cultural considerations should be mandatory within these reports, and we propose below that there be statutory requirements for the content of the reports. We consider that privacy concerns are outweighed by the need to ensure that the best decision is made for the child.

Government, the Court, and accredited bodies

3.18 The primary agency involved in New Zealand in inter-country adoption is Oranga Tamariki, which is the central authority for inter-country adoptions under the Hague Convention. Oranga Tamariki undertakes assessments where a child is to be adopted from another Hague Convention country.

3.19 For Hague Convention inter-country adoptions, non-government organisations (NGOs) can be accredited bodies who are approved by the New Zealand Government to carry out certain functions associated with inter-country adoption.

3.20 The Law Society considers it is appropriate for Oranga Tamariki to remain the central authority in relation to inter-country adoptions under the Hague Convention. Oranga Tamariki has the requisite expertise to undertake the necessary assessments, which are then provided to the central authority in the country from where the child will be adopted. Oranga Tamariki has appropriate systems in place for monitoring the adoption placement in New Zealand, and reporting to the home country's central authority.

3.21 We consider that it remains appropriate to permit some tasks within the inter-country adoption process to be undertaken by accredited bodies separate from Oranga Tamariki. There is currently a check and balance within the system so that the accredited body can either carry out education and assessment functions or functions associated with facilitating and finalising adoptions. An accredited body may not perform both functions. The Law Society considers that this is a key protective factor for a robust, child-centred process.

4 Culture and Adoption

4.1 It is vital a child's culture is taken into consideration in the adoption process and that any child subject to an adoption order is provided with as much information as possible about who they are.

4.2 The Law Society notes the Discussion Document states that adoptive parents are encouraged to have some type of connection to a child's heritage and language and to be able to nurture the child's cultural identity. This practice is not specifically set out in the current Act but should be included in any new adoption legislation.

4.3 The Discussion Document asks how Aotearoa New Zealand's adoption law can be made more culturally inclusive. For many cultures, the concept of adoption will be irreconcilable with the needs and best interests of a child. However, it is accepted that there are times when adoption is necessary. To ensure the cultural needs of the child are met, a cultural report should always be obtained, or those matters otherwise addressed in the social work report.

Whāngai

4.4 Whāngai is a concept that has existed within Te Ao Māori since time immemorial. The whāngai system is generally open and is done with the full knowledge of the whānau, hapū,

and iwi. The child knows both their birth parents and whāngai parents. Rather than being the sole decision of the mother or parents, a wider community is involved in the decision. Unlike formal adoption, whāngai does not sever the relationship between the child and their birth parents and wider whānau but allows for ongoing contact between them. Any disagreements are traditionally resolved by members of the child's whānau. This ensures that a child remains in the family, thus retaining his or her whakapapa and tribal identity.

4.5 In her article "*Kua tutū te puehu, kia mau: Māori aspirations and family law policy*," Professor Jacinta Ruru says, "at the heart of the discomfort with the Adoption Act 1955 is the stark difference in which Māori view adoption."[11] She goes on to explain:[12]

> *The Act lays down in the strongest possible terms the principle that adoption replaces one set of parents with another, extinguishing totally the child's legal connection with his or her birth parents. While they agree that the tie between the child and adoptive parents becomes the primary tie, Māori do not approve of the complete severance of relations between the child and his or her natural parents.*
>
> *Because of the importance of descent in establishing personal identity and group membership, it is vital that individuals know their true whakapapa and connections. Because the Māori view of the parental role is not an exclusive one but allows for the involvement of other relatives, the natural parents do not constitute a threat to the adoptive parents but step easily into the role of supplementary caregivers, especially when adoption takes place within the whānau. In Māori experience, the problems that arise in adoptive relationships are less serious and more easily handled if all parties know the details and each other.*

4.6 The practice of whāngai has most often happened outside of the legal framework in the Adoption Act and in the Law Society's view it should continue to do so. Adoption in its current form under the Act is not able to be reconciled with Te Ao Māori and the kinship spirit of whāngai. Whāngai is a customary practice and the particulars of whāngai arrangements vary between whānau, hapū or iwi. However, if whānau consider that legal orders are necessary to support that child in the whāngai placement, then there are other legal remedies available under the Care of Children Act 2004 (such as parenting orders and additional guardianship orders).

4.7 The Law Society understands that there are divergent views within Māoridom on the extent to which the practice of whāngai should be governed by a legislative framework. There should be extensive consultation with Māori on this issue.

Customary adoptions

4.8 According to Census data and projections, New Zealand's population will become more ethnically diverse over the next two decades. To obtain further information about how the law treats other customary adoptions, further consultation with specific communities, and their leaders, should take place.

4.9 The Law Society considers there needs to be recognition of the diverse cultures represented in Aotearoa New Zealand that use the adoption process to secure the care of a child.

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11 Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) Family Law Policy in New Zealand (4th ed, LexisNexis, Wellington, 2013) page 72.

12 *Ibid*, pages 72 – 73.

4.10 The customary notion of "guardianship" in many Pacific cultures is primarily a moral responsibility with spiritual genealogical roots. It is a relationship based on belonging, responsibilities, obligations, and status.[13] Pacific cultures are traditionally collective, so the sharing of information about a possible adoption may require input from a wider collective than just the parent(s) of a child that may be adopted.[14]

4.11 There should be a requirement for birth parents to provide information about culture and heritage when they place their child for adoption. This is important given the projections of a more diverse community. A requirement of this kind will need to consider who must provide the information, and how the information will be obtained. There may be issues where birth parents are not forthcoming with the information, or they are simply unable to provide the necessary information.

4.12 In some circumstances, a cultural report may be the only opportunity to gather information on the birth parents and report on the child's cultural needs.

4.13 Having obtained this information, it would then be for the adoptive parents to evidence how they will meet the child's needs. The suggestion of providing educational resources to the adoptive parents as an option is also a good idea, particularly if the adoptive parents are not of the same cultural background as the child. However, we consider that a question will remain around whether adoption in a different culture serves the welfare and best interests of a child, from a 'whole of life' perspective.

5 How does the adoption process work: inter-country adoptions

5.1 The primary reasons inter-country adoptions are utilised in New Zealand are:

(a) To provide a child for a couple who, for whatever reason, cannot give birth to their own child.

(b) To give immigration benefits to a child.

(c) To bring a child out of poverty, to have the opportunities and advantages of life in New Zealand.

(d) For cultural or altruistic reasons, to provide a family in which an otherwise orphaned child can be brought up.

5.2 The applicants for inter-country adoption are either extended family members seeking to bring their relatives into New Zealand, or stranger adoptions arranged through an approved agency. Some inter-country adoptions may be as a result of international surrogacy; however we provide comment on surrogacy adoption further below.

5.3 Although not specifically an overseas adoption, section 17 of the Adoption Act 1955 provides that for a person who has been adopted in any place outside of New Zealand according to the law of that place, their adoption order shall have the same effect as an adoption order validly made under the New Zealand adoption law.

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13 Va'aifetu, Data, Literature, Practice Environment Part 1 and Principles, Cultural Frameworks, Guidelines Part II for the Office of the Chief Social Worker.

14 *Ibid*, page 45.

5.4 There are some exceptions to that provision. The primary exclusion is that the section does not apply to any adoption in another contracting state on or after the date on which the Hague Convention was entered into force as between New Zealand and that contracting state. That is a necessary exclusion as otherwise there would be a loophole for prospective adoptive parents to circumvent the safeguards of the Hague Convention and New Zealand adoption processes, thereby exposing children to risk.

5.5 Notwithstanding that safeguard, the Law Society considers section 17 of the Act to be problematic. It combines concepts of day-to-day care with inheritance rights and does not provide any requirement to show what checks have been undertaken in terms of child protection before the granting of the adoption order in the original country.

5.6 A provision akin to section 17 is necessary as children adopted outside of New Zealand must be able to have that adoption legally recognised in New Zealand should their adoptive parents be either New Zealand citizens or residing in New Zealand.

5.7 This concept can be retained, however the criteria for recognising overseas adoptions should be amended to incorporate the child-focused premise proposed for this reform.

5.8 Section 17 refers to a "person" who has been adopted. There is no distinction between a child and an adult. An adult may need their overseas adoption to be recognised for important purposes of immigration or access to health or education in New Zealand. If the person is an adult, in our view, the only requirement for the overseas adoption order to be legally valid in New Zealand is for the overseas adoption order to be legally valid in the country of origin.

5.9 If the adoption which is sought to be given effect to in New Zealand is for a child adopted outside of the Hague Convention process, evidence should be provided to show that an independent assessment of the applicants has been undertaken. This is to ensure that the rights of the child were upheld throughout that process.

5.10 The Discussion Document raises the concern that this kind of process could cause difficulties for New Zealand's relationship with other countries, as it could be seen to question the validity of another country's adoption decision. That issue could be addressed by any new legislation reaffirming New Zealand's commitment to the process set out in the Hague Convention, so that even if the country in question has not ratified the Convention or entered into an agreement with New Zealand, any adoption sought to be recognised in New Zealand will be assessed against criteria applicable to all adoptions involving children from outside of New Zealand.

The Hague Convention

5.11 New Zealand has incorporated the Hague Convention into law through the Adoption (Inter-Country) Act. The Hague Convention principles reflect the child-centred approach which should underpin adoption law in New Zealand.

5.12 There is an issue regarding the Article 23 certificate, which is the certificate confirming that the adoption meets the Hague Convention requirements and finalises the adoption. The process in New Zealand is that the Registrar-General recognises the Article 23 certificate as being equivalent to an adoption order and then creates a birth record in New Zealand. This allows for a New Zealand birth certificate to be issued. This makes it very straightforward for parents and children to provide legal birth information for all identification purposes.

5.13 The Law Society agrees with the issue raised in the paper that there is an anomaly in relation to which country issues the Article 23 certificate. If New Zealand issues the certificate, then the child is effectively deemed to have New Zealand citizenship by birth and can pass on that citizenship to their own children. But if the Article 23 certificate is issued by the other country, the child is still entitled to New Zealand citizenship but by descent only from the adopting parent. This means that the child cannot pass New Zealand citizenship onto their children and would need to then apply in New Zealand at some later date for citizenship by grant.

5.14 The Law Society considers that any new adoption legislation should ensure that children adopted under the Hague Convention are treated the same for New Zealand citizenship purposes, no matter which country has issued the Article 23 certificate.

Other inter-country adoptions

5.15 Section 3 of the Adoption Act is broad. Anyone can make an application for adoption from anywhere, whether in New Zealand or outside of New Zealand, regarding any child, whether that child is in New Zealand or outside of New Zealand.

5.16 If a non-Hague Convention adoption application is made, then it follows the domestic adoption process.

5.17 Adoptions where the children are not present in New Zealand are usually family reunification adoptions for humanitarian reasons. The courts have identified issues with these adoptions, in respect of confirming the child's identity and obtaining information about the child's circumstances to evaluate whether the adoption is in the child's best interests. A number of these adoptions are for children from so called "fragile states," where it can be extremely difficult to obtain reliable information about a child's date of birth, parentage, and identity. Our current law could allow people to circumvent processes in their own country where there may be difficulties adopting and seek to adopt a child via an application under the New Zealand legislation.

5.18 The Law Society considers the current jurisdiction is drafted too widely. It would be more child-focussed for the criteria to be limited, so that jurisdiction exists for an adoption application where either the child or the adoptive parents live in New Zealand.

5.19 There may be some exceptional cases of a humanitarian nature where the children are not resident in New Zealand and for numerous reasons it may not be possible for there to be an application lodged in their home country. In those cases, the applicants, if they are citizens or residents of New Zealand, should retain the right to be able to apply for an order through the New Zealand courts.

5.20 New Zealand currently has agreements with Thailand, Philippines, Lithuania, India, China, Hong Kong and Chile for inter-country adoptions under the Hague Convention. Many other countries have acceded to the Hague Convention, but New Zealand does not have agreements with them. This means that if children are being adopted from other non-convention countries the Convention does not apply. However, the courts have repeatedly stated that they will consider the Convention principles in other inter-country adoptions. Consideration should be given to expanding the number of countries with whom New Zealand has agreements and incorporating into our law that adoptions with non-convention countries will still be subject to the same considerations as if the Convention were in force.

5.21 As stated above, any inter-country adoption should follow the Hague Convention or an equivalent inquiry and process.

Inter-country adoptions in an overseas court

5.22 In relation to our proposal to replace the current section 17, the Law Society agrees that there is a potential risk for children who are adopted through an overseas adoption process in another country then coming to New Zealand. However, we consider the option proposed in the paper (that New Zealand only recognises overseas adoptions where both the child and the adoptive parents lived overseas at the time of the adoption or lived overseas for a certain amount of time at the time the adoption order was made) to be too restrictive. It does not consider the variety of reasons for why an adoption may take place outside of New Zealand.

5.23 The concerns regarding people circumventing the Hague process or the domestic process could be addressed by applicants having their overseas adoption order recognised in New Zealand once they have shown that Hague Convention or equivalent processes have been followed, or there has been appropriate inquiry by a social welfare agency in the country where the adoption took place, confirming the adoption is in the child's best interests.

6 How does adoption work? Domestic adoption in Aotearoa

Who should agree to the adoption

Birth parents

6.1 There are clear problems with the current approach given the changing nature of family relationships in Aotearoa.

6.2 If the focus is to be on the best interests and welfare of the child being adopted, and there is to be a 'whole of life approach', then it will be incumbent on the courts to give equal standing to birth fathers.

6.3 If consent sits only with the birth mother, the birth mother may choose not to involve the birth father. This would be inconsistent with a "whole of life welfare and best interests" approach, and with the ongoing research into adult wellbeing in relation to adopted persons not knowing where they 'fit in.'

Wider whānau

6.4 The same problem arises with wider family or whānau. Any concern about involving the wider family or whānau should be alleviated if a "whole of life welfare and best interests" approach is taken. The involvement of wider whānau is likely to be culturally specific and different cultural needs must be accounted for.

6.5 The Law Society recommends that, if an agency is to be charged with performing a statutory function to assist with consents, a useful vehicle would be to use a Family Group Conference (FGC) type process.[15] This will enable the birth parents and wider family or whānau to participate in the consent process.

[15] As currently used under the Oranga Tamariki Act 1989

6.6 This may appear unwieldy on the face of it, but if any adoption legislation is to take a child-centred approach towards consent, it must follow a process similar to an FGC. This would allow for inclusion and/or exclusion of participants if there are any safety concerns.

6.7 The issue of parental privacy is less relevant than the issue of privacy for the child. Both would need to be weighed and balanced, however such a balancing exercise would not be novel. Examples of such balancing exercises are contained in the Official Information Act and the Privacy Act, where the holder of information must balance privacy interests against other interests to determine whether or not information should be released.

6.8 The involvement of wider whānau should be the starting point when looking at an inclusionary process of adoption. However, there may be certain cases where it is not appropriate to involve wider whānau. This may require a statutory body (like Oranga Tamariki) to assess if involvement of wider whānau is appropriate or if an exception needs to be made.

6.9 Children who are adopted may have full or half siblings. Consideration should be given to whether the views of siblings (particularly older siblings who have capacity but who are not necessarily of adult age) should be sought.

The child to be adopted

6.10 Children's participation is vital in an Act that is child-centred.

6.11 Section 6(2) of COCA provides that a child must be given reasonable opportunities to express views on matters affecting them; and that any views they child express (either directly or through a representative) must be taken into account.

6.12 The Law Society supports the inclusion of both parents and the child in the consent process and for children to be actively involved and participate as much as they are able. One way to obtain the views of the child would be for the court to appoint a lawyer for child, who can address the issue of capacity and consent.

6.13 There are clearly circumstances where safety concerns will make obtaining consent inappropriate. However, the threshold needs to be high, and the more relevant concern may be one of timing.

Consent

6.14 It is unclear why the 10-day minimum timeframe was included in the current legislation. In contemporary Aotearoa this could appear harsh and based on adult needs, rather than the welfare and best interests of the child.

6.15 Today, we know more about matters such as post-natal depression, attachment, and bonding. Consideration should be given as to whether a particular timeframe is required for post-birth adoptions, whether the timeframe should be longer than the current 10 days, and whether an exception will be provided for any date that is ultimately proposed. The Discussion Document refers to the United Kingdom (UK) model of 42 days post-birth, and the Ministry may wish to consider the basis on which that timeframe has been allocated, and whether it could be appropriate for Aotearoa.

6.16 There seem to be a wide range of views from overseas jurisdictions in respect of timeframes for consent. However, we consider that Aotearoa is in a unique space and small enough to

provide a more flexible approach. This would alleviate the need for a formula or 'hard date,' though it could be that the starting point is the provision of a specified timeframe, with exceptions to allow flexibility according to the differences in each adoption situation.

6.17 To eliminate any concerns about consent (for example, of duress or post-natal depression), it may be preferable for both birth parents and/or guardians be able to participate in the adoption process should they wish to, until a final order is made.

6.18 Consent to an adoption should be able to be withdrawn any time up until the making of a final order with leave to apply if there is a change in circumstance. There should be express provision for this in any new adoption legislation. Section 125(1A) and (1B) of the Oranga Tamariki Act has a similar provision under "special guardianship."

6.19 The Law Society fully supports the provision of counselling and legal advice to birth parents prior to the consent process.

Suitability to adopt

6.20 Before the court makes an adoption order, it must be satisfied that the adoptive applicants are fit and proper people to provide day-to-day care for the child, and are of sufficient ability to bring up, maintain and educate the child.[16] The Act does not include any criteria to assist the court in determining whether an applicant is fit and proper, however the court has developed a range of factors it will consider, including the child's safety and identity, the mental and physical health of the adoptive parents, and any criminal convictions the adoptive parents may have.

6.21 As discussed above, we consider the paramount consideration should be the 'whole of life' welfare and best interests of the child to be adopted.

6.22 In almost all cases the court will ask for a social work report to be prepared, assessing the adoptive applicant.[17] A report is not required if any applicant is an existing parent of the child, including a natural or adoptive parent under any other adoption.[18]

6.23 The Law Society recommends that a report be mandatory in all adoption proceedings, including where an applicant is a stepparent and partner of a birth parent, before an adoption order can be made. Criteria to assess whether a person is suitable to adopt a child in these cases could be part of the prescribed content for social work reports (as discussed below).

6.24 We also note that the Discussion Document states, "the law says that where both the child and adoptive parents are Māori, a Māori person must prepare the social worker report." It is not clear what this statement is referring to, and we are unable to find any reference in the Adoption Act to this effect. We consider the real issue, where a Māori child is to be adopted by non-Māori parents, will be ensuring that the necessary cultural information has been obtained.

The social work report

16 Section 11(a) Adoption Act 1955.
17 Section 10 Adoption Act 1955.
18 Section 10(1)(c) Adoption Act 1955.

6.25 Section 10 of the Act provides for the court to direct a social work report on the adoption application. This is a mandatory requirement before the court makes an interim order or a final order (without an interim order being made first), provided that this requirement does not apply in any case where the applicant or one of the applicants is an existing parent of the child. The Law Society considers that a social work report should be required in all adoption cases.

6.26 These reports also require greater transparency. Any new legislation should prescribe the content of the report, such as the criteria found in section 133 of COCA.

6.27 Section 134 of COCA provides a mechanism for distribution of these kinds of reports. The Registrar must copy the report to the lawyer acting for each party to the proceedings (or under certain circumstances, directly to the party where they have no lawyer acting on their behalf), and also lawyer for child. The court must then consider whether to order that the report be given or shown to the child.

6.28 The Law Society recommends this practice be considered in the adoption context. Usually, the report is released to the lawyers on the basis that the report is shown to but not copied to the party, given the personal nature of the information contained in the report and the risk that the information may be disseminated.

6.29 In the adoption context, it is far less likely to be contentious and there is no reason why the report could not be provided either to the lawyer or to the party without any prohibition on the party retaining a copy of the report. The court could retain a residual discretion to order that the report not be copied, or that parts of the report be redacted.

6.30 The Law Society proposes that the contents of the social work report be set out in legislation. The report writer should cover the following matters:

(a) Full family details and whakapapa of the child who is the subject of the adoption.

(b) Full family details, whakapapa, and circumstances of the birth parents.

(c) Other options that have been considered for the child, and an evaluation of those options.

(d) An assessment of the suitability of the prospective adoptive parents to meet the child's needs, including cultural needs. Such an evaluation should also include an evaluation of the parent's health, Police check, and two referees.

(e) The child's views as to the adoption, and any other available options the social worker may have identified.

(f) An evaluation of how the child will maintain contact with, and knowledge of, their family of origin.

(g) An evaluation as to whether, in all of the circumstances, the social worker considers the adoption to be in the welfare and best interests of the child. The report should be required to set out the reasons for this conclusion.

Court processes

6.31 The Law Society suggests that the requirement for an interim order, prior to making of a final order, be removed. A rigorous assessment of the suitability of the placement should remove any need for what is suggestive of a "trial period". If the court is in doubt, no order should be made.

6.32 The paper proposes that the court's powers could be extended so it has access to better information, for example by allowing it to:

(a) order specialist reports;

(b) appoint a lawyer for child; and

(c) request additional evidence from people outside of the application, but who have a connection to the child.

6.33 We support these powers and recommend the appointment of a lawyer to represent the child subject to the application be mandatory and expressly provided for in any new adoption legislation, with the function of the role to be as prescribed in section 9B of the Family Court Act 1980.

6.34 In addition, the following powers should also be included:

(a) to obtain a psychiatric report (akin to section 133 of COCA);

(b) permitting the court to hear a person speak on the child's cultural background and any aspects of a child's cultural background that may be relevant to the application (akin to section 136 of COCA); and

(c) permitting the court, on its own initiative, to call any person as a witness whose evidence may, in the court's opinion, assist the court (akin to section 129 of COCA).

6.35 The court should retain the power to appoint lawyer to assist the court on any matter without detracting from the role of any lawyer appointed to represent the child. The role of lawyer to assist should be as prescribed in section 9C of the Family Court Act 1980. The Law Society notes that the option of a judicial interview is also available in adoption applications.[19]

6.36 In respect of children participating in proceedings, we refer the Ministry to our comments on children's' rights in the adoption process.

Legal effect of adoption

6.37 When an adoption order is made, the birth parent(s) give up all legal and parental rights over the child to the adoptive parents. The practical consequences of this include:

(a) A new birth certificate is created, showing both adoptive and birth parents.

(b) Adoptive parents can change the child's name without the child's agreement.

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[19] See Rule 54 of the Family Court Rules 2002.

(c) The child has inheritance rights only in relation to their adoptive parent(s). The birth parent(s) can make provision for the child in their will(s) but the child does not have enforceable inheritance rights.

(d) After the adoption the birth parents do not have to pay child support for the child.

6.38 We consider that the legal effect of adoption should not change. The birth parent(s) rights, responsibilities, and obligations should cease once a final adoption order has been made and be passed to the adoptive parent(s). This makes the law clear in terms of the legal rights, responsibilities and obligations of both birth and adoptive parent(s) regardless of how "open" the adoption is.

6.39 This view is premised on the following:

(a) The paramount consideration being the welfare and best interests of the child, from a 'whole of life' perspective.

(b) Adoption should be a last resort, after all other care arrangements and guardianship options have been examined; and

(c) There should be "open" adoptions, at least in the sense that birth parents should be involved in the adoption process; the child will know their genealogy; and the child will have easier access to records relating to the adoption.

6.40 The Discussion Document sets out several options:

(a) Recognise both the birth parents and the adoptive parents as the child's legal parents, but the adoptive parents have additional responsibilities. Or, recognise both the birth parents and adoptive parents as the child's legal parents, but only the adoptive parents have full parental rights and responsibilities towards the child.

(b) In terms of succession, the law can stay the way it is. Alternatively, recognise the adopted person as a family member of both birth parents and adoptive parents for the purposes of inheritance.

(c) In terms of child support the law could stay the way it is, so that the birth parents do not have to pay child support once an adoption order is made. Alternatively, provide that the birth parents still have a duty to pay child support following the adoption.

6.41 The Law Society considers that some of these options have the potential to create confusion in terms of parental rights and responsibilities, as well as for succession law and child support obligations.

6.42 We consider it preferable that the outcome is not a combination of effects, i.e., that for some circumstances the legal effect of adoption is shared between birth and adopted parent(s) and for others the legal effect is as it is currently, the adoptive parents having full legal and parental rights towards the child.

6.43 We consider that the option of both birth parents and adoptive parents being 'legal parents', with additional responsibilities for the adoptive parents, is akin to "special guardianship" under the Oranga Tamariki Act and has too much scope for potential conflict.

6.44 In respect of an arrangement in which both birth parents and adoptive parents are 'legal parents', but only adoptive parents have full parental rights and responsibility, this would mean that an adopted child could claim under both a birth parent(s) and adopted parent(s) estate. This would of course also be the case if the adopted person is recognised as a family member of both birth and adopted parents for the purposes of inheritance.

6.45 In terms of child support, the Law Society supports maintaining the law as it is, so that birth parents do not have to pay child support once an adoption order is made. The option in which birth parents still have a duty to pay child support would only work if the legal effect of adoption is changed, so that a continued legal link with the birth parent(s) is retained.

6.46 As noted above, we consider the legal effect of adoption should not change. The birth parent(s) rights, responsibilities and obligations should cease once a final adoption order has been made, these passing to the adoptive parent(s). If broader options are implemented, we believe there will be greater scope for conflict in relation to succession and maintenance duties and entitlements.

6.47 In that regard, we refer the Ministry to the recent High Court case of *Berghan*.[20] In that case, the Court granted letters of administration to the applicant on the basis that she was the deceased's birth child and still had strong connections with her whānau. That came with special circumstances in relation to who may be appointed as an administrator. The Court said that while the applicant's whakapapa had not been severed by the adoption, the applicant had no special beneficial interest in the deceased's estate, because of the adoption order made in respect of the applicant.

Alternative care arrangements and models

6.48 The Law Society's key submission is that an adoption order should only be made in circumstances where no alternative option is appropriate or suitable, having regard to the child's welfare and best interests. We recommend a broad, but non-prescriptive, approach to the issue of "welfare and best interests," looking beyond childhood and considering whole-of-life consequences.

6.49 In that context, there are several available options as an alternative to an adoption order, which could militate against some of the Ministry's concerns around existing adoption law and practice.

6.50 We do not consider that the development of an "open adoption" model designed to encourage and support post-adoption contact by the natural parent(s) will address the issues we have identified elsewhere in this submission. Nor do we favour the making of adoption orders subject to "conditions" designed for the same purpose.

6.51 We do not consider that the concerns identified should be resolved by 'practice', being the application of principles and protocols falling outside the legislative framework. We also do not consider that cataloguing principles, such as those contained in section 5 of COCA, are an adequate substitute for clear legislative provisions.

6.52 COCA provides a pathway for the appointment of additional guardians.[21] This may also, but need not necessarily, be undertaken in conjunction with the removal of an existing guardian where such a person is unwilling to perform or exercise the duties, powers, rights and

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20 Re the Estate of Berghan [2020] NZHC 1399.

21 See section 27 of the Care of Children Act 2004 and, in prescribed circumstances, section 23.

responsibilities of a guardian or is, for some grave reason, unfit to be a guardian of the child. It is considered that in many circumstances this procedural mechanism can provide suitable and appropriate safeguards for a child as an alternative to adoption.

6.53 The "special guardianship" model found in section 113A of the Oranga Tamariki Act also offers some constructive alternatives.

6.54 While the appointment of additional guardians and/or special guardianship are valid options, some circumstances (or the wishes of the adoptive parents and/or adopted child) may warrant a more final and long-term arrangement, as guardianship ceases once a child turns 18 years of age.

Discharging an adoption order

6.55 We do not consider that changes should be made regarding when an adoption order can be discharged. The discharge of an adoption order by the court should still only be made in extremely limited circumstances and should not risk undermining the certainty which adoption orders are intended to provide.

6.56 The Law Society is not in favour of creating a new ground of "special circumstances" for the discharge of an order. Except in cases where the existing grounds[22] are met, an application for discharge should not be an opportunity for those involved in the original application or wider family members to revisit or relitigate an adoption order. That said, there would appear to be no principled basis for requiring applications to discharge an adoption order to be channelled through the Attorney-General. Applications meeting the necessary criteria should be able to be made directly to the Family Court.

6.57 The rarely used provision to discharge an adoption order by way of private Act of Parliament (see, for example, Liddle Adoption Discharge Act 1963) can be retained. The Law Society notes that such private Acts are generally utilised to overcome issues created by the "legal fiction" of the adoption order and with the degrees of prohibited relationships specified in the Marriage Act 1955.

6.58 We consider that there are already legislative instruments in place to deal with any issues of breakdown in the adoptive relationship while the adoptive person is a child.[23] Notwithstanding the acknowledged differences between adopted and natural parenthood, we do not consider that adoptive children should (as an adult) be able to apply to become "parent-less" at law by way of a discharge of the adoption order when there is no legislative provision that would enable a child to make a similar application in respect of their birth parents.

6.59 To the extent that any of those involved in the original application have concerns around succession (for example, in respect of who would benefit from an adopted child's estate were the child to die intestate in circumstances where the relationship has broken down), we consider that these too can be dealt with under the pre-existing framework and legislation.

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22 See section 20(3)(a) of the Adoption Act 1955.

23 Such as the Care of Children Act 2004 or the Oranga Tamariki Act 1989.

7 Impacts of adoption

Adoption support services

7.1 The Law Society agrees with the concerns and issues outlined in the Discussion Document in respect of the lack of adoption support services.

7.2 The proper involvement of whānau prior to and during the adoption process could alleviate, to some extent, the lack of support, care options, and information about the adoption process.

7.3 Each of the five examples provided in the section headed "Options for Change" are helpful and appropriate. Concerns in respect of funding and cost, while valid, are outweighed by the small number of adoptions that occur each year.

Birth certificates after adoption

7.4 The current process, whereby the adoptive parents are the only parents noted on the birth certificate is described as a "legal fiction". The adopted child's birth certificate currently contains no information regarding the biological parents and makes no mention of the parentage having come about by virtue of an adoption.

7.5 As such, the birth certificate could be regarded as being an adult-focused record, reinforcing the out-dated notion of secrecy and view that "order" is best if a child is born outside of the traditional "nuclear family" setting. Such practice is no longer appropriate, is not child-focused, and should now be changed.

7.6 Having regard to the respect that society now pays to children's views and individual needs, and our current knowledge of the benefits of transparency and honesty around issues such as identity, heritage, and family, the Law Society believes that the child should be able to have a birth certificate that records biological parentage as well as adoptive parents.

7.7 New Zealand's legislation and processes must comply with our international obligations, and in particular UNCROC.

7.8 Article 3 of UNCROC provides:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be of primary consideration.*

7.9 Article 7 provides:

> *1 The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.*
>
> *2 States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*

7.10 In accordance with New Zealand law, the adoptive parents are in fact the only legal parents of the child. However, UNCROC clearly provides that the child's best interests should be at the forefront of legislators' minds when considering future legislation, and enshrines the child's right to know of their heritage and biological origins. The Law Society agrees that it is in a child's best interests to be aware of their biological lineage and their "origins," both of which contribute to a child's sense of "identity".

7.11 However, there should also be provision for removal of biological parentage or reference to the adoption process from the birth certificate, if the child so chooses once they are a legal adult. This would comply with Article 8 of UNCROC which provides:

> *1 States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, naming family relations as recognised by law without unlawful interference.*
>
> *2 Where a child is illegally deprived of some or all of the elements of his or her identity, State Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.*

7.12 The paper sets out four options in terms of what is recorded and what is shown on the birth record post-adoption. These options are:

(a) including both the birth parents and the adoptive parents on a birth certificate;

(b) creating two types of post-adoption birth certificates;

(c) introducing a new, different type of document that shows the adoptive parents as the child's legal parents but doesn't change the child's original birth certificate; and

(d) the current approach could be kept as it makes the legal relationship between the child and the adoptive parents clear.

7.13 There are a number of considerations that need to be balanced in terms of a birth certificate: the right of the child to know their identity, and also the privacy of birth parent(s) who may not wish to be included on a birth certificate.

7.14 Issuing different birth certificates for adopted children does ultimately leave those children vulnerable, however balanced against that will be a need for privacy in some situations. For example, where a child adopted had been conceived through rape, a socially unacceptable relationship, incest, or a secret relationship within a small community. Full disclosure of a child's biological parentage in those situations could be adverse to a child's best interests when the birth certificate is used for things such as a school enrolment or services within the community.

7.15 A fourth option that may be the best balance of all considerations would be an initial birth certificate that contains adoptive parents' names, and reference to an adoption process. That certificate could also contain the names of the biological parent(s), unless the adoptive parents request those details to not be included on the birth certificate. In that case, information of the biological parent(s) could be held on a confidential basis with the Registry of Births, Deaths and Marriages, able to be accessed by the "child" when they reach the age of 18 years.

Access to adoption information

7.16 Section 23 of the Adoption Act provides limited grounds for accessing an adoption record. An executor of a will or a trustee of a trust can apply to the court for access to an adoption record in connection with the administration of an estate or trust; a registrar or marriage celebrant is able to access information for the purpose of ascertaining any forbidden degrees of marriage or civil union; and a social worker is able to access an adoption record to prepare a report under section 23A(1) of the Act.

7.17 Section 23(3) also allows access to adoption records:

(a) To the extent authorised by section 11(4)(b) of the Adult Adoption Information Act 1955.

(b) On the order of a Family, District, or High Court judge:

(i) For the purposes of a prosecution for making a false statement.

(ii) In the event of questions as to the validity or effect of any interim order or adoption order.

(iii) On any other special ground.

7.18 The Discussion Document rightly states that the legal threshold for "special ground" is a high one, and an interest or desire to meet a person would likely not meet that threshold.

7.19 Rule 252 of the Family Court Rules 2002 also enables any person to seek a copy of an adoption order but only if "special reasons" exist. In respect of the adopted person, they can only apply to the court if they have attained the age of 18 years or, if under 18, a litigation guardian has been appointed and makes the application upon their behalf. A successful application would enable the provision of the adoption order, but no other court records. The latter would necessitate an application under rule 429 of the Family Court Rules, and the provisions of section 23 of the Adoption Act would prevail.

7.20 A person who has been adopted can apply to Oranga Tamariki for identifying information relating to their birth parents, but only with a copy of their 'original' birth certificate. To obtain that original birth certificate, the person must be at least 20 years old. The Discussion Document rightly identifies that, in practice, accessing adoption records held by Oranga Tamariki is difficult as the same restrictions that apply to accessing birth certificates also apply. In addition, Oranga Tamariki may hold information about the birth father, but if they are not listed on the original birth certificate, Oranga Tamariki is not able to legally share the information.[24]

7.21 In our view, the age at which the adopted "child" can apply to obtain their 'original birth certificate' (and therefore their adoption information) should be lowered from 20 years to 18 years of age. This would be consistent with section 8 of COCA, which defines "child" as meaning "a person under the age of eighteen years", and consistent with UNCROC, which regards a child as being a person under the age of 18 years. It is not appropriate for a person to be precluded from accessing important records relating to their birth until they are 20 years of age, but to be no longer regarded as a "child" under COCA and UNCROC.

[24] Page 59 of the Discussion Document.

7.22 We also consider that the requirement to provide an original birth certificate before accessing Oranga Tamariki records is too onerous and creates a hurdle that now appears arbitrary. These records should be accessible by right, to the person adopted and to each birth parent, upon Oranga Tamariki being satisfied of the person's identity and connection.

7.23 We support changes to the thresholds required by rule 252 and section 23. Consideration could be given to a lower threshold such as "reasonable need." This would enable whānau, iwi and other affected parties, to potentially satisfy the court that a reasonable need exists, once evidence has been provided regarding the reason for the application and the impact obtaining the information would have.

7.24 The paper also suggests creating a separate system for storing and sharing information about the identity of a person who has been adopted, that could sit alongside the birth certificate process. It could include information relating to a person's whakapapa, culture and heritage, and relevant genetic and medical information. The Law Society supports the creation of such a system, which could be accessed by the adopted person once they have turned 18 years of age. This information should also be able to be accessed by any guardian of an adopted child, as it may become important for the child, for example for medical reasons, but also more broadly, for the child's sense of identity and knowledge regarding their "place in the world".

7.25 Overall, we agree that the current legislative barriers to accessing adoption information appear out of step with current adoption practice and with cultural needs and expectations. This should be further explored through proper consultation with Māori, to ensure changes are made that enable information to be accessed more widely, and to properly meet the whanaungatanga needs and entitlements of Māori.

The veto system

7.26 In respect of the veto system, this was introduced when the Adult Adoption Information Act 1985 came into force in respect of adoptions made before 1 March 1986.

7.27 Where an adoption took place prior to 1 March 1986, both birth parents and the adopted person could veto access to identifying information from the birth register. The adopted person could lodge a veto at any time. Every veto had to be renewed 10 years after it was placed, or it would expire. Birth parents cannot place vetoes in respect of adoptions that have occurred after the introduction of the Adult Adoption Information Act.

7.28 The Law Commission's issues paper on adoption[25] states that in 1986 3,730 vetoes had been placed by birth parents and adopted persons. By 1996 a further 826 vetoes had been placed. Those vetoes placed in 1986 were due for renewal in 1996. Of the 3,730 vetoes placed, only 489 were renewed.[26] A slight increase was seen in 1996 in a trend of otherwise declining rates of new vetoes (some of these may also have been replacements for vetoes that had expired).

7.29 The Ministry's paper states that as of 20 December 2020, there were 201 active vetoes, the majority placed by birth mothers, so less than half of the 489 vetoes in place in 1996. Between 2016 and 2020, six people who were adopted tried to access their original birth certificate but were not able to due to a veto being in place.

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25 Report 65, *Adoption and It's Alternatives: A Different Approach and a New Framework*, Law Commission, 28 September 2000.

26 *Ibid*, paragraph 453.

7.30 The Discussion Document offers the option of phasing out or removing the veto system for adoptions that took place before 1 March 1986.

7.31 The Law Commission's 2000 paper stated that the focus of the veto debate should be on what the person lodging the veto is seeking to guard against. It suggested the introduction of non-contact vetoes, like those that are available in New South Wales. In New South Wales, a birth parent cannot place a veto on information but can place a non-contact veto. As a pre-condition of accessing information, the adopted person or the birth parent must agree to abide by the non-contact veto. A review of the New South Wales system by the Commission concluded there had been a high level of compliance.[27] It suggested conversion of all existing information vetoes into these non-contact vetoes, with the consent of the person who had lodged the veto.

7.32 An enforceable non-contact veto with a penalty for breach might afford a sense of security to birth parents or adoptees who do not wish to be contacted, while providing adopted individuals with the ability to confirm their origins, and obtain information about their heritage. Such a system could also be extended to birth family and whānau.

7.33 Considering the principles of UNCROC and society's acceptance of an individual's entitlement to knowledge regarding their own personal information, the option to abolish the veto system at a future date with that abolition date being publicised in advance would seem appropriate.

8 Surrogacy and the adoption process

Domestic surrogacy arrangements

8.1 The Law Society considers there should be stand-alone legislation providing for the transfer of legal parentage in surrogacy cases, and that this should not be attained via an adoption order. The Ministry should look to the Surrogacy Act 2012 (Tasmania) and the Human Fertilization and Embryology Act 2008 (United Kingdom) for guidance on the obtaining of post-birth orders.[28]

8.2 Many of the issues related to the making of adoption orders, as identified in this discussion paper, do not arise in surrogacy cases. Significantly:

(a) The making of a post-birth order in surrogacy cases does not create any legal fiction as to parentage. In fact, the order provides the intending parents with the legal status to support their already existing biological connection to the child. As one judge has stated,[29] the order is simply to create the legal scaffolding to support the biology.

(b) Whilst there is a presumption of legal parentage in favour of the surrogate and her partner, the very nature of the surrogacy agreement is that they will not have any ongoing rights and/or responsibilities. The order severing their legal ties is crucial in protecting them (and their own children) from exposure to the obligations created by the legal presumption of parenthood and guardianship.

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27 *Ibid*, paragraph 455.

28 Called a "parentage order" under the Surrogacy Act 2012 and a "parental order" Human Fertilization and Embryology Act 2008.

29 *Re X* [2019] NZFC 6116, Judge Pidwell.

(c) The rights of the surrogate (as the birth mother) are likely to differ significantly from those of a birth mother in an ordinary adoption, and would be specifically focused on protection against exploitation, ensuring appropriate compensation for her role, and her rights to make decisions about her body during the pregnancy.

8.3 The Law Commission has now released its issue papers on surrogacy.[30] The Law Society encourages the Ministry to defer enacting any changes to the adoption legislation (and particularly as they relate to surrogacy and the adoption process) until submissions received on the surrogacy issues paper have been considered by the Law Commission.

8.4 If the Ministry wishes to progress reform to the adoption law sooner, then there needs to be particular attention paid to these reforms (in the context of surrogacy adoptions) so as to avoid any adverse and inappropriate consequences arising. Some of these have been identified in the paper. Dependent on the outcome of the review of both adoption and surrogacy law, surrogacy adoptions may need to be specifically exempt from some provisions. For example:

(a) Making it mandatory to consult with the birth family and whānau, or have their views heard.

(b) Any requirement to provide information about their culture and heritage.

(c) Any mandatory requirement for the court to consider a child's culture or language.

(d) The information to be included in social worker's reports in surrogacy adoption. For example, financial and health would not be a relevant consideration.

(e) The retention of any parental rights and responsibilities of birth parents.

(f) Provision for an adopted child to inherit property from the birth family.

(g) Any responsibility of the birth parents to pay child support.

(h) The need to consider alternatives to adoption.

8.5 The following further changes could improve the adoption process where a child is born by surrogacy:[31]

(a) The child being placed with the intending parents immediately following the child's birth without having to wait for the necessary consents being given. Whilst this is the current practice, the applicants are reliant on the policy decisions of Oranga Tamariki. There should also not be the need to obtain a placement certificate from Oranga Tamariki.[32]

(b) The making of a final adoption order in the first instance.

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30 The Law Society will make a submission in response to this paper.

31 The proposed changes referred to above reflect the current approach taken by the Family Court but require a specific submission at every hearing.

32 Section 6 of the Adoption Act 1955 makes it an offence, in certain circumstances, to place or receive or keep any child in the home for the purposes of adoption unless prior approval has been given by a social worker.

(c) Making the obtaining of a social work report discretionary. A social worker's report could, for example, be required only where there have not been any previous assessments undertaken by Oranga Tamariki.[33]

(d) Release of any social worker's report to the applicants as a matter of course.

8.6 Providing user-friendly information on the adoption process would certainly be of assistance. Information about how surrogacy adoption differs from ordinary adoption would also be useful.

8.7 The reduced (more specific) role of social workers in surrogacy adoptions has been dealt with above, and it is accepted and agreed that the number of home visits to intending parents in all surrogacy arrangements should be reduced.

International surrogacy arrangements

8.8 The Law Society's comments in respect of domestic surrogacy arrangements apply equally to international surrogacy arrangements.

Herman Visagie
Vice President
31 August 2021

[33] Traditional and international surrogacies where the intending parents have not required approval from ECART.