

# **4<sup>th</sup> World Congress on Family Law and Children's Rights**

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## **Care and Protection of Children: New Zealand and Australian Experience of Cross-Border Co-operation**

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### **Introduction**

In the international context of care and protection of children, the fundamental instrument to consider is the United Nations Convention on the Rights of the Child. The Convention is the most universally accepted human rights document in history, ratified by 192 countries, with only 2 countries yet to do so. This places children at the focus for the spread of human rights generally.<sup>1</sup>

As such an overarching document, the Convention provides the context for the operation of all other mechanisms for the care and protection of children. When applying these other instruments, such as the Hague Convention on the Civil Aspects of International Child Abduction, and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, it is crucial to bear in mind the implications of the Convention on the Rights of the Child. It is also necessary to take the Convention into account in terms of domestic law, to ensure the obligations it provides are fulfilled.

The Convention was ratified in New Zealand in 1993. I will begin by giving a brief overview of how we have incorporated the principles of the Convention into domestic law, as much of our international co-operation stems from domestic legislation. I will then address how New Zealand and Australia work together to implement measures to ensure the international aspects of the Convention are met.

New Zealand and Australia have a unique relationship which demands, as well as allows for, very close co-operation on matters of the care and protection of children. Some consideration will be given to this relationship to better illustrate this need and ability.

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<sup>1</sup> UNICEF, *Convention on the Rights of the Child*, [www.unicef.org/crc/crc.htm](http://www.unicef.org/crc/crc.htm). The 2 Countries yet to ratify the Convention are the United States and Somalia but both are signatories to the Convention (see Office of the UN High Commissioner for Human Rights, *Status of Ratification of Principle International Human Rights Treaties*, 9 June 2004).

## **Provision, Protection, and Participation**

The United Nations Convention on the Rights of the Child recognises that children are entitled to the same basic set of human rights as every person, such as the right to life, freedom of expression, and freedom of thought.<sup>2</sup> However due to the particular vulnerability and dependence of children there are further measures that need to be taken to provide for their welfare.

On top of these basic rights the Convention establishes a set of guiding principles to provide for the development of children through provision, protection, and participation.<sup>3</sup> Provision refers to the establishment of certain environmental factors such as education, health care, and access to justice. Protection is the right for children not to suffer from harmful influences like abuse and neglect. Participation is the right to take part in family, cultural and social activities, and decisions affecting them. All of these principles are to be applied with the best interests of the child as the paramount consideration.<sup>4</sup>

## **Families have Primary Responsibility for Children's Care and Protection**

Children are primarily dependent on those closest to them: their family. The family therefore have the primary responsibility to provide for the rights of their own children. The State of course must provide certain aspects, such as education, but the State's role is largely confined to situations where something has gone wrong, and the parents are unable to provide as they are obliged. The Convention speaks of the right of children to be cared for by their parents at first instance.<sup>5</sup> Separation from parents should be a last resort, and if it cannot be avoided family ties are to be preserved.<sup>6</sup> States are then to provide the necessary care and protection, but with regard to the duties and rights of parents, or others responsible for the child.<sup>7</sup>

The focus on providing a strong family environment to provide for the care and protection of the rights of children has been a driving force in much of New Zealand's legislation in this area. Also of concern is children's participation in the justice system. This is in terms of both their participation within the decision-making process, and engineering the system itself to provide a mechanism to deal with the needs of children and young offenders, which can be vastly different to those of adult offenders.

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<sup>2</sup> Articles 6, 13, and 14 respectively.

<sup>3</sup> See Lansdown, G. *Children's Rights* in Mayall, B. (Ed), *Children's Childhood: Observed and Experienced*, (The Falmer Press, London, 1994) where children's rights are broken down into the three categories of provision, protection and participation.

<sup>4</sup> Article 3.

<sup>5</sup> Article 7.

<sup>6</sup> Articles 9 and 8.

<sup>7</sup> Article 3.

## **Domestic Law**

### **Care of Children Act 2004: The Establishment of a Strong Family Care Arrangement**

The Guardianship Act 1968 is currently New Zealand's primary statutory instrument for dealing with the care of children by their family, from custody and access, to disputes between guardians on how to bring up a child. This Act is to be replaced by the Care of Children Act 2004 which comes into force on the 1<sup>st</sup> of July this year.

The Justice and Electoral Select Committee decided not to make specific reference to the Convention in the Care of Children Act, as the Convention deals with a much broader set of rights and obligations than the Act is designed to cover.<sup>8</sup> However the principles of the Convention are used extensively throughout the Act.

### **Welfare and Best Interests**

Consideration for the welfare of children has long been the fundamental principle guiding Family Law in New Zealand. Consistent with the Convention, s23 of the Guardianship Act provides that the welfare of the child is to be the paramount consideration in any proceedings involving children. This principle is strengthened by the Care of Children Act, along with increasing the participation of children in proceedings, and clarifying children's rights.

The paramountcy of child welfare provision is moved to the front of the Care of Children Act in s4 to that it is to guide all that follows. The language used in s4 is different than that in s23 of the Guardianship Act. The term "best interests" is added to the consideration of the child's welfare to better correspond to international usage and the language of the Convention.

Along with the re-emphasis of the 'child first' principle, the Care of Children Act provides guidance for decision makers, previously absent from the Guardianship Act, on the types of considerations to be taken into account when assessing just what is in the best interests of each child. These principles correspond to those of the Convention and deal with matters including:

- parents have the primary responsibility for children's upbringing and development;
- relationships with parents and family members should be preserved and strengthened;
- the individual identity of children should be provided for; and
- children must be protected from all forms of violence.<sup>9</sup>

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<sup>8</sup> Justice and Electoral Select Committee Report, Care of Children Bill, p3.

<sup>9</sup> Care of Children Act s5.

The child focus of the family dispute process is increased further as any decision must now be made within a time frame that is sensitive to the child's sense of time.<sup>10</sup>

## **Participation**

The Convention stresses the importance of children's participation in any judicial or administrative matter affecting them.<sup>11</sup> The Care of Children Act seeks to strengthen New Zealand's adherence to this obligation. Section 6 of the Act deals specifically with the acquisition of the child's views. There is a duty on the Court to give every child reasonable opportunity to express their views in any matter relating to day-to-day care, contact, or in the administration of property belonging to the child, or the income of that property. Further, these views must be taken into account.

To facilitate the acquisition of the child's views there is a requirement to appoint counsel to represent the child in all matters involving their day-to-day care that are likely to proceed to a hearing, unless this would serve no useful purpose (for example if the child was an infant so unable to express any views). To deal with a problem previously encountered where counsel for the child were not giving the Court a thorough submission on the views of the child, there is now a presumption that counsel must meet with the child for the purposes of obtaining their views.<sup>12</sup>

Where children are subject to proceedings under the Act they are given a right to appeal decisions to the High Court.<sup>13</sup>

Children's rights to participate in decisions about medical procedures are clarified by the Care of Children Act. An ambiguity of the Guardianship Act is fixed by providing that children over the age of 16 can refuse as well as consent to medical procedures.<sup>14</sup> Previously there was no provision for a child to refuse consent, only to give it.

The right of a girl of any age to consent to an abortion without the knowledge of her parents remains in the face of much debate.<sup>15</sup>

## **The Nature of Parenting**

There is a change of emphasis in relation to guardianship and the nature of parenting. The Care of Children Act echoes the Convention by providing that parenting is about responsibilities towards the child rather than just rights against other parties.<sup>16</sup> The term "custody" used in the Guardianship Act is replaced by "day-to-day care", as custody can be associated with the

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<sup>10</sup> Care of Children Act s4(5).

<sup>11</sup> Article 12.

<sup>12</sup> Care of Children Act s7.

<sup>13</sup> Care of Children Act s143(2).

<sup>14</sup> Care of Children Act s36(1).

<sup>15</sup> Care of Children Act s38.

<sup>16</sup> Care of Children Act s15 and Article 5 of the Convention.

possession of property rather than with the care and protection of children. Re-emphasising that children are to be put first, considerations of the parents conduct is only to be taken into account so far as it is relevant to the welfare and best interests of the child.<sup>17</sup>

As children grow they move from dependence to independence and parents and others involved in making decisions affecting children should encourage and foster this evolution.<sup>18</sup> The Act recognises that parenting responsibilities are not an absolute, and that children have an evolving capacity. This can be seen in the consent to medical procedure provisions that apply as the child gets older,<sup>19</sup> and the definition of guardianship which includes that parenting is about determining or *helping a child to determine* important matters affecting the child.<sup>20</sup>

The Family Court's powers to enforce of parenting orders are increased under the new Act. This provides children with the certainty required for a stable and happy upbringing. There are a greater range of options for the Court to apply to remedy a breach, and the penalties have been increased.<sup>21</sup>

### **The Children Young Persons and their Families Act 1989: State Intervention into Care and Protection**

The Children Young Persons and their Families Act (CYPF Act) defines the role of the State in New Zealand where families alone are unable to provide for the care and protection of their children. The Act has two distinct parts:

- The first deals with the care and protection of children and young persons;
- The second provides a system of youth justice separate from that of the adult criminal system.

The Family Court administers the first part of the Act, while the Youth Court (created by the Act) deals with young offenders.

A “child that is in need of care and protection” is extensively defined in the Act. The broadest definition, which gives a picture of the type of situation the Act is aimed at preventing, is a child who is being, or is likely to be, harmed, ill-treated, neglected, abused, or seriously deprived.<sup>22</sup>

The Act provides a set of guiding principles that apply to both Parts. Like the Convention and the Care of Children Act, these principles are based around the philosophy that primary responsibility for the care and protection of young people should reside with their families, whānau, or family group, with State

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<sup>17</sup> Care of Children Act s4(3).

<sup>18</sup> Article 5 of the Convention instils this obligation.

<sup>19</sup> A child over 16 in a married or de facto relationship can also consent to medical procedure as next of kin (Care of Children Act s36(2)).

<sup>20</sup> Care of Children Act s15.

<sup>21</sup> See Care of Children Act ss69-73 and 78-80.

<sup>22</sup> CYPF Act s14(1)(a).

intervention kept to a minimum. The role of the State is to assist the family to care for children by providing services and support. The Act states its primary objectives as being:

- Providing facilities to promote the well being of children and their families that are appropriate to cultural needs and are accessible;
- Assisting children and their families avoid harms such as abuse and neglect;
- Providing a youth justice system that holds the offender accountable through the acceptance of responsibility, while helping them develop in a beneficial and socially acceptable way.<sup>23</sup>

The Act also provides guidance on what principles to apply to achieve these objectives. These correspond to those in the Convention, and include:

- The welfare and best interests of the child are to be the primary consideration;<sup>24</sup>
- Primary responsibility for care and protection lies with the family, so families should be assisted and supported wherever possible, and intervention should disrupt the family unit as little as possible.
- The child should only be removed from the family if they represent a serious risk of harm;
- Where a child is removed, they should be returned to their family wherever possible but if that is not possible, then they should be placed in a family setting that allows for continuity of the child's individual and cultural identity;
- Young people must be protected from harm, their rights upheld, and their welfare promoted;
- Consideration is to be given to the views of the child.<sup>25</sup>

The dependence and vulnerability of children recognised by the Convention is also seen in the CYPF Act. Children are primarily dependent on their families, so to truly uphold the principle that the welfare of the child is paramount, one must also look to the welfare of the child's family as the two are inextricably linked.<sup>26</sup>

## Youth Justice

The Youth Justice system seeks to provide for accountability as well as the development of the child. Based on a restorative justice approach, the primary mechanism for the Youth Court to deal with young offenders is the Family Group Conference. This brings together the young person and their representative, their family and people invited by the family, the police and

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<sup>23</sup> CYPF Act s4.

<sup>24</sup> CYPF Act s6. Although it should be noted this section does not apply to the Youth Justice sections of the CYPF Act.

<sup>25</sup> CYPF Act ss5 and 13.

<sup>26</sup> *Trapski's Family Law*, Vol. V, (Brookers) p1-14(b).

social workers, and the victim.<sup>27</sup> This reflects an understanding that contact with the adult criminal justice system can be a harm in itself for young people.<sup>28</sup> Accountability is thus sought through the child being confronted with their offending and the effects it has on the victim. They are encouraged to take responsibility for their actions by making amends to the victim, and seeing the human impact their actions can have.

Development is sought by realising that youth offending is often an opportunistic activity that is grown out of, so to punish a child as one would punish an adult can be counterproductive.<sup>29</sup>

The family group conference is also a means to strengthen the family and encourage them to be the primary unit for the care and protection of the child.

### **Judicial Decision Making**

New Zealand has not explicitly incorporated the Convention into domestic law beyond ratification. However the principles of the Convention have provided a guide for legislative drafting, and must be taken into account in judicial decision making.

The New Zealand Court of Appeal has discussed in the context of the Immigration Act that despite no legislative reference to the Convention, decision-makers are not free to ignore it.<sup>30</sup> New Zealand has, by ratifying the Convention, taken on a responsibility to adhere to it. The Convention has become part of our New Zealand law and parties are entitled to resort to it for recourse.

A recent example of the Court applying the convention came in a case that received a large amount of attention due to its unusual and provocative subject matter. In *Re an Unborn Child*,<sup>31</sup> a mother wanted to give birth as part of a pornographic film. The Court was required to interpret the word “child” to determine whether it covered an unborn child, so action could be taken to prevent the birth being filmed. The Court held:

“Having regard to the international obligations which have been assumed by New Zealand under the Convention, and other provisions of New Zealand law which support the interests of the unborn child, I hold that the term “child” in s2(1) of the [Guardianship] Act can include an unborn child.”

Further, the Court of Appeal held in *B v G*<sup>32</sup> that as far as the language allows, legislation should be interpreted in a way that is consistent with New

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<sup>27</sup> CYPF Act s22.

<sup>28</sup> Ministry of Justice, *Family Group Conferences*, [www.justice.govt.nz/youth/fgc.html](http://www.justice.govt.nz/youth/fgc.html)

<sup>29</sup> *Family Law in New Zealand*, (LexisNexis New Zealand Ltd, Wellington, 2003), p1031.

<sup>30</sup> *Tavita v Ministry of Immigration* [1994] 2 NZLR 257, 266.

<sup>31</sup> [2003] 1 NZLR 115.

<sup>32</sup> [2002] 3 NZLR 233.

Zealand's international obligations. Here the Convention was used as a guide to interpreting the Adoption Act 1955.

## **Trans-Tasman Co-operation: Ways we Ensure Children are Protected when they Leave our Shores.**

### **New Zealand and Australia**

New Zealand and Australia have a unique relationship, driven by our close proximity. Just as the Court must understand the unique relationship between a child and their parents in coming to a decision, one must understand our two countries relationship to get a picture of our co-operation. First, we are proud of the closeness of our relationship, but at the same time we are fiercely determined to keep our separate identities.

New Zealand sits as the largest island in the South Pacific. We are of a similar geographical size to the United Kingdom but with a population of just over 4 million.<sup>33</sup> This leaves for a lot of relatively unpopulated space, upon which New Zealand capitalises in the Eco-tourism market. Australia is the closest large country to us some 2,250 km across the Tasman Sea.

Australia and New Zealand have a close relationship in all aspects of international co-operation. We have the proud history of the ANZAC forces. This stands for the Australian and New Zealand Army Corps who made their debut together at Gallipoli on the 25<sup>th</sup> of April 1915. Australia is New Zealand's largest trading partner, and our close proximity means travel between the two countries is easy, with no requirement for a visa. Australia provides 16% of visitor expenditure in New Zealand which is the largest contribution of any single nation to this very important aspect of our local economy.<sup>34</sup> Over 50% of New Zealand's international travellers visit Australia.<sup>35</sup>

We also harbour a close and highly competitive sporting rivalry. Although as far as the recent one-day cricket tour by Australia was concerned, the relationship was more close than it was competitive.

Unlike Australia, New Zealand has no 'supreme' constitutional document. Our Constitution can be found in a number of pieces of legislation, decisions of the Courts, and constitutional conventions that are followed. Our system of governance is based heavily on the Westminster system of the United Kingdom but with only one Parliamentary Chamber. The Queen is the head of State, represented by the Governor-General, whose assent is required to pass any legislation. By constitutional convention the Governor-General acts on the advice of the Ministers so all legislation passed by the House of Representatives is assented to.

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<sup>33</sup> Statistics New Zealand.

<sup>34</sup> Statistics New Zealand, *Key Statistics*, 2002, p9.

<sup>35</sup> *Ibid*, p14.

Our close relationship with Australia has been taken advantage of in relation to the international aspects of the care and protection of children. This is particularly important given the number of people that travel between our two countries.

## Hague Convention

One international instrument with which New Zealand and Australia have had considerable experience in applying together is the Hague Convention on the Civil Aspects of International Child Abduction. New Zealand became a party to the Hague Convention in 1991 and Australia in 1992.<sup>36</sup> The majority of situations where a child has been abducted from New Zealand involve them being taken to Australia. In 2004, 40 applications were made in circumstances where children had been removed, in breach of the Hague Convention, to other countries. Of the total of 40, 30 involved removals to Australia. In the same period, 29 applications were made in relation to children that had been removed in breach of the Hague Convention, to New Zealand. The countries of origin were:

- Australia 22
- United Kingdom and Wales 3
- Netherlands 2
- United States 2

It can be seen from these numbers, that by far, we have our greatest Hague Convention (Child Abduction) relationship with Australia.

The Hague Convention aims to protect children from harm through a universal principle rather than on a case by case basis, as much domestic legislation seeks to do. The preamble to the Hague Convention states wrongful removal or retention of a child can cause harm, so children should be protected from these situations through expeditious return to their state of habitual residence.

It is presumed the state of habitual residence is best suited to decide what is in the best interests of the individual child, while all children need to be protected from the harms associated with abduction. The Hague Convention is thus primarily concerned with forum rather than the welfare of individual children.<sup>37</sup>

As is common knowledge, the Hague Convention applies to children under the age of 16 who have been taken from their state of habitual residence contrary to the rights of custody of another person. There is then a strong presumption for the return of the child. There are a number of exceptions to that presumption which are:

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<sup>36</sup> *Family Law in New Zealand*, (LexisNexis New Zealand Ltd, Wellington, 2003), pp588-589.

<sup>37</sup> For a recent decision on this matter see *Secretary for Justice as New Zealand Central Authority ex parte BPH v HDH* FC Lower Hutt, FAM 2004-032-752, 21 December 2004.

- that 1 year has elapsed since the removal and the child is settled in the new environment;
- that the person making the application was not exercising their rights of custody;
- the person applying for the return consented or acquiesced to the removal;
- there is a grave risk of exposure to physical or psychological harm, or of placing the child in a situation that is intolerable should they be returned;
- the child objects to returning, and has reached an age and maturity where it is appropriate to take into account their views.<sup>38</sup>

Only one of these exceptions has the potential to open the case to a hearing on the merits, rather than of forum. That is the risk of grave harm upon the return of the child. The words of the section are strong – the risk must be “grave”, or the situation “intolerable”. In assessing whether there is a grave risk of exposure to harm, one must bear in mind the guiding principle of the Hague Convention that as a universal rule children should be returned to their state of habitual residence to avoid the harms of abduction. Also there is the presumption that it is their home court that is best suited to decide what is in the interests of the individual.

These principles have been strongly applied in the New Zealand Courts. In the case of *A v A*<sup>39</sup> the Court of Appeal held that the decision is not about *what* is in the best interests of the child, but *where* their best interests should be determined. It was further held that:

“in most instances where the best interests of the child are paramount in the country of habitual residence the Courts of that country will be able to deal with any possible risk to the child, this overcoming the possible defence of the abducting parent.”

With the frequency of abduction between New Zealand and Australia and given that both jurisdictions operate specialist Family Courts:

“particular care must be exercised to ensure that the competence of the Family Court of Australia is not questioned”.<sup>40</sup>

To establish this defence, the party must show the Courts of the State of habitual residence are incapable of protecting the child from the risk of harm. In *KS v LS* the High Court overturned the original decision of the Family Court not to order return, as the Family Court gave no consideration to the clear ability of the Family Court of Australia to deal with the relevant issues of

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<sup>38</sup> Care of Children Act s106, Guardianship Amendment Act s13, and Hague Convention article 13.

<sup>39</sup> [1996] 2 NZLR 517.

<sup>40</sup> *KS v LS* [2003] NZFLR 817.

protection. This approach has been questioned in the High Court<sup>41</sup> but the Court of Appeal decision is still binding, so the approach will continue to be one of forum rather than merits. This is consistent with the international approach.<sup>42</sup>

New Zealand has the highest respect for the Family Court of Australia, so the defence of grave risk of psychological harm is all but redundant in any situation where a child has been abducted from Australia to New Zealand. This recognises that Australia is fully capable of protecting the rights of children within its jurisdiction, and that the harm of greatest concern in cases of abduction between out two States is that caused by the abduction itself.

An area of law which is not completely settled in New Zealand is the attachment of conditions to a return order. To do this would inherently question the ability of the Court of the receiving state to provide for the welfare of the child, and step into a consideration of welfare rather than forum.

There has been a distinction made between an order to return under s12 of our Guardianship Amendment Act<sup>43</sup> where a s13 defence is successful,<sup>44</sup> and where such a defence is not.<sup>45</sup> Where a defence is not made out, there is an absolute duty to return the child. Where a defence is made out there is discretion whether or not to make an order for return. This allows at least for undertakings of the applicant to be taken into account to negate a defence, and possibly for the imposition of conditions. Our Court of Appeal has stated it seems clear that there is no power to apply conditions where no defence is made out, but no final determination has been made.<sup>46</sup> It was emphasised that it is not the place of our Court to interfere with the responsibilities of another Central Authority or Court of another jurisdiction.

Before and after this discussion by the Court of Appeal conditions have been imposed to provide for the protection of children moving from New Zealand to Australia. In *H v C*<sup>47</sup> the return of a child to Australia was made conditional on the issue of interim orders from the Family Court of Australia for the protection of the mother, and ensuring she had custody and the father had supervised access.

In *Adams v Wigfield*<sup>48</sup> conditions were also imposed. In this case it was ordered that the applicant for the return of the child was to pay the costs of

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<sup>41</sup> *E v Secretary for Justice ex parte E* HC Wellington, AP 209/02, 30 October 2002.

<sup>42</sup> For example see the decision of the United States Court of Appeals for the Sixth Circuit in *Friedrich v Friedrich* 983 F2d 1396, 1401 (CA 6, 1993). It was held grave risk of harm would be to return the child to a war zone, or famine, or disease (this is the intolerable situation limb), or where the court in the country of habitual residence is unable or unwilling to give the child adequate protection.

<sup>43</sup> This Act incorporates the provisions of the Hague Convention into domestic law.

<sup>44</sup> These are the exceptions outlined above.

<sup>45</sup> *Hall v Hibbs* FC Levin, FP 031-073-95, 29 May 1995.

<sup>46</sup> *Anderson v Central Authority for New Zealand* [1996] 2 NZLR 517.

<sup>47</sup> FC Lower Hutt FP 368/00, 9 March 2001.

<sup>48</sup> [1994] NZFLR 135.

the return. The applicant was taking the benefit of a very real change of position (the change from an access order to a custody order in their favour) so should meet the costs of that change. There was no obligation to return the child until the costs had been paid by the applicant, despite the absolute duty of return in the absence of a s13 defence. It was this case that triggered the distinction of the power to apply conditions in the presence or absence of a defence.

### **Transfer of Protection Orders other than in Cases of Abduction**

Where a child has been identified under the CYPF Act as being in need of care and protection, it is crucial to ensure they continue to receive that care if they move from one State to another.

With this aim, in November 1999 the Protocol for the Transfer of Child Protection Orders and Proceedings and Interstate Assistance commenced between Australia and New Zealand. The Protocol was established to promote the transfer of proceedings and to ensure that a protection order follows a child as they move between States.<sup>49</sup> A protection order is an order that places responsibilities of custody, guardianship, supervision, or support on a government or statutory department, or any organisation granted authority under the child protection laws of that state.<sup>50</sup> The specifics of the Protocol have been added to the CYPF Act as Part 3A.

Orders may be transferred by either the Chief Executive of the Department of Child Youth and Family Services, or by an order of the Court.

### **General Principles**

Decisions regarding the interstate transfer of child protection orders and proceedings and the interstate placement of children are made in accordance with each State's case planning principles, so in New Zealand the principles discussed above in relation to the CYPF Act, as well as the following principles:

- The interests of the child are paramount;
- Delay is contrary to the interests of a child and should, where possible, be minimised. The Protocol is designed to move the process along promptly i.e. the transfer of an order occurs within six months (often more quickly) of a child being placed interstate;
- Planning an interstate placement, whether the child is subject to a protection order or not, should include the thorough involvement of the receiving State prior to the interstate placement; and

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<sup>49</sup> A "State" is defined as a State or Territory of Australia, or New Zealand in clause 2 of the Protocol. NSW has yet to enact the Protocol.

<sup>50</sup> CYPF Act s207C.

- A child protection order should generally be enforceable and effective pursuant to the child protection legislation of the State where the child resides.<sup>51</sup>

### **Trans-Tasman Enforcement of Child Support Orders**

A parent who does not live in the same country as their child still has an equal responsibility to provide for their upbringing. Interstate enforcement of child support can raise considerable legal and practical difficulties, but our Courts have stressed that one cannot avoid paying the proper obligations merely because of a choice to be domicile in a country different to that of your children.<sup>52</sup> The needs of the children remain, as does their right to parental care under the Convention, so this must be provided for if signatories are to uphold their obligations in taking on the Convention.

To help alleviate some of the difficulties faced in cross-border legal enforcement, such as choice of law questions, New Zealand and Australia entered into a reciprocal agreement, which came into force on 1 July 2000.<sup>53</sup> In New Zealand this was enacted as the Child Support (Reciprocal Agreement with Australia) Order 2000. The agreement allows one State to use the facilities of the other State to collect child support from parents living in the other country.<sup>54</sup> The money is then passed onto the custodial parent.

The amount of child support to be paid is calculated in the country where the child and custodial parent are living to ensure there is only one liability.

The agreement has proved to be an effective mechanism for the enforcement of child support. A total of over \$17.4 million has been collected under the Agreement since it came into force in 2000. \$7.7 million of this was collected by Australian authorities on behalf of custodians living in New Zealand, with \$9.7 million going the other way. There are currently 3928 paying parents living in Australia who have been referred to the Australian Child Support for action, and 3379 in New Zealand.<sup>55</sup>

### **Working Group**

In September 2004, the New Zealand Ministry of Justice sought Judicial input into the establishment of a group called the “Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement”.

The purpose of the Group is to “consider the potential for greater Trans-Tasman co-operation in relation to civil Court proceedings and regulatory enforcement”.

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<sup>51</sup> Clause 5 of the Protocol.

<sup>52</sup> See *Harding v Bryson* (1995) 13 FRNZ 302, 307.

<sup>53</sup> Agreement Between the Government of New Zealand and the Government of Australia on Child and Spousal Maintenance.

<sup>54</sup> Article 12.

<sup>55</sup> Figures provided by Inland Revenue Child Support.

Although the purpose of the group is to clearly deal with the wider range of civil and criminal issues of common interest to both countries, inevitably, the Working Group will progress and enhance Trans-Tasman issues so that easier methods of enforcement and co-operation are established.

### **International Child Adoption**

The plight of children involved in 'baby trafficking' has sparked international concern. This resulted in the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. This Convention provides for the adoption of children between States, while ensuring the welfare of the child is the guiding principle with regard to their fundamental rights under international law. New Zealand has incorporated this Convention into domestic law through the enactment of the Adoption (Intercountry) Act 1997, s4 of which declares the provisions of the Convention shall have the force of law.

Common source countries for New Zealanders wanting to adopt children from another State are nations such as Romania, Brazil, China, and Paraguay, where there is real concern for the welfare of some of their children.<sup>56</sup> Many adoptions from Australia have also occurred for other reasons.

Article 4(b) of the Convention requires that the country of origin must have given due consideration to the possibility of placement within that State, and have determined that intercountry adoption is in the best interests of the child. When considering placement within the State of origin, family placement must be considered in order to uphold the requirements of the UN Convention on the Rights of the Child. The right of a child to be cared for by their parents must be remembered, and the principle that it will generally be in the best interests of a child to have their cultural identity provided for. If intercountry adoption has been deemed as in the best interests of the child, there are stringent requirements on the adoptive parents to make sure they are able to provide an environment that will cater for the welfare of the child including keeping up their unique cultural ties.

Intercountry adoptions have long been able to be recognised as binding in New Zealand through recognition provisions in our Adoption Act 1955. If the adoption is between a contracting state and New Zealand however, the adoption is excluded from being recognised in this way and must satisfy the requirements of the Convention.<sup>57</sup>

One problem that has arisen from this requirement was found in the case of *Re T*,<sup>58</sup> where a couple resident in Australia wanted to adopt a child from New Zealand with the support of the child's parents under a private adoption. This could not occur as the laws of New South Wales do not permit for an adoption

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<sup>56</sup> *Trapski's Family Law*, Vol. V (Brookers), p1-431 (12/11/03).

<sup>57</sup> Section 17(5) Adoption Act 1955.

<sup>58</sup> (1999) 19 FRNZ 11.

where it has been privately arranged,<sup>59</sup> and Article 5 of the Convention prevents any adoption where it would not be legal in the country of residence.

Naturally, there is an understandable conflict between New Zealand's wish to foster adoptions within family or "whanau" and applying the international covenant which, could be seen as discouraging private "whanau" arrangements.

I doubt that this is insoluble however. What the Convention wants is transparency in process, not a fostering of private sometimes undesirable motives for adoption. The relationship with Australia results in desired adoptions within family, being openly undertaken, to comply with the Convention, with the knowledge agreement of Central Agencies.

If I step back from looking only at our relationship with Australia, this requirement to comply with the Convention has also raised some problems in relation to intercountry adoption between India and other contracting States.

The Convention requires the furnishing of reports as to the adoptability, family background, and other matters about the child under Article 16 from the state of origin. It has been the position of India not to respond to requests for these reports for in-family adoption but only in relation to stranger adoption of abandoned or orphaned children. This has meant in-family adoption cannot be recognised by the New Zealand Court's as without these reports the Convention cannot be adhered to.

To respect the obligations of the Conventions, in-family adoption must be a preferred option, rather than discouraged. Contracting states have a duty to preserve and in fact re-establish family relations.<sup>60</sup>

## **Conclusion**

Where two countries have different sovereign Governments, even though they may be close geographically, complex and unhelpful strains can develop which can be detrimental to children.

The Family Courts of Australia and New Zealand share a very similar ethos, and a similar philosophy in child focussed solutions to international law questions.

It is vital for all of our children, that countries co-operate not just in word, but in deed. Time matters to children. Delay can be corrosive and injurious. The examples above, of consciously working on matters of common interest, and on developing matters of principle in relation to child abduction, adoption, child support and care and protection of young people, are clear indicators

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<sup>59</sup> Adoption of Children Act 1965 (NSW) s51.

<sup>60</sup> Article 8 UN Convention on the Rights of the Child.

that sovereign countries can respect each others sovereignty but work concertedly to protect the interests and lives of young vulnerable children.

Peter Boshier  
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