

## RELATIVE AND KNOWN CHILD ADOPTIONS

### PURPOSE

Relative adoption refers to the adoption of a child by the child's biological relatives. Known child adoption refers to adoptions where the child is previously known to the prospective adoptive parents.

The purpose of this document is to set out general principles that apply to intercountry relative and known child adoptions in Australia. This paper has been developed by Australian Central Authorities based on the principles of the *Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption* (Hague Convention), the *Guide to Good Practice*<sup>1</sup> and Australian domestic policy concerning intercountry adoption and immigration.

### EXECUTIVE SUMMARY

In practice, relative and known child adoptions will only be facilitated in a very limited number of cases. Adoption is not considered to be an appropriate mechanism for resolving an intra-family situation and relative adoption has the potential to lead to confusion and complexity in family relationships. Concerns may also exist relating to the compatibility of the adoption with principles of the Hague Convention.

Australian States and Territories have primary responsibility for considering and facilitating relative and known child adoption requests. Each State and Territory has its own laws, policies and guidelines on relative and known child adoptions. These laws, policies and guidelines differ between jurisdictions. As such, this document provides general guidance only. Any specific enquiries about relative or known child adoption should be discussed with the relevant State or Territory Central Authority.<sup>2</sup>

State and Territory Central Authorities are only able to facilitate an adoption if it is in accordance with relevant State or Territory legislation. Relative and known child adoptions may not be permissible in some States and Territories. For example, Western Australia's adoption legislation does not permit relative adoptions.<sup>3</sup> In other States and Territories, relative and known child adoptions are only facilitated in limited circumstances and where all other available options have been investigated.

Key principles in relation to relative and known child adoption in Australia are set out below. The basis for these principles is discussed in the body of this paper.

1. State and Territory Central Authorities may only facilitate relative or known child adoptions where it is consistent with the relevant State or Territory adoption legislation.
2. State and Territory Central Authorities will only facilitate relative or known child adoptions where the child is legally in need of adoption and the adoption would be in the best interests of the child.

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<sup>1</sup> Hague Conference on Private International Law, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice*, Guide No. 1, 2008.

<sup>2</sup> Requests regarding relative and known child adoptions in Victoria fall within the responsibilities of the Child Protection, Placement and Family Services Branch, Department of Human Services, and are not the responsibility of the Victorian Central Authority. Any requests received by the Victorian Central Authority will be referred to the appropriate area.

<sup>3</sup> Subsection 66(3) *Adoption Act 1994 (WA)*

3. Where possible and appropriate, the competent authorities of the country of origin should investigate options for placing the child within the country of origin<sup>4</sup>.
4. Intercountry adoption, including with foreign relatives, may provide a permanent placement option as envisaged by the Hague Convention, where other alternatives are not appropriate.
5. Legitimate requests concerning relative and known adoptions for children identified as legally in need of adoption will be considered by State and Territory Central Authorities on a case-by-case basis.
6. Where a relative or known child adoption (or any other overseas adoption) is not arranged through the relevant State or Territory Central Authority, there is a significant risk that the child will not meet Australian immigration requirements, and will therefore be unable to enter Australia.

## HAGUE CONVENTION ON INTERCOUNTRY ADOPTION

The Hague Convention establishes principles to ensure intercountry adoptions occur only where it is in the best interests of the child and with respect for the child's fundamental rights.<sup>5</sup> The Convention also focuses on the need for countries to work towards preventing the abduction, sale or trafficking of children by establishing a system of safeguards and international co-operation.<sup>6</sup> Australia applies Hague Convention standards and principles generally, whether a particular country that Australia works with is a party to the Convention or not. Based on this approach, the principles contained in this document with respect to relative and known child adoptions apply equally to non-member countries as they do to member countries.

### Principle of Subsidiarity

Article 4(b) of the Hague Convention sets out the principle of subsidiarity. This principle states that in order for an intercountry adoption to take place, the competent authorities of the child's State of origin must have determined that a child is unable to be placed within their country of origin and that intercountry adoption would be in the child's best interests. This means that possible options for placing the child within their country of origin, with relatives, or another family, should be considered before a child can be considered for intercountry adoption. The Guide to Good Practice emphasises that the Convention refers to 'possibilities' for placing a child in their country of origin and stresses that this does not require that all possibilities be exhausted.<sup>7</sup>

The Guide lists a number of factors which are relevant in assessing whether it is in the child's best interests to be placed with a family in the child's country of origin or considered for intercountry adoption either with a relative or non-related family.<sup>8</sup> These factors include:

- protecting the child from harm and abuse
- appropriate permanent care by extended family
- appropriate national adoption or permanent family care

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<sup>4</sup> This is a requirement of Article 4(b) of the *Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption* (Subsidiarity Principle).

<sup>5</sup> Article 1, subparagraph (a), Hague Convention.

<sup>6</sup> Article 1, subparagraph (b), Hague Convention.

<sup>7</sup> *Guide to Good Practice*, pp 29, paragraph 50.

<sup>8</sup> *Guide to Good Practice*, pp 30, paragraph 51.

- availability of a permanent placement in the country of origin or overseas, and
- institutionalisation, as a permanent care option, is not in a child's best interests (excepting special circumstances).

The Guide to Good Practice notes that although there are arguments about whether the principle of subsidiarity is followed in all circumstances, in cases of relative adoption it is not the overarching principle of the Convention and cannot trump situations where it may be in the child's best interests to be placed with overseas relatives.<sup>9</sup>

The Guide notes that it is up to the competent authorities of the country of origin and the receiving country to consider whether a particular placement would be in the child's best interests using the Convention as a guide. In some cases it may be preferable to maintain the family bond by placing a child with overseas relatives rather than with a non-related family in the country of origin.<sup>10</sup> On the other hand, it should not be assumed that placing a child with family members whether in the country of origin or abroad will always be better for the child than adoption by another family.<sup>11</sup> All relevant factors should be assessed on a case-by-case basis in accordance with the best interests of the child. If the relevant authorities decide that it is in a child's best interest to be placed with overseas relatives, each authority has a role to play in facilitating the adoption or placement.

### **Procedural requirements**

Relative adoptions fall within the scope of the Hague Convention, and Convention procedures and safeguards must be applied to them.<sup>12</sup> Article 4 of the Hague Convention sets out a number of requirements for the competent authorities of the State of origin. These requirements include ensuring the child is legally adoptable, that all necessary consents to the adoption have been given, that such persons have been counselled and informed of the effects of their consent and consideration has been given to the child's wishes and opinions (where appropriate). Article 16 requires that where the Central Authority of the State of origin is satisfied that the child is adoptable, it must prepare an assessment report about the child and transmit the report to the Central Authority of the receiving State.

Article 5 provides that the competent authorities of the receiving State must ensure that the prospective adoptive parents are eligible and suited to adopt and have been counselled as may be necessary. In Australia prospective adoptive parents of an overseas relative or known child must be assessed and approved by their Australian State or Territory Central Authority. This is generally done by preparing an assessment report of the applicants at the request of the Central Authority of the country of origin, and transmitting it to the country of origin.<sup>13</sup> The Guide to Good Practice emphasises that this report is essential to enable both competent authorities to decide whether a relative adoption would be in the best interests of the child.<sup>14</sup>

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<sup>9</sup> *Guide to Good Practice*, pp 114, paragraph 516.

<sup>10</sup> *Guide to Good Practice*, pp 114, paragraph 517.

<sup>11</sup> *Guide to Good Practice*, pp 114, paragraph 514.

<sup>12</sup> *Guide to Good Practice*, pp 113, paragraph 511.

<sup>13</sup> Article 15 of the Hague Convention provides that the report transmitted to the Central Authority in the country of origin should detail: 'information about the parents' identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care'.

<sup>14</sup> *Guide to Good Practice*, pp 114, paragraph 514..

## **PROCESS FOR RELATIVE ADOPTION**

As stated above, State and Territory Central Authorities are responsible for the consideration and facilitation of individual adoption cases. As such, respective State and Territory adoption legislation will affect individuals' abilities to adopt an overseas relative child, including whether a State or Territory has the power to facilitate such an adoption.

Where a State or Territory Central Authority and the relevant overseas competent authority have decided to facilitate the adoption of a relative or known child, in the absence of alternative procedures, the file should be processed in the following way.

1. The relevant overseas authority conducts an assessment of the circumstances of the child to determine whether the child is in need of an alternative placement.
2. The relevant overseas authority will contact the relevant Australian State or Territory Central Authority, providing the required documentation about the circumstances of the child.
3. Consideration must be given to alternative arrangements for the care of the child, including possibilities for placement within the country of origin and other arrangements such as immigration provisions relating to orphan children.
4. Should an adoption placement be contemplated for the child, an assessment report for the prospective adoptive parents will be completed by the relevant State or Territory Central Authority and transmitted to the overseas authority.
5. Both the relevant overseas authority and the State or Territory Central Authority will consider whether it is in the child's best interests for an intercountry relative adoption to occur in a similar way to ordinary intercountry adoptions.
6. If it is decided that the adoption would be in the child's best interests, the relevant overseas authority and the Australian Central Authority agree to facilitate the adoption.

## **CONCERNS AND RISKS OF RELATIVE ADOPTION**

Relative adoption is generally not viewed as an appropriate mechanism for resolving intra-family relationships. An adoption order is a profound and significant legal order that changes the legal identity of a child and creates a new parent-child relationship. Any former parent-child relationship that existed prior to the adoption is severed. Relative adoption can lead to additional difficulties and confusion for an adoptee in understanding their family relationships, their origin and developing their own identity. For example, where a child is adopted by an aunt (the sister of the child's birth mother), the birth mother would become the child's aunt, and the child's biological siblings would become cousins. A complex and confusing family situation may be created, which may result in added difficulties for the adoptee and other family members.

There may also be concerns over the compatibility of relative and known child adoptions with other principles of the Hague Convention. These include whether there are real or perceived financial or other inducements offered in the context of formal relinquishment of the child.<sup>15</sup> There will generally be contact between the prospective adoptive parents and the particular child which can

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<sup>15</sup> See Article 32 of the Hague Convention.

contribute to further challenges in meeting the requirements of the Convention.<sup>16</sup> These concerns are required to be addressed by the competent authorities in both countries by the preparation of comprehensive reports about the prospective adoptive parents and the child in agreeing to the relative or known child adoption.<sup>17</sup>

## **IMMIGRATION**

Where a relative or known child adoption (or any other overseas adoption) is not arranged through the relevant Australian State or Territory Central Authority as set out above, there is a risk that the child will not meet immigration requirements. The Australian Government Department of Immigration and Citizenship (DIAC) will generally only grant a permanent visa to a child adopted from overseas if the adoption has been approved by the child's country of origin as well as an Australian State or Territory Central Authority.

In some cases, there may be other options available to place a child with an overseas relative in Australia. For example, the child may be eligible for an orphan relative visa. This is a permanent visa which allows a child under 18 years of age whose parent is unable to care for them to enter and live in Australia. The child must be sponsored by a relative who is an Australian citizen or permanent resident and other specific criteria must be met. Further information about child visas can be obtained from DIAC's website at <<http://www.immi.gov.au/migrants/family/>>.

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<sup>16</sup> See Article 29 of the Hague Convention.

<sup>17</sup> See Article 17 of the Hague Convention which requires Central Authorities of the State of origin and receiving State to agree and approve the intercountry adoption. See also Articles 15 and 16.