CHAPTER 2

Key issues

2.1 This chapter discusses a number of issues raised about the Bill by the Parliamentary Joint Committee on Human Rights and submitters and witnesses to the inquiry.

Issues raised by the Parliamentary Joint Committee on Human Rights

2.2 In its report on the Bill, tabled on 24 June 2014, the Parliamentary Joint Committee on Human Rights (PJCHR) noted that Article 21 of the Convention on the Rights of the Child[1] (CRC) provides specific protections for children in relation to intercountry adoption, to ensure the primacy of the best interests of the child. These include the requirement that adoptions are authorised only by competent authorities, are subject to equivalent safeguards and standards to those applied to national adoption, and do not result in improper financial gain for those involved. The obligations in Article 21 of the CRC are imposed upon both the country of the child's birth and the country of the adopting parents. The Hague Convention establishes a common regime, including minimum standards and appropriate safeguards, for ensuring that those obligations are met by its parties.[2]

2.3 Given Australia's obligations under Article 21 of the CRC, the PJCHR concluded that the government's assessment that the Bill does not raise any human rights issues for Australia was 'based on an unduly restricted view of both the scope of Australia's human rights obligations, and the circumstances in which they may apply'.[3]

2.4 The PJCHR expressed the view that the Bill may limit the rights of the child, and particularly the obligation to consider the best interests of the child in relation to intercountry adoptions, because neither the Bill nor the regulations specify standards or safeguards that will apply to intercountry adoptions under a bilateral agreement. The PJCHR therefore sought:

> the advice of the Minister for Immigration and Border Protection as to whether the Bill is compatible with the best interests of the child and the specific protections for inter-country adoption provided for in article 21 of the CRC and the Hague Convention.[4]

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1 New York, 20 November 1989. Entered into force for Australia 16 January 1991, [1991] ATS 4.

2 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament*, June 2014, pp 9-10.

3 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament,* June 2014, pp 9-10.

4 Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament,* June 2014, p. 10.

2.5 At the time of finalising this report, the PJCHR had not reported any response from the minister.

2.6 At the public hearing on 28 July, the Department of Immigration and Border Protection stated that the Bill was consistent with Article 21 of the CRC, because in practice the same safeguards were applied to adoptions from Hague and non-Hague countries. The department added that in its opinion the Bill enhanced the wellbeing of adopted children by creating a more streamlined and cost-effective process which allowed them to commence their lives in Australia more quickly.[5]

Issues raised during this inquiry

2.7 The issues raised in submissions focused on Australia's obligations to prioritise the best interests of the child in intercountry adoptions. All the submissions emphasised that streamlining adoption procedures through the Bill (and through the broader package of reforms of which it forms a part) must not weaken the protections for children built in to the current system.

Standards applied under bilateral arrangements

2.8 Responding to the committee's query as to the terms of Australia's existing bilateral arrangements, the Attorney-General's Department advised that 'the government does not have formal government-to-government agreements with South Korea or Taiwan' in relation to intercountry adoption.[6] Thus there does not appear to be a legally binding framework mandating standards and safeguards for child protection applicable to the parties to bilateral arrangements, equivalent to that established by the Hague Convention for its parties.

2.9 Many of the submissions expressed concerns that in the absence of such legal provisions, and with Australian authorities no longer having a role in determining the validity of an adoption, the streamlined citizenship process created by the Bill would make the process vulnerable to reduced standards for the protection of children, and greater risks of malpractice.

2.10 In their submission, three academics from Griffith University and RMIT commented that:

> Diminishing the checks and protections built into Australia's world class intercountry adoption system risks opening the doors to increased incidents of child trafficking, coercive practices and breaches of international and national laws. Non-Hague countries, even those with whom Australia has bilateral arrangements do not necessarily guarantee the same protections nor meet the same standards as those countries which have ratified...[7]

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5 Ms Frances Finney, Assistant Secretary Citizenship Branch, Department of Immigration and Border Protection, *Committee Hansard*, 28 July 2014, p. 15.

6 Attorney-General's Department, response to question on notice ('Additional Question') following the 28 July public hearing, received 12 August 2014.

7 Dr Patricia Fronek, Professor Denise Cuthbert and Professor Mary Keyes, *Submission 1*, p. 3.

2.11 International Social Service (ISS) Australia offered its view of the risks involved:

> The ISS network is aware that in countries whose child protection systems have limited capacity to monitor individual cases, individuals and criminal organisations may exploit loopholes in the adoption system, for financial gain or other unlawful or unethical purposes. Admittedly unlawful or unethical practices may also occur in Convention countries, however the probability is higher in non-Convention countries as they are not required to follow the rigorous processes required by the Convention.[8]

2.12 Witnesses at the public hearing discussed the types of malpractice that could occur in countries of origin, including failure to adequately explore domestic adoption options as a first priority for children, falsification of records, insufficient efforts to trace a child's family prior to authorising an adoption, and the absence of genuine free and informed consent from the child's parents, including pressure to release children for adoption.[9]

2.13 In its submission and at the hearing, UNICEF Australia stated its 'unequivocal' view that intercountry adoptions should only occur under the terms set out in the Hague Convention:

> In real terms, UNICEF's view is that our overarching recommendation is that we work only with Hague countries. If the government was absolutely committed to working under bilateral agreements then we would recommend that, where possible, they adopt most of the safeguarding that is already set out in the Hague Convention and then, as has just been mentioned, have those checks and balances in place through the life of the adoption process so that the adoptive family, the biological family and the child are all adequately protected.[10]

2.14 It was recognised that the problem may not necessarily be that lower standards were accepted by bilateral arrangement countries, rather that the capacity and ability of non-Hague countries to meet the standards tended to be poorer, and thus, there was a greater prevalence of serious problems with adoptions in non-Hague countries.[11] Moreover, non-Hague countries were not able to benefit from the systems of monitoring and technical assistance provided under the Convention framework.

2.15 At the public hearing, Mr Greg Manning from the Attorney-General's Department emphasised that

> …the approach of the department in relation to regulating or administering intercountry adoption programs is the same whether or not the country you

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8 International Social Service (ISS) Australia, *Submission* 3, p. 2.

9 See Dr Patricia Fronek and Miss Amy Lamoin, *Committee Hansard,* 28 July 2014, p. 7.

10 Miss Amy Lamoin, Head of Advocacy, UNICEF Australia, *Committee Hansard*, 28 July 2014, p. 9.

11 Dr Norman Gillespie, Chief Executive Officer, UNICEF Australia, *Committee Hansard*, 28 July 2014, p. 12.

> are dealing with is a Hague or a non-Hague country…our approach generally…is one of ensuring practical compliance with and implementation of Hague convention standards, rather than something more theoretical.
>
> …We would encourage and probably prefer all countries being party to an important multilateral convention such as the Hague convention. But the reality is that being a party is not enough in relation to satisfying ourselves about what occurs in a country in relation to intercountry adoption, so we undertake more practical measures to satisfy ourselves of that.[12]

2.16 The department advised that these practical measures included ongoing review of relevant legislation, guidelines and infrastructure in the countries in question, monitoring the practical operation of programs, regular dialogue with relevant in-country authorities through Australia's diplomatic missions and through visits to the country, and exchanging information with other countries and with NGOs working in the field.[13] Mr Manning mentioned that while bilateral arrangement countries were not eligible to receive technical assistance for compliance through the Hague Convention mechanisms, international NGOs often provided such assistance.[14]

Post-adoption monitoring and support

2.17 Several submissions raised concerns about the nature and level of post-adoption monitoring and support to be provided to adopted children and their families under adoptions completed overseas under bilateral arrangements. This included both follow up support to the child and family in Australia, and the sharing of post-adoption information and reporting with authorities in the sending country.

2.18 While post-adoption processes did not fall directly within the terms of the Bill, it was noted that the immediate grant of citizenship to children adopted overseas would remove the guardianship of the minister over the child that had previously prevailed while the adoption was being finalised in Australia, and may therefore remove the monitoring and reporting requirements which accompanied that status.[15] Witnesses also felt that post-adoption support was an indispensable part of the bigger picture in a reformed adoption system which must be taken into account when considering the Bill.

2.19 Speaking at the public hearing, Dr Patricia Fronek said that 'the biggest issue with post-adoption support is that we do not have enough', especially in light of the

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12 Mr Greg Manning, First Assistant Secretary Access to Justice Division, Attorney-General's Department, *Committee Hansard*, 28 July 2014, p. 16.

13 Attorney-General's Department, response to question on notice (Question 1) following the 28 July public hearing, received 12 August 2014, pp 2-3.

14 Mr Greg Manning, First Assistant Secretary Access to Justice Division, Attorney-General's Department, *Committee Hansard*, 28 July 2014, pp 18.

15 *Committee Hansard*, 28 July 2014, p. 18.

growing proportion of adoptees being older children and children with special needs.[16] This was also well expressed in the submission of Ms Sandi Petersen:

> Children adopted from overseas often have a history of trauma and loss which brings additional and complex emotional, developmental and social needs… these exceedingly vulnerable children deserve the highest standard of care and supervision that our country can provide, including provision of specialised support and supervision during their first year in family placement.[17]

2.20 Origins Vic Inc observed that 'the fast adoption process may increase the numbers of intercountry adoptions and government resources may need to increase to monitor the arrangements once the child is in Australia'.[18] Origins and other submitters also emphasised the importance of maintaining reporting systems which ensured that children could develop an understanding of their identity and family of origin, and be able to contact their biological family if they chose to do so in future.

2.21 The Attorney-General's Department advised that the Bill would not change post-adoption support arrangements, which were provided by state and territory governments in accordance with their respective laws. While the laws and processes may vary in some respects between states and territories, support services were provided to adopted children and their families on an identical basis whether the adoption took place under the Hague Convention or under bilateral arrangements. With respect to post-adoption reporting, the department advised that this was determined by the requirements imposed by the country of origin, and facilitated by state and territory governments accordingly.[19]

Dual nationality

2.22 In its submission UNICEF recommended that the Bill include provision that wherever legally possible, and wherever in the best interests of the child, children granted citizenship under the amended provisions of the Act would automatically retain dual nationality.[20] UNICEF explained during the hearing that this reflected 'a simple idea about a child's right to their own nationality', to embrace their identity and, if they wished, to reconnect with their country of origin later in life.[21]

2.23 The Australian Institute of Family Studies advised that its studies into past adoption practices in Australia had revealed the importance of supporting and

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16 Dr Patricia Fronek, *Committee Hansard*, 28 July 2014, p. 6.

17 Ms Sandi Petersen, *Submission* 10, p. 1.

18 Origins Vic Inc, *Submission* 6, p. 3.

19 Attorney-General's Department, response to question on notice (Question 2) following the 28 July public hearing, received 12 August 2014.

20 UNICEF, *Submission 9*, p. 3.

21 Miss Amy Lamoin, Head of Advocacy, UNICEF, *Committee Hansard*, 28 July 2014, p. 11.

sustaining contact between adoptees and their biological families, while recognising the greater difficulty of this in the intercountry adoption context.[22]

Possible future bilateral agreements

2.24 A key concern expressed in almost all submissions, and by witnesses at the public hearing, was that the Bill reflected an intention on the part of the government to expand the number of countries with which Australia carried out intercountry adoptions under bilateral arrangements rather than under the Hague Convention. While the existing bilateral arrangements pre-dated the Hague Convention, submitters took the view that the Hague Convention should now be the preferred (or the only) framework under which Australia facilitated intercountry adoptions.

2.25 In its evidence to the committee, the Attorney-General's Department advised that there were only two countries with which intercountry adoptions were presently taking place under bilateral arrangements. One of these, the Republic of Korea, was in the 'final stages' of becoming party to the Hague Convention. The other, Taiwan, may be precluded by its international status from becoming party to the Convention.[23]

2.26 The department further advised that discussions were presently under way about opening new intercountry adoptions with seven countries, all of whom were parties to the Hague Convention[24], and that there were no current plans to consider new bilateral arrangements with non-Hague Convention countries.

2.27 At the same time, the department noted that Article 21(e) of the Convention on the Rights of the Child specifically envisaged that parties could undertake bilateral as well as multilateral adoption arrangements, and that nothing in the present Bill was directed toward making future bilateral arrangements more or less likely.[25] The department reiterated that 'Australia will only consider opening a new intercountry adoption programme where it can be demonstrated that there is practical compliance with the Hague Convention'.[26]

Committee view

2.28 The committee believes that the Bill offers benefits to all parties involved with intercountry adoptions under Australia's bilateral arrangements. The streamlined citizenship process effected by the Bill will make overseas adoption a little bit faster, easier and more cost-effective for adopting families, and will enable adopted children

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22 Australian Institute of Family Studies, *Submission* 5, pp 2-3.

23 Mr Greg Manning, First Assistant Secretary Access to Justice Division, Attorney-General's Department, *Committee Hansard*, 28 July 2014, p. 14.

24 The seven countries currently under investigation are Bulgaria, Cambodia, Kenya, Latvia, Poland, the USA, and Vietnam. Attorney-General's Department, response to question on notice (Question 1) following the 28 July public hearing, received 12 August 2014, p. 3.

25 Mr Greg Manning, First Assistant Secretary Access to Justice Division, Attorney-General's Department, *Committee Hansard*, 28 July 2014, pp 14-15.

26 Attorney-General's Department, response to question on notice (Question 1) following the 28 July public hearing, received 12 August 2014, p. 3.

to settle more quickly and easily into their new lives, and access key support services immediately on arrival in Australia.

2.29 The committee notes the advice provided by the relevant departments that in doing so, the Bill will not in any way compromise the interests of the child, nor the standards and safeguards applied to intercountry adoption programs under bilateral arrangements, which will continue to mirror the principles of the Hague Convention.

Recommendation 1

2.30 The committee recommends, subject to the two subsequent recommendations, that the Bill be passed.

2.31 The committee acknowledges the view shared by both government and community stakeholders that the Hague Convention represents the best-practice international framework for intercountry adoptions today. The committee commends the unequivocal assurances given by the Attorney-General's Department that whether an overseas adoption is covered by the Hague Convention or a bilateral arrangement, the same standards, safeguards and monitoring procedures are and will be applied.

2.32 Unlike the Hague Convention regime, the principles governing Australia's bilateral arrangements are not set out in law, either in government-to-government agreements or in the Bill and the related regulations. This lacuna gives rise to understandable concerns within the community as to whether, and how, relevant standards are agreed and enforced in the context of bilateral arrangements. A similar concern was expressed by the PJCHR in its consideration of the Bill.

2.33 The committee does not question the good faith of Australia's authorities in their efforts to ensure that appropriate and consistent standards are upheld in all intercountry adoptions. The committee believes nonetheless that the principles of the Hague Convention, and most notably the requirement that the best interests of the child be the paramount consideration throughout the adoption cycle, need to be not just implicitly understood but explicitly and publicly stated in the context of Australia's bilateral arrangements.

Recommendation 2

2.34 The committee recommends that the child protection principles set out in the Hague Convention, particularly the overarching requirement that the best interests of the child be the paramount consideration in intercountry adoption processes, be explicitly articulated in Australia's bilateral arrangements and, where relevant, in the related legislation and regulations.

2.35 The committee recognises that that accords with the government's general position, and is comforted by the approach that the government currently goes 'behind' both the Convention and bilateral arrangements when considering intercountry adoptions, by undertaking practical measures such as those discussed at paragraph 2.16: ongoing review of relevant legislation, guidelines and infrastructure in the countries in question, monitoring the practical operation of programs, regular dialogue with relevant in-country authorities through Australia's diplomatic missions and through visits to the country, and exchanging information with other countries and with NGOs working in the field.

2.36 In the course of the inquiry it became clear that post-adoption monitoring and support was crucially important to protecting the welfare of adopted children, as well as the families involved. The committee noted the evidence of several submitters that post-adoption support may be under-resourced at present, and the strongly-held view that under a more streamlined adoption system the level of support provided, as well as monitoring and reporting to countries of origin, must not be compromised.

Recommendation 3

2.37 While not directly relevant to the committee's terms of reference, the committee strongly urges Commonwealth, state and territory governments to ensure that adequate resourcing and priority is provided for follow up monitoring and support to ensure that it fully addresses Australia's obligations to adoptees throughout the adoption cycle, regardless of whether adoptions take place under the Hague Convention or under bilateral arrangements.

2.38 The committee recognises the historical and legal reasons which gave rise to the bilateral arrangements currently in place, noting that only two remain in practical effect, and one of these will soon become obsolete.

2.39 At this point in time, with the Hague Convention attracting a robust and growing list of parties, and representing the benchmark for global best-practice in intercountry adoption, the committee is of the view that it would be preferable if further bilateral arrangements with non-Hague parties were not pursued unless there are compelling reasons for doing so.

Senator the Hon Ian Macdonald

Chair