Intercountry adoption in Australia

By Justice Susan Kenny

From earliest times, orphaned children have had a central place in the imagination of civilised communities.[1] We empathise with child heroes like Harry Potter because of their loss and vulnerability. They capture our imagination because of their courage in adversity and the intensity of their quest for identity. Outside literature, there remain many millions of children worldwide who have no family to nurture them, usually as a consequence of poverty, war or disease.[2]

Responses within countries and internationally to the need to protect and nurture children deprived of their birth families vary, depending on economic, cultural, social and political factors. They include intra-family adoption or adoption within their country of origin, care in publicly or privately run institutions, foster care and, sometimes, intercountry adoption. Generally speaking, institutionalisation has been found to have significant adverse effects on children, because it fails to meet their emotional and psychological needs.[3] Other options in a child's original country may not be available, or may not afford the long-term care and commitment that children need to flourish. Placement in a family outside a child's country of origin may ultimately offer the best opportunity for children to reach their full potential as secure, loving and productive adults.

Outside the Islamic world, which has its own regimes for orphans, adoption in one form or other is practised around the world.[4] It is a time-honoured way of caring for children. The significant change in adoption practices over the past fifty years has been the growth in intercountry adoption.

The rate of intercountry adoption has risen globally since the late 1960s, with the result that by the 1990s, an international report described it as 'a world wide phenomenon involving migration of children over long geographical distances and from one society and culture to another very different environment'.[5] In modern history, families, particularly in the United States, adopted children from Europe, Japan and China after World War II and again after the Korean War. The Australian programs for intercountry adoption probably began with the airlifts of orphaned children from Vietnam in 1975 and grew from the 1980s.[6]

In 2004, the top 20 receiving countries, led by the United States, recorded 44,872 intercountry adoptions for that year.[7] By international standards, however, Australia has a comparatively low intercountry adoption rate. In Australia, there were 405 intercountry adoptions recorded for the years 2006-2007.[8] For 2004, Australia's adoption rate or intercountry adoptions per 100,000[9] was 1.9, as compared with 15.4 for Norway, 13.0 for Spain, 12.3 for Sweden, 9.8 for Denmark and Ireland, and 8.8 for New Zealand.[10]

Internationally, intercountry adoption increased by 42 per cent between 1998 and 2004 in the top 20 receiving countries.[11] In Australia, the 244 intercountry adoptions recorded in 1998–1999 rose to 370 for 2003–2004 and to 434 for 2004–2005.[12] In 2004, the principal sending countries worldwide, though not to Australia, were China, Russia, Guatemala, Korea, Ukraine, Colombia, Ethiopia, Haiti, India and Kazakhstan.[13] In 2007, the principal countries of origin for Australian adoptions

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were China (30.9%), South Korea (19.8%), Ethiopia (11.6%), Philippines (11.1%), Thailand (6.9%), Taiwan (6.4%), India (6.2%), Hong Kong (2.2%), Sri Lanka (1.2%), Colombia (1.2%) and Guatemala (0.5%), with the remaining 2% coming from a diverse group of other countries.[14]

When a child moves from a birth family and country of origin, there are deep and life-long consequences for the child, as well as for the birth and adoptive families. Intercountry adoption begins with profound loss—loss of birth family and often birth identity. It involves entrusting a child to another family to nurture outside the child's country of origin, in order that the child can grow up 'in an atmosphere of happiness, love and understanding'.[15] Plainly enough, the process needs very careful national and international regulation, and a multilateral approach. Without this, the opportunities for child abuse, through various forms of child trafficking, are clear.

△Central to the Convention is the principle that the best interests of the child are paramount and intercountry adoption is only to be pursued in these circumstances.△

The *Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption* of 29 May 1993, was ratified by Australia on 25 August 1998, and entered into force here on 1 December 1998. The main aims of the Convention are to: ensure intercountry adoptions take place in the best interests of children; standardise intercountry adoption processes, in order to prevent trafficking in children and related forms of child abuse; and secure the recognition in ratifying States of adoptions in accordance with the Convention.[16]

The Convention recognises that intercountry adoption may offer the advantage of a permanent family to a child, when a suitable family in the child's country of origin cannot be found.[17] Central to the Convention is the principle that the best interests of the child are paramount and intercountry adoption is only to be pursued in these circumstances.[18] The key provisions of the Convention ensure that:

(1) The competent authorities in the child's country of origin must establish that:[19]

(i) the child is adoptable;

(ii) a suitable family for the child cannot be found within the country of origin;

(iii) intercountry adoption is in the child's best interests;

(iv) the persons, institutions and authorities whose consent is required have been counselled before giving their consent;

(v) no consent has been induced by payment or compensation;

(vi) consents have been freely given; and

(vii) consideration has been given to the child's wishes and opinions.

(2) The competent authorities of the receiving State must ensure that:[20]

(i) the prospective adoptive parents are eligible and suited to adopt;

(ii) the prospective adoptive parents have been counselled; and

(iii) the child is or will be authorised to enter and reside permanently in the receiving State.

(3) Ratifying States must designate a central authority or authorities to manage intercountry adoption.[21]

(4) Central authorities have a duty to facilitate, follow and expedite proceedings with a view to obtaining the adoption.[22]

(5) Central authorities may delegate their functions to accredited bodies.[23]

(6) Ratifying States are required to recognise each others' adoption orders.[24]

(7) There must be no improper financial or other gain from intercountry adoption.[25]

The Convention is given effect in Australia by the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* (Cth), made under s 111C of the *Family Law Act 1975* (Cth), as well as by means of an agreement between the Commonwealth, the states and territories with respect to implementation of the Convention. The agreement did not result in much change to then existing State and territory practices. The states and territories continued to be primarily responsible for intercountry adoption in Australia. The Commonwealth did not use its power under the Constitution to introduce national legislation to implement the Convention. Presumably, one reason for this was that, historically, the states and territories have assumed responsibility for adoption, including intercountry adoption, and have suitably experienced and qualified staff.

The Commonwealth, state and territory statutory framework reflects the distribution of responsibility between the various governments. The *Family Law (Hague Convention on Intercountry Adoption)*

Regulations 1998 (Cth) apply, unless and until a state or territory passes legislation to the same or comparable effect. In this event, the Commonwealth regulations do not apply in that state or territory. [26] New South Wales, Victoria, Western Australia and Queensland have each passed mirror legislation.[27] The Commonwealth regulations make provision for the establishment of central authorities, the making of adoption orders, and the recognition of adoption orders made in Convention countries. The functions of the Commonwealth central authority include co-operating with central authorities outside Australia, consulting with the authorities in the states and territories, and taking appropriate measures to ensure compliance with the Convention.[28]

The states and territories are mostly responsible for the practical aspects of processing intercountry adoptions. The functions of competent authorities in the states and territories include receiving applications from prospective adoptive parents and preparing reports as to their suitability; transmitting the reports to a child's country of origin; counselling the prospective parents; providing information to the authorities in other Convention countries, either directly or through other bodies; taking measures to prevent improper financial or other gain in connection with adoptions; ensuring that the transfer of children between countries takes place in secure and appropriate circumstances; and providing post-placement reports to the authorities in the countries of origin.[29]

Several years ago, a Commonwealth Parliamentary report highlighted numerous deficiencies in the process of intercountry adoption in Australia.[30] There have been numerous reforms as a consequence, including the establishment of a National Peak Overseas Adoption Support Group and an amendment to the citizenship legislation. The *Australian Citizenship Act 2007* (Cth) now confers citizenship automatically on an adopted child once a final adoption order has been made in a state or territory court.[31] Further, following the report's recommendation that the Commonwealth take a more active role, the Commonwealth, the states and territories are currently negotiating a new agreement to improve the collaborative framework for intercountry adoptions.

Areas for reconsideration and possible reform remain. The first area concerns Australia's health requirements. Children enter Australia pursuant to adoption visas issued under the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth). Under this regime, children are required to satisfy stringent health requirements, with the result that only healthy and able-bodied children are permitted to enter. A child, therefore cannot enter on an adoption visa if suffering from a condition that would be likely to require health care or community services unless the condition is waived by the Minister. The Minister can waive the condition in limited circumstances only, including that the grant of the visa would be unlikely to result in undue cost to the Australian community. These strict requirements render many children ineligible for adoption in this country. Their stringency is difficult to justify, given Australia's comparative wealth, the fact that the excluded children are often in particular need in their countries of origin, and that there are suitable Australian families with the commitment to care for them.

Secondly, state and territory adoption requirements and processing practices differ, often for no discernible good reason. For example, the Parliamentary report referred to earlier indicated that the process in some of the states was unjustifiably slow.[32] The Report may well have promoted improved performance, but there is a need for regular reviews of state and territory practices in order to ensure that these practices are reasonably harmonized and working in children's best interests. Moreover, more resources would probably be needed if Australia's adoption rate were to improve and perhaps approach that of its neighbour, New Zealand.

Thirdly, different legislative requirements between the states and territories with respect to age, family composition, marriage and the like, have significant effects on the eligibility of prospective adoptive parents to provide a family for a child, regardless of their apparent suitability to adopt.[33] It would appear preferable for the governing legislation not to stipulate such matters in detail, but rather to state the general principles for determining eligibility and suitability, leaving the ultimate decision in a particular case to skilled and knowledgeable persons. The decision as to whether a child's best interests would be served by placement in a particular family may be best left to expert evaluation on a case by case[34] basis.

Fourthly, attention should also be given to encouraging and assisting adoptive parents to preserve and enhance cultural links with their

child's country of origin.[35] Intercountry adoption children are entitled to know about and be at home in the culture of their birth. Fostering knowledge about children's culture of origin, and promoting pride in this and their biological inheritances, is a fundamental duty of every intercountry adoption parent. Its importance is such that it should be recognised in governing legislation. This recognition might, for example, usefully be incorporated in a legislative statement of the principles of suitability to adopt.

Of course, in this complex area there are many other areas for active consideration, including the extent of publicly funded support for post-placement assistance, the nature of improper financial and other gain from adoption, the place of accredited non-government agencies in the delivery of adoption services, and the development of new intercountry adoption programs. In the future, these issues may become even more pressing in Australia than now.

For those involved, intercountry adoption is a bitter-sweet process, commencing in losses at the deepest level for which there may be no sufficient recompense. It is also a process of hope, in which a new family undertakes to cherish their new member not only for themselves, but also in trust for the people and the country the child has left behind.

At its best, intercountry adoption celebrates the inestimable value of children and recognises the myriad potentialities a child has for goodness and happiness. At its worst, intercountry adoption becomes a vehicle for child abuse—for child trafficking and exploitation—and as just another way of wasting human life. If intercountry adoption is to be fruitful and provide an environment for children to flourish, the adult participants in the process in countries of origin and in receiving countries, whether government officials, social workers, or private citizens, must place the interests of children first every time. The Convention provides a very good framework for this, but there must also be adequate and well-resourced national regulation, and a responsible and respectful multilateral approach.

Endnotes

1. M Kimball, 'Folktales to Fiction: Orphan Characters in Children's Literature', (1999) 47(3) Library Trends 558, 558–578.
2. Joint United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Children's Fund (UNICEF), and United Nations Agency for International Development (USAID), Children on the Brink 2004: A Joint Report of New Orphan Estimates and a Framework for Action (4th ed, 2004), 7.
3. Ibid, 19–20; *Hague Conference on Private International Law, Report on Intercountry Adoption* (1990), 64. (Report on Intercountry Adoption 1990).
4. *Hague Conference on Private International Law, Report on Intercountry Adoption* (1990), 20.
5. Ibid, 6.
6. J Degeling, National Report for Australia (2003) Colloque Sur L'Adoption Internationale en Droit Comparé, 2.
7. P Selman, 'Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998–2004', (2006) 23(2) *Journal of Population Research* pp 183–185.
8. Australian Institute of Health and Welfare, Adoptions Australia 2006–07— *Child Welfare Series No 44* (2008), 43 (Table A10: Intercountry Adoptions, by Country of Origin, 1997–98 to 2006–07).
9. Adoptions per 100,000 population: P Selman, 'Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998–2004', (2006) 23(2) *Journal of Population Research* pp 183–189.
10. Ibid.
11. P Selman, 'Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998–2004', (2006) 23(2) *Journal of Population Research* pp 183–187.
12. Australian Institute of Health and Welfare, Adoptions Australia 2006–07— *Child Welfare Series No 44* (2008), 43 (Table A10: Intercountry Adoptions, by Country of Origin, 1997–98 to 2006–07).
13. P Selman, 'Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998–2004', (2006) 23(2) *Journal of Population Research* pp 183–191.
14. Australian Institute of Health and Welfare, Adoptions Australia 2006–07— *Child Welfare Series* No 44 (2008), 43 (Table A10: Intercountry Adoptions, by Country of Origin, 1997–98 to 2006–07). These other countries included Azerbaijan, Bolivia, Burkina Faso, Canada, Chile, Croatia, Honduras, Italy, Lebanon, Lithuania, Macedonia, Malta, Nicaragua, Papua New Guinea, Poland, Tonga, Uganda, United Kingdom and United States of America.
15. *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 29 May 1993, [1998] ATS 21, (entered into force 1 May 1995), Preamble.
16. Ibid, art 1.
17. Ibid, Preamble and art 4. See also P Pfund, 'Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise', (1994) 28 *Family Law Quarterly* pp 53–54.
18. *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 29 May 1993, [1998] ATS 21, (entered into force 1 May 1995), art 1.
19. Ibid, art 4.
20. Ibid, art 5.
21. Ibid, arts 6 and 7.
22. Ibid, arts 9 and 35.
23. Ibid, arts 10 and 11.
24. Ibid, art 23.

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22 *Children's Court Act 1992* (Qld) s 20(g).

23 *Young Offenders Act 1994* (WA) ss 17A, 17B.

24 *Young Offenders Act 1997* (NSW) s 27(2).

25 *Young Offenders Act 1997* (NSW) s 3(g).

26 *Seen and Heard*, pp 518–521.

27 *Young Offenders Act 1997* (NSW) ss 7(b), 22(1)(b), 39(1)(b).

28 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 33.

29 Arie Freiberg and Neil Morgan, 'Between bail and sentence: the conflation of dispositional options' (2004) *Current Issues in Criminal Justice* 220.

30 See, eg, the discussion in NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) at p 257. See also Georgia Brignell, *Bail: An Examination of Contemporary Issues—Sentencing Trends & Issues* No 24 (2002) Judicial Commission of New South Wales.

31 NSW Department of Juvenile Justice, *Annual Report 2005–06*.

32 See NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2006* (2007) summary tables at pp 9 and 4 respectively.

33 The proportion of children and young people appearing in court for breach bail conditions rose from 14% in 2003–04 to 20% in 2006–07. In 2006–07 almost one quarter of all Aboriginal children appearing in court in NSW were there for breach of bail conditions.

34 *Children (Criminal Proceedings) Act 1987* (NSW) s 9.

35 Mark Allerton et al, *NSW Young People in Custody Health Survey: Key Findings Report* (2003), NSW Department of Juvenile Justice; and Dianna T Kenny et al, *NSW Young People on Community Orders Health Survey 2003–06*, (2006). Both reports are available at www.djj.nsw.gov.au/publications.htm.

36 The amendments were to the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW).

37 See the Second Reading Speech by the Attorney General, the Hon. John Hatzistergos, Legislative Council, NSW Parliament, Full Day Hansard Transcript, 15 November 2007, p 54. Designated government agencies now have standing to apply to the court for a direction about the appearance in person of the child. The court can require the child's presence at court, providing this is in the interests of the administration of justice. The child's legal representative will also be able to make submissions to the court in support of the child's presence at the court during the proceedings.

38 Hansard, Legislative Council, 17 October 2007.

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26. Report, p 428.

27. http://www.facsia.gov.au/internet/facsinternet.nsf/family/parenting-child_protection_discussion_page.htm.

28. Report, chapters 18,19 and 20.

29. Sentencing Young Offenders in Australia, *Reform*, Winter 2005 Issue 86.

30. Report, p 483.

31. '*A Last Resort? The Report of the Inquiry into Children in Immigration Detention*' Human Rights & Equal Opportunity Commission, 2004.

32. Report, pp 578–581.

33. For further information, contact the authors of this article.