

INTERCOUNTRY ADOPTIONS: IN THE BEST INTERESTS OF THE CHILD?

CELICA BOJORGE*

I INTRODUCTION

With the rise in demand for children and people's willingness to pay large sums of money to obtain a baby, lucrative businesses had developed in the trafficking of children in a number of countries aided by lax national controls over intercountry adoption and a lack of international regulation.¹ International cooperation was therefore needed to protect children's rights and to prevent the sale and trafficking of children.² In response to international concern, on 29 May 1993, during the 17th Session of the Hague Conference on Private International Law, 63 States signed *The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* ("the Hague Convention").³

Australia ratified the Hague Convention on 25 August 1998 and it entered into force on 1 December 1998.⁴ The Commonwealth Government implemented the Hague Convention via:

- the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998*;⁵ and

* Assistant Parliamentary Counsel, Australian Office of Parliamentary Counsel. The views expressed in this paper are the views of the author and may not represent the views of the Commonwealth Government. This article was originally submitted as a Masters paper in the Faculty of Law, Queensland University of Technology. The author would like to acknowledge the assistance given by Ms Sally Kift in the preparation of this article.

¹ O Calcetas-Santos, 'Report of the Special Rapporteur on the sale of children, child prostitution and child pornography' (27 January 2000), United Nations Economic and Social Council, Commission on Human Rights 53rd Session, 5-6 at <<http://casa-alianza.org.EN/human-rights/sexual-exploit/ONU/sale.shtml>>; W Duncan, 'The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption' (1993) 17(3) *Adoption and Fostering* 9.

² S Detrick and P Vlaardingerbroek, *Globalization of Child Law The Role of the Hague Conventions* (Martinus Nijhoff Publishers: The Hague, 1999) 19; J Degeling, 'Intercountry Adoption—a New Convention for Australia?' (1993) 1(5) *Australian Law Librarian* 215.

³ Duncan, above n 1, 9; P H Pfund, 'Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation and Promise' (1994) 28(1) *Family Law Quarterly* 54.

⁴ Joint News Release Minister for Foreign Affairs The Hon. Alexander Downer at <http://law.gov.au.aghome/agnews/1998newsag/Join_11_98.htm>; 'Status Sheet Convention #33' Hague Conference on Private International Law, 2 at <<http://www.hcch.net/e/status/adoshte.html>>.

⁵ Section 111C(1) - (2) *Family Law Act 1975*. The *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* commenced on 1 December 1998.

- the Commonwealth-State agreement for the implementation of the *Hague Convention on Protection of Children in Respect of Intercountry Adoption* (“the Commonwealth-State agreement”).⁶

Since the adoption process has been predominantly a responsibility of State and Territory Governments, the Commonwealth, States and Territories decided that the State and Territory departments should retain the control of intercountry adoptions.⁷ Queensland implemented the Hague convention by amending the *Adoption of Children Act 1964* (Qld) (“the Queensland Act”).⁸ This paper will focus on Queensland’s implementation of the Hague Convention.

Specifically, the effectiveness of the Hague Convention and the Queensland Act will be examined and evaluated in light of the objectives of Article 1 of the Hague Convention. Current intercountry adoption trends will be briefly outlined followed by a consideration of the Hague Convention’s objectives. The latter’s first objective is to establish safeguards to ensure intercountry adoptions take place in the child’s best interests. The second objective is to establish a system of cooperation among Contracting States to ensure that those safeguards are respected. Since the first two objectives are interrelated, they will be examined concurrently in light of the duties and responsibilities delegated to the country of origin and the receiving State. The third objective to be examined is the recognition of adoptions. Post-adoption issues of culture, race, religion and language will also be considered. Finally, some recommendations will be made regarding consent, monitoring and accountability, adoptee’s access to information and non-accredited bodies.

II INTERCOUNTRY ADOPTION TRENDS

Since World War II, intercountry adoption has become increasingly popular and widespread.⁹ Primarily arising as a humanitarian response to wars (World War II, the Korean and Vietnam Wars), intercountry adoption is now growing in response to, inter alia, affluent countries’ decline in babies and children available nationally for adoption, low fertility, greater availability of contraception, increased availability of welfare and social acceptability of single mothers and the rise in population and poverty in developing countries.¹⁰ According to figures by S L Kane, from 1980 to 1989 some 170,000-180,000 children were involved in intercountry adoption, with 90% of the children coming from 10 countries.¹¹ The major “sending” countries were Korea (61,235), India (15,325) and Colombia (14,837).¹² The United States is the major “receiving” country with 19,237 immigration visas issued to orphans in 2000-2001 and

⁶ The Commonwealth-State agreement commenced operation on 9 April 1998.

⁷ The Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Fifteenth Report (June 1998) 9 at <http://www.aph.gov.au/house/committee/jsct/reports/report15.pdf>.

⁸ The amendments to the *Adoption of Children Act 1964* commenced on 16 April 1999.

⁹ M Humphrey and H Humphrey (eds), *Intercountry Adoption Practical Experiences* (Travistock/Routledge: London, 1993) 119, 121; N Cantwell, ‘Intercountry Adoption’ (1998) 4 *Innocenti Digest* 2 at <http://unicef-icdc.org/pdf/digest4e.pdf>.

¹⁰ Humphrey, above n 9, 121; Cantwell, above n 9, 2; Duncan, above n 1, 9.

¹¹ Cantwell, above n 9, 3.

¹² Ibid.

the majority of children coming from China (4,681), Russia (4,279), South Korea (1,870) and Guatemala (1,609).¹³

In Australia, intercountry placement adoptions have increased overall by 50% since 1981-1982.¹⁴ In the 1990s intercountry adoptions remained stable with 301 adoptions nationally (a 23% increase from the previous year), with 60 in Queensland in 1999-2000.¹⁵ Sixty-six of the adoptions were carried out in conformity with the Hague Convention.¹⁶ In 2000-2001 there were 289 national placement adoptions (40 in Queensland) and 240 intercountry adoptions which were not finalised by 30 June 2001.¹⁷ There were 51 Hague adoptions of children from Romania (20), the Philippines (18), Colombia (9) and Sri Lanka (4).¹⁸ As of 31 December 2001 there were 496 applicants listed on the Foreign Children's Adoption List in Queensland.¹⁹ Since the early 1990s the majority of children adopted are from India, South Korea and Thailand.²⁰

Adoption costs can vary greatly depending on the country of origin. In Australia, fees for overseas adoption agencies and travel costs can range from \$7,000 to \$30,000, which are additional to the expression of interest and assessment fees.²¹ Currently, the expression of interest fee is \$53 and the assessment fee is \$2,000.²² Administrative costs for adopting a child from Guatemala are approximately \$17,700-\$19,300, Romania \$7,250-\$15,300, Korea \$10,500, Taiwan \$14,000-24,000 and Thailand requires a voluntary contribution of \$500.²³ China has administrative costs of \$6,000 plus costs for certification of documents, travelling to the country, visa application and migration health check.²⁴ Applicants wanting to adopt children from Colombia must be able to travel to Colombia on short notice and reside there for at least two months while the adoption order is being finalised.²⁵ Similarly, in the United States agency fees for intercountry adoption may range from \$US10,000 to \$US30,000.²⁶

¹³ 'Intercountry Adoption' National Adoption Information Clearing House, 1 at <http://www.calib.com/naic/pubs/s_inter.htm>; 'Immigration Visas Issued to Orphans Coming to the U.S. Top Countries of Origin' at <http://travel.state.gov/orphan_numbers.html>.

¹⁴ Adoptions Australia 1998-1999, Child Welfare Series, Australian Institute of Health and Welfare, Canberra, 8.

¹⁵ Adoptions Australia 1999-2000, Child Welfare Series, Australian Institute of Health and Welfare, Canberra, 14; Adoptions Newsletter (August 2000) 2(1), Department of Families, Youth and Community Care Queensland, Adoption Services Branch, 1 at <<http://www.families.qld.gov.au>>.

¹⁶ 30 adoptions were from Romania, 23 from the Philippines, 11 from Colombia and 2 from Sri Lanka, at Adoptions Australia 1999-2000, above n 15, 14.

¹⁷ Adoptions Australia 2000-2001, Child Welfare Series, Australian Institute of Health and Welfare, Canberra, 15-18.

¹⁸ Ibid.

¹⁹ Adoptions Newsletter (February 2002) 4(1), Department of Families, Adoptions Services Branch, 5 at <<http://www.families.qld.gov.au>>. As a result of the amendments made to the *Adoption of Children Act 1964* (Qld) by the *Adoption of Children Amendment Act 2002* (No 21), as of 1 July 2002 the Foreign Children's Adoption List and the General Children's Adoption List have been replaced by the 'expression of interest register' and the 'assessment register'.

²⁰ Adoptions Australia 2000-2001, above n 17, 43.

²¹ 'Adoption services—Foreign Children's Adoption program', Department of Families, Youth and Community Care Queensland Government, 4 at <<http://www.families.qld.gov.au>>.

²² Schedule 1 *Adoption of Children Regulation 1999* (Qld).

²³ Senator Hill, 'Intercountry Adoption Agreement with China', 1 at <<http://aph/parliamentaryinfo/>>

²⁴ Ibid.

²⁵ Adoption Newsletter (August 2000), above n 15, 9.

²⁶ 'Cost of Adopting', National Adoption Information Clearinghouse at <http://www.calib.com/naic/pubs/s_cost.htm>.

III OBJECTIVES OF THE HAGUE CONVENTION

The Hague Convention aims to establish safeguards to ensure intercountry adoptions take place in the child's best interests and with respect for his or her fundamental rights as recognised in international law.²⁷ A similar provision is found in s 10 of the Queensland Act, which states that the welfare and interests of the child concerned must be regarded as the paramount consideration. The Hague Convention also endeavours to establish a system for cooperation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale, or the trafficking of children.²⁸ This prevention though is only indirect, as the Hague Convention does not regulate criminal aspects of abuses against children.²⁹ It also seeks to ensure the recognition by Contracting States of adoptions made in accordance with the Hague Convention.³⁰ However, the Hague Convention only applies to Contracting States³¹ and to adoptions that create a permanent parent-child relationship.³²

Under Article 2(1) of the Hague Convention, a child need not be a national of the Contracting State to be adoptable, only 'habitually resident' in that Contracting State. However, if a child is a national of a Contracting State but not habitually resident in a Contracting State, the Hague Convention will not apply to that child.³³ The Hague Convention, therefore, only applies to refugee and internationally displaced children where the child and the prospective adoptive parents habitually reside in different Contracting States.³⁴ The Special Commission on the Implementation of the Hague Conference that convened in 1994 adopted the proposal of the Working Group to Study the Application to Refugee Children of the Hague Convention (with some amendments), and recommended that the Hague Convention should also apply to the more common cases involving children and adoptive parents who were habitually resident in the same Contracting State.³⁵ Australia, however, has declared that while it accepts the obligations imposed by the Hague Convention in its application to refugee and internationally displaced children, Australia is not bound by the recommendations of the Special Commission of 1994.³⁶

²⁷ Article 1(a), Paragraph 4 of the Preamble to *the Hague Convention*, Article 21 of *The United Nations Convention on the Rights of the Child*.

²⁸ Article 1(b) *Hague Convention*.

²⁹ G Parra-Aranguren, 'Explanatory Report #33 on The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption' (1993), 10 at <<http://www.hcch.net/e/conventions/exp133e.html>>.

³⁰ Article 1(c) *Hague Convention*.

³¹ Article 41 *Hague Convention*.

³² Article 2(2) *Hague Convention*. Parra-Aranguren, above n 29, 17; New South Wales Law Reform Commission, Report 81 (1997), Review of Adoption of Children Act 1965 (NSW), 397 ('NSW LRC R 81').

³³ 'Report of the Working Group to Study the Application to Refugee Children of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption' The Permanent Bureau, 12-14 April 1994, 5 at <<http://www.hcch.net/e/conventions/wgrpt33e.html>>.

³⁴ Parra-Aranguren, above n 29, 88; 'Report of the Working Group', above n 33, 4-5; 'Report of the Special Commission on the Implementation of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption', The Permanent Bureau, 17-21 October 1994, 4 at <<http://www.hcch.net/e/conventions/screport33e.html>>.

³⁵ 'Report of the Working Group', above n 33, 10; 'Report of the Special Commission', above n 34, 4.

³⁶ 'Full Status Report Convention #33', 2 at <<http://www.hcch.net/e/status/stat33.html>>.

IV SAFEGUARDS & MECHANISMS OF COOPERATION

A *Competent authorities*

Contracting States must designate a national Central Authority to carry out the duties imposed by the Hague Convention.³⁷ In Australia, the Commonwealth Attorney-General's Department is the Federal Central Authority and the Department of Families, Youth and Community Care (DFYCCQ) is the Queensland Central Authority.³⁸ The Central Authority may also allow public authorities or accredited bodies to perform its functions.³⁹ However, an accredited body under Article 10 must satisfy the minimum requirements set by Article 11, namely, to:

- (a) pursue non-profit objectives (within limits established by competent authorities); and
- (b) be directed and staffed by persons qualified by their ethical standards and training or experience in the field of intercountry adoption; and
- (c) be subject to supervision by the competent authorities regarding its composition, operation and financial situation.

Conversely, under Article 22 of the Hague Convention, non-accredited bodies or persons are not limited to pursue non-profit objectives.⁴⁰ Article 22 allows private adoptions, subject to the reports under Articles 15 and 16 being prepared under the responsibility of the Central Authority.⁴¹ They are still to meet the requirements of integrity, professional competence, experience and accountability of that State and to be qualified by ethical standards and training or experience to work in the field of intercountry adoption.⁴² Moreover, Contracting States can declare to the depositary of the Hague Convention⁴³ that only Central Authorities, public authorities, or accredited bodies are to arrange adoptions.⁴⁴

The Commonwealth-State agreement provides that in order for a body to be eligible for accreditation, the body:

- must be an incorporated non-profit organisation; and
- cannot be a party to an agreement for the establishment of adoption arrangements with overseas countries; and

³⁷ Article 6 *Hague Convention*.

³⁸ Article 6(2) of the *Hague Convention* allows Federal systems to appoint more than one Central Authority.

ACT—Australian Capital Territory Family Services, NSW—New South Wales Department of Community Services, Norfolk Island—Norfolk Island Community Services, NT—Northern Territory Health Services, SA—South Australian Department of Human Services, TAS—Tasmanian Department of Health and Human Services, VIC—Victorian Department of Human Services, WA—Western Australian Department of Family and Children's Services, in 'Authorities—Intercountry Adoption Convention' at <http://www.hcch.net/e/authorities/caadopt.html>.

³⁹ Articles 8 and 9 *Hague Convention*.

⁴⁰ Parra-Aranguren, above n 29, 56; Pfund, above n 3, 62.

⁴¹ Article 22(5) *Hague Convention*; Pfund, above n 3, 62.

⁴² Article 22(2)(a) and (b) *Hague Convention*.

⁴³ The depositary of the Hague Convention is the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

⁴⁴ Article 22(4) *Hague Convention*.

- must employ a principal officer with a social science qualification and experience in adoption in order to supervise the adoption undertaken by the body; and
- must employ professional staff with appropriate qualifications; and
- must have accommodation suitable for the conduct of assessment, interviews, training and support of adoption arrangements that does not form part of, or is not adjacent to, accommodation that is used by an organisation that represents the adoptive parents.⁴⁵

In Queensland only the DFYCCQ can arrange adoptions.⁴⁶

B *Duties of the State of origin*

Under Article 4 of the Hague Convention, an adoption can only take place if competent authorities of the State of origin:

1 *Have established that the child is adoptable*

‘Adoptable’ is undefined, however Parra-Aranguren in his commentary to the Hague Convention states that ‘adoptable’ is in accordance with legal, psychological, social and cultural factors.⁴⁷ It is suggested that countries must take particular care to ensure children are declared abandoned or orphaned before considering the child for adoption. In particular, children should not be ‘adoptable’ immediately following a socio-political upheaval or natural disaster, where children may only be temporarily separated from their parents.⁴⁸ It would have been preferable for the Hague Convention to have defined ‘adoptable’ clearly and perhaps outlined circumstances in which countries are prohibited from allowing children to be adopted, unless it is in the child’s best interests.

2 *Have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests*

This subsidiary principle arose from Article 21 of the *United Nations Convention on the Rights of the Child* (“the CRC”), which requires national options to be exhausted before placing a child abroad. However, during the drafting of the Hague Convention, delegates concurred that, in certain circumstances, intercountry adoption may be in the child’s best interests, even if a family was available in the country of origin, for instance, if the adoption is by relatives abroad or if the child is handicapped and he or she cannot be adequately cared for in the country of origin.⁴⁹ The guiding principle is always the best interests of the child. Countries in upheaval or emergency situations should be providing temporary measures to care for children and taking steps to reunite them with their family or relatives.⁵⁰ Where children are adoptable, national adoptions

⁴⁵ The Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Fifteenth Report (June 1998) 10-11 at <<http://www.aph.gov.au>>.

⁴⁶ The Northern Territory Australian Aiding Children Adoption Agency Inc, an accredited body, can conduct intercountry adoptions in the Northern Territory, at <<http://www.hcch.net/e/authorities/caadopt.html>>; Adoptions Australia (2000-2001), above n 17, 26, 40.

⁴⁷ Parra-Aranguren, above n 29, 20; Cantwell, above n 9, 14.

⁴⁸ Cantwell, above n 9, 9.

⁴⁹ Parra-Aranguren, above n 29, 21.

⁵⁰ Cantwell, above n 9, 9.

should be encouraged and preference should be given to nationals (if the required criteria are satisfied) to minimise the necessity of intercountry adoptions. However, as the third paragraph of the preamble suggests, a ‘family’ in a receiving State is to be preferred over institutional care in the country of origin. This represents a change from Article 21 of the CRC, in which non-permanent foster placement and institutional care in the country of origin are preferred over intercountry adoption.⁵¹

3 *Have ensured that:*

- (1) *persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin; and*
- (2) *such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing; and*
- (3) *the consents have not been induced by payment or compensation of any kind and have not been withdrawn; and*
- (4) *the consent of the mother, where required, has been given only after the birth of the child*

Counselling to those giving consent at this point is only general, as the prospective parents are not yet known.⁵² Under Article 9(c) of the Hague Convention, Central Authorities, public or accredited bodies are to promote the development of adoption counselling and post-adoption services. It is suggested that the Hague Convention should have required that counsellors trained in the field of intercountry adoption provide such counselling. There should also be a minimum amount of counselling required of the relevant persons, in terms of sessions/time, to enable the relevant persons to be properly counselled and informed. For instance, a 15 minute counselling session would not be adequate to counsel and inform the relevant persons and bodies of the effects of the adoption.

The requirement to provide parents, institutions and authorities with information on whether their legal relationship with the child will be terminated is a positive step as, in some cases, parents in the past have been misled into relinquishing their child in the belief that the legal relationship was not severed.⁵³ Additionally, parties should be informed about consent and the revocation of consent⁵⁴ and, where available, whether they may exercise rights of contact with the child and adoptive parents through correspondence or other means after the adoption. In cases of adoptions by relatives, the relevant persons and bodies should also be informed that the legal relationship will only be severed as between the biological parents and the child and not with other relatives.⁵⁵

⁵¹ Detrick and Vlaardingerbroek, above n 2, 21.

⁵² Parra-Aranguren, above n 29, 22. Article 29 of the *Hague Convention* prohibits contact between adoptive parents and relinquishing parents until Article 4(a)-(c) and Article 5(a) have been complied with.

⁵³ Parra-Aranguren, above n 29, 23.

⁵⁴ Ibid.

⁵⁵ Ibid.

The requirement that consent be ‘freely’ given, that is, not obtained under duress, fraud, mistake or undue influence⁵⁶ is vitally important in the fight against trafficking and sale of children. Under Article 4(c)(2) of the Hague Convention, Central Authorities must assume responsibility and make enquiries of the country of origin to determine whether consent was informed and freely given. Under the Queensland Act defective consent includes fraud, duress, or other improper means.⁵⁷ Equally important, is the requirement that consent not be induced by payment or compensation of any kind.⁵⁸ This requirement should be read in conjunction with Articles 8 and 32 of the Hague Convention.⁵⁹ Article 8 requires Central Authorities and public authorities to take ‘all appropriate measures’ to prevent ‘improper’ financial or ‘other gain’ in connection with the adoption. What constitutes ‘appropriate measures’ is left to the laws of the Contracting States. Therefore, the success of this provision will largely depend on countries’ willingness to implement measures to enforce that requirement. Under subsection 43(1) of the Queensland Act, a person is not to (whether before or after the birth of the child concerned) make, give or receive, or agree to make, give or receive, a payment or reward, for or in consideration of:

- (a) the adoption or proposed adoption of a child; or
- (b) the giving of consent or the signing of an instrument of consent, to the adoption of a child; or
- (c) the transfer of possession or custody of a child with a view to the adoption of a child; or
- (d) the making of arrangements with a view to the adoption of a child.

A person who commits an offence against the Queensland Act can be liable to a penalty not exceeding 40 penalty units or imprisonment not exceeding six months.⁶⁰

Under Article 8 of the Hague Convention, however, only ‘improper’ financial gain is prohibited, allowing ‘proper’ financial gain to be made.⁶¹ Neither ‘improper financial gain’ nor ‘other gain’ is defined in the Hague Convention, which leaves room for diverse interpretations of what constitutes proper and improper gain. As the New South Wales Law Reform Commission (“the NSW LRC”) pointed out, trafficking and selling children can be easily held to be at the extreme end of the ‘improper’ scale, the difficulties arise in determining when something borders on the ‘improper’.⁶² For instance, when considering a donation made by prospective adoptive parents to the child’s orphanage, which can be compulsory in some countries, when can it be said that the donation is so vital and onerous as to constitute improper financial gain?⁶³ The NSW LRC suggested separating the donation from the adoption process to avoid conflicts of interest between the adoptive parents and the overseas agency or orphanage.⁶⁴ The Special Commission on the Practical Operation of the Hague Convention, which convened in 2000, recommended that donations by prospective adopters to bodies involved in the adoption process must not be sought, offered or

⁵⁶ Ibid.

⁵⁷ Paragraph 24(1)(b) *Adoption of Children Act 1964* (Qld).

⁵⁸ Article 4(c)(3) *Hague Convention*.

⁵⁹ Parra-Aranguren, above n 29, 33.

⁶⁰ Section 53 *Adoption of Children Act 1964* (Qld).

⁶¹ Parra-Aranguren, above n 29, 76.

⁶² NSW LRC R 81, above n 32, 403-404.

⁶³ Ibid 404.

⁶⁴ Ibid 407.

made.⁶⁵ Similarly, any support offered to improve national protection services in the country of origin should not compromise the integrity of the adoption process or create a dependency on income derived from intercountry adoptions.⁶⁶ These are issues which the Hague Convention could have addressed or at least made some attempt to define and/or clarify and/or provide some guidelines to which countries should adhere.

Improper financial gain was debated during the drafting of Article 21 of the CRC. In that instance, the Venezuelan delegate believed that all financial gain should be prohibited and stated that it was impossible to combat the existing market in child trafficking whilst simultaneously institutionalising that market by permitting persons dealing with intercountry adoptions to make a financial gain.⁶⁷ Thus, the Hague Convention missed an opportunity to make the rights of the child the paramount consideration by prohibiting all forms of financial gain, or at least, by setting parameters or defining financial or non-financial gain or circumstances that would fall into either category.

Under Article 32 of the Hague Convention, no one is to derive any improper financial or other gain from an activity related to an intercountry adoption. Only reasonable costs and expenses are to be charged and directors, administrators and employees or bodies involved in an adoption are not to receive any remuneration ‘unreasonably high’ in relation to services rendered.⁶⁸ The comments made above regarding improper financial gain are equally applicable here. The issue of ‘reasonable costs’ poses problems when costs vary greatly from one country to another: for instance, in Brazil legal costs are \$5,000 plus \$1,000 translation cost.⁶⁹ Consequently, what might be regarded as ‘reasonable’ in one country can be unreasonably high and improper financial gain in another country. Australia’s Central Authorities must therefore scrutinise overseas costs to assist in preventing improper financial gain.⁷⁰

An inherent weakness, however, in prohibiting financial gain is the fact that the Hague Convention does not outline consequences for breach.⁷¹ As pointed out earlier, the Hague Convention only aims indirectly to prevent the sale and trafficking of children by establishing safeguards for countries to abide by when conducting adoptions. It does not directly prevent abuses of children’s rights nor does it penalise contraventions. Furthermore, delegates believed that automatic refusal to recognise the adoption, where an infringement occurred, would constitute too drastic a measure.⁷²

⁶⁵ ‘Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption’, 28 November-1 December 2000, Permanent Bureau, 27-30 at http://www.hcch.net/e/conventions/adospec_e.html.

⁶⁶ Ibid.

⁶⁷ M Freeman and P Veerman, *The Ideologies of Children’s Rights* (Martinus Nijhoff Publishers: Dordrecht, 1992) 107; S Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers: The Hague, 1999) 353.

⁶⁸ Article 32 *Hague Convention*.

⁶⁹ NSW LRC R 81, above n 32, 405; C Gray, NSW Law Reform Commission, *Research Report 6 Intercountry Adoption and Parent Support Groups*, para 7.44 (“NSW LRC RR 6”) at <http://www.lawlink.nsw.gov.au>.

⁷⁰ NSW LRC R 81, above n 32, 405.

⁷¹ Parra-Aranguren, above n 29, 76.

⁷² Ibid.

Requiring the mother's consent only after the birth of the child is an important provision in assisting to curb practices of pressuring mothers while at hospitals or clinics, into giving up their child before it is born, particularly unwed teenage mothers in Latin American countries⁷³ and generally.⁷⁴ Under paragraph 24(1)(f) of the Queensland Act the chief executive⁷⁵ must not make an adoption order if it appears that the instrument of consent was signed by the mother before the birth of the child. Furthermore, s 24(2) of the Queensland Act provides that:

the chief executive shall not make an adoption order in reliance on an instrument of consent signed by the mother of the child within 5 days after the birth of the child unless the chief executive is satisfied, on the certificate of a medical practitioner or on other adequate evidence, that, at the time the instrument was signed, the mother was in a fit condition to give the consent.

Article 4(c)(4) of the Hague Convention, however, could have been made more effective by setting a minimum period, for instance 30 days, to allow mothers time to think about the adoption or other possibilities and countries could legislate for longer periods if necessary.⁷⁶ Similarly, the Hague Convention should have required a minimum revocation period, for instance, of 30 days.⁷⁷ This way, once mothers are counselled, they will have time to consider their decision or revoke their consent.⁷⁸

- 4 *Have ensured, having regard to the age and degree of maturity of the child, that:*
- (1) *he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where the consent is required; and*
 - (2) *consideration has been given to the child's wishes and opinions; and*
 - (3) *the child's consent to the adoption, where such consent was required, has been given freely, in the required legal form, and expressed or evidenced in writing; and*
 - (4) *such consent has not been induced by payment or compensation of any kind*⁷⁹

During the drafting of the Hague Convention, the age at which a child's consent would be required was discussed, with some delegates suggesting a minimum age, however, the broader approach was favoured and the discretion rests on the competent authorities to determine when a child's wishes and consent should be considered.⁸⁰ States, therefore, could take advantage of this provision and may always consider the wishes of the child, at any age, having regard to his or her level of maturity. Under section 26 of the Queensland Act, an adoption order for a 12-year-old is not to be made without the child's consent, unless there are special reasons related to the welfare and interests of the child. The NSW LRC suggested that a 12-year-old's consent should be the *only* consent required.⁸¹ Importantly, irrespective of other consents that may be required, a

⁷³ Calcetas-Santos, above n 1, 8-11.

⁷⁴ Parra-Aranguren, above n 29, 25.

⁷⁵ Under section 6 of the *Adoption of Children Act 1964* (Qld) 'chief executive for child protection' means the chief executive of the department in which the *Child Protection Act 1999* (Qld) is administered.

⁷⁶ NSW LRC RR6, above n 69, para 5.68.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Article 4(d)(1)-(4) *Hague Convention*.

⁸⁰ Parra-Aranguren, above n 29, 26.

⁸¹ NSW LRC R 81, above n 32, 178.

child's wishes and opinions are to be considered and *taken into account*, not merely allowing the child to express his or her views.⁸² This mirrors Article 12(1) of the CRC, which states that:

State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, those views of the child being given due weight in accordance with the age and maturity of the child.⁸³

Under Article 13(1) of the CRC, a child also has a right to freedom of expression.⁸⁴ The comments made above regarding counselling and inducing consent through payment or compensation, are equally applicable here.

Once the Central Authority is satisfied that a child is adoptable, it prepares a report that includes information regarding the child's identity, adoptability, background, social environment, family history, medical history (including the family's medical history) and any special needs of the child.⁸⁵ The Central Authority is to give due consideration to the child's upbringing and to his or her ethnic and cultural background, to ensure that consents have been obtained in accordance with Article 4 and to determine, on the basis of the reports relating to the child and the prospective adoptive parents, that the placement is in the child's best interests.⁸⁶ Once the report is finalised, it is transmitted to the Central Authority of the receiving State together with reasons for the determination and placement (without revealing the identity of the child's parents in the State of origin) and proof that the consents have been obtained.⁸⁷

C Duties of the receiving State

Under the Hague Convention, the Central Authority of the receiving State has certain minimum responsibilities, which enables Australia as a Contracting State to expand upon those requirements. Under Article 5, the competent authority of the receiving State must:

- 1 *Have determined that the prospective adoptive parents are eligible and suited to adopt*

Under regulation 7 of the *Adoption of Children Regulation 1999* (Qld) ("the Queensland Regulation") to be eligible to be on the expression of interest register for non-resident children, a person must:

- (a) be resident or domiciled in Queensland; and
- (b) be an Australian citizen or married to an Australian citizen; and

⁸² Parra-Aranguren, above n 29, 26.

⁸³ Detrick, above n 2, 213-214.

⁸⁴ Ibid 231.

⁸⁵ Article 16(1)(a) *Hague Convention*.

⁸⁶ Article 16(1)(b), (c) and (d) *Hague Convention*.

⁸⁷ Article 16(2) *Hague Convention*. Section 45 of the *Adoption of Children Act 1964* (Qld) prohibits publication of the names of the applicant, child, parent of the child or adopter or any matter reasonably likely to identify those persons in relation to an application under the Act or under another law of a State or Territory, or the proceedings of an application.

- (c) not be suffering from a physical or mental condition or have a physical or mental disability to an extent that the person could not provide a high level of stable long term care for a child; and
- (d) have been married for at least two years; and
- (e) not have more than four children in their custody; and
- (f) be less than 47 years at the time the chief executive received the expression of interest.⁸⁸

However, with special needs children or in exceptional circumstances, a single person can apply to be on the adoption list provided he or she does not have more than four children in his or her custody and is less than 41 years (if not a previous adopter) or 43 years (if a previous adopter).⁸⁹ Suitability is determined under paragraph 13B(2)(b) of the Queensland Act. The chief executive assesses whether the persons named in the expression of interest register are of good repute and fit and proper persons to become adoptive parents. The chief executive takes into consideration the quality and stability of the persons' marriage, the persons' capacity to be adoptive parents (emotionally and financially) and the persons' capacity to ensure a child's safety and wellbeing.⁹⁰ The chief executive also has regard to the persons' attitudes and understanding of the child's physical and emotional development, of the responsibilities of parenthood, of the issues relevant to adoptive parents (including informing the child about the adoption) and of the significance of the adopted child's natural family.⁹¹ Under section 14 of the Queensland Act the chief executive may, before making an adoption order, make a further assessment of the prospective adopters.

Consequently, regulations 7 and 9 of the Queensland Regulation allow married couples or a single person (if married living separately from his or her spouse)⁹² to be on the expression of interest register, but not de facto couples (same sex or heterosexual). Under regulation 9 one of the de facto spouses could apply individually to adopt a special needs child or in exceptional circumstances. Arguably, an individual homosexual or lesbian could come under regulation 9. Nonetheless, even if expressions of interest by homosexuals or lesbians or de facto couples were accepted in Queensland, the country of origin will ultimately determine whether they find the applicants suitable. Moreover, countries could rely on Article 24 of the Hague Convention and refuse applications by homosexuals or lesbians, or not recognise such adoptions, on the basis that it is contrary to that country's public policy.⁹³ Before the Hague Convention came into being, the Special Commission (on intercountry adoption)⁹⁴ and the Diplomatic Conference considered whether de facto couples, same sex couples, lesbian or homosexual individuals could be covered by the Hague Convention and, ultimately, delegates opted to limit themselves to the issue of 'spouses' male and female and 'a

⁸⁸ Regulation 7(2)(a)-(f) *Adoption of Children Regulation 1999* (Qld); s 13AC *Adoption of Children Act 1964* (Qld).

⁸⁹ Regulation 9(3)-(6) *Adoption of Children Regulation 1999* (Qld), paragraph 12(3)(a)-(c) *Adoption of Children Act 1964* (Qld).

⁹⁰ Regulations 11(a) and (b) *Adoption of Children Regulation 1999* (Qld).

⁹¹ Regulation 11(c) *Adoption of Children Regulation 1999* (Qld).

⁹² Section 12(4) *Adoption of Children Act 1964* (Qld).

⁹³ Parra-Aranguren, above n 29, 14.

⁹⁴ Ibid 4-5, the first meeting of the Special Commission took place from 11-21 June 1990, the second meeting took place from 22 April to 3 May 1990, and the third meeting took place from 3-14 February 1992.

person', married or single.⁹⁵ The issue of homosexuals or lesbians being able to adopt was considered too sensitive and not within the scope of the Hague Convention.⁹⁶

It is suggested that, in keeping with the Preamble (Paragraphs 1 and 3) to the Hague Convention and the principle that the best interests of the child are the paramount consideration, de facto couples (heterosexual or same sex) should be permitted under the Hague Convention and the Queensland legislation to be on the expression of interest register.⁹⁷ Neither the term 'family' nor 'family environment' is defined in the Hague Convention or in the CRC. Given the diverse types of families throughout the world, with extended, blended, single and interracial families, it is unrealistic to limit the scope of 'family' to a nuclear family with married spouses. De facto couples and same sex couples or a single person can provide a child with a family environment in an atmosphere of happiness, love and understanding as required by the Hague Convention. Should de facto couples be permitted to adopt, the same requirements should apply regarding the quality and duration of the relationship.⁹⁸ For instance, a requirement could be that de facto couples have lived together on a genuine domestic basis in a relationship based on intimacy, trust and personal commitment to each other for two years, as required under section 260 of the *Property Law Act 1976* (Qld) when dealing with financial matters between de facto spouses. In relation to same sex couples, as the NSW LRC pointed out, there is no positive or negative correlation between parenting ability and sexual orientation.⁹⁹ There is, therefore, no reason why homosexuals and lesbians should not be allowed to be on the expression of interest register.¹⁰⁰ The focus should be on whether the person is suitable to meet and promote the child's best interests and not on stereotypes and assumptions about homosexuality and marital status.¹⁰¹ Sexual orientation should only be considered in relation to suitability when matching an applicant with a particular child.¹⁰²

Furthermore, in light of anti-discrimination legislation, eligibility requirements should be in conformity with those principles, provided that the best interests of the child remain the paramount consideration.¹⁰³ The best interests of the child are not being served if potentially suitable persons are being excluded.¹⁰⁴ The NSW LRC recommended that legislation should only provide minimum requirements for eligibility and that trained professionals in the field should select the best possible parent for a child.¹⁰⁵

Once the Central Authority is satisfied that applicants are eligible and suited to adopt, it prepares an assessment report to transmit to the country of origin.¹⁰⁶ The report includes information about the applicants':

⁹⁵ Ibid 14-15.

⁹⁶ Ibid.

⁹⁷ NSW LRC R 81, above n 32, 229.

⁹⁸ Ibid 230.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid 233.

¹⁰⁴ Ibid 232.

¹⁰⁵ Ibid 233.

¹⁰⁶ Article 15 *Hague Convention*.

- identities, eligibility and suitability to adopt;
- background;
- family and medical history;
- social environment;
- reasons for adoption;
- ability to undertake an intercountry adoption; and
- the characteristics of the children for whom they would be qualified to care.¹⁰⁷

2 *Have ensured that prospective adoptive parents have been counselled as may be necessary*

Regulation 11(e) of the Queensland Regulation requires the chief executive to have regard to the extent of the person's (the person named in the expression of interest register) participation in educational programs relevant to the adoption, including any programs conducted by the chief executive. The DFYCCQ requires a person who lodges an expression of interest to attend Adoption Educational Sessions.¹⁰⁸ These educational sessions are separate from other information days and educative activities provided by support groups and community organisations.¹⁰⁹ No other education seminar is required after that. This is similar to the approach taken in the Netherlands where prospective adopters are required to attend the information programs before the assessment report is done.¹¹⁰ This provides a good opportunity for future adoptive parents to understand the differences and similarities between being a birth parent and an adoptive parent.¹¹¹ Particularly, it allows for the exploration of their expectations, and provides opportunities to learn about the child's possible experiences in the country of origin and future adjustments, to learn about challenges ahead and to assess their own ability to become adoptive parents.¹¹² In this way, parents can determine at an early stage whether they are able to undertake the responsibilities or opt out of the adoption program.¹¹³ This enables applicants to be better prepared and informed about the adoption before eligibility and suitability are determined and also to meet other applicants at an early stage of the process to develop a support base.¹¹⁴

3 *Have determined that the child is or will be authorised to enter and reside permanently in the receiving State*

Under section 18D of the Queensland Act an adoption order may be made by the chief executive only if, at the time of the order:

- the child is not prevented from residing permanently in Australia; and
- the chief executive is satisfied that arrangements for the adoption have been made under the Hague Convention (and the law of the country of origin); and

¹⁰⁷ Ibid.

¹⁰⁸ 'Considering adoptions from overseas?', Department of Families, Queensland Government at <<http://www.families.qld.gov.au/adoptions/considadoptfromoverseas.html>>.

¹⁰⁹ Adoptions Newsletter (April 2000) 1(3), Department of Families, Youth and Community Care Queensland, Adoption Services Branch, 7 at <<http://www.families.qld.gov.au>>.

¹¹⁰ NSW LRC R 81, above n 32, 431; Cantwell, above n 9, 14.

¹¹¹ Cantwell, above n 9, 14.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

- the chief executive is satisfied that the Central Authority of the country of origin has approved the adoption.

Queensland is the only State that allows the Director General of the DFYCCQ to approve both national and intercountry adoption orders.¹¹⁵ Pursuant to the Commonwealth-State agreement, the DFYCCQ can continue working with countries that have not ratified the Hague Convention until that agreement is reviewed.¹¹⁶ Under Article 17 of the Hague Convention any decision in the State of origin that a child should be entrusted to the prospective adoptive parents may only be made if:

- (a) the Central Authority of that State has ensured that the prospective adoptive parents agree; and
- (b) the Central Authority of the receiving State has approved the decision; and
- (c) the Central Authorities of both States have agreed that the adoption may proceed; and
- (d) it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible to adopt and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State.

Central Authorities of both States are then required to take all necessary steps to obtain permission for the child to leave the State of origin and enter into and reside permanently in the receiving State.¹¹⁷ Under Article 19 of the Hague Convention a child may then be transferred to the receiving State, in secure and appropriate circumstances and, where possible, accompanied by the prospective adoptive parents.

V RECOGNITION OF ADOPTION

An adoption certified by the competent authority (which complies with the Hague Convention) will be automatically recognised in other Contracting States.¹¹⁸ Under the Queensland Act foreign adoptions are recognised under Division 1 of Part 4. Pursuant to Article 26(1) of the Hague Convention, the recognition of an adoption includes the recognition of:

- (a) the legal parent-child relationship between the child and his or her adoptive parents; and
- (b) parental responsibilities of adoptive parents for the child; and
- (c) the termination of the pre-existing legal relationship of the child with his or her mother and father, if the adoption has this effect in the Contracting State where it was made.

The Hague Convention applies to ‘full adoptions’ (the legal relationship between the child and the biological parents is completely severed) and to ‘simple adoptions’ (where the legal relationship between the child and the biological parents is not completely severed).¹¹⁹ If the State of origin makes a simple adoption order, Article 27 of the

¹¹⁵ ‘Foreign Children’s Adoption Program’, Department of Families, Youth and Community Care Queensland, 2-3 at <http://www.families.qld.gov.au/adoptions/applying_foreign.html>; Adoptions Australia 2000-2001, above n 17, 36.

¹¹⁶ Ibid.

¹¹⁷ Article 18 *Hague Convention*.

¹¹⁸ Article 23 *Hague Convention*.

¹¹⁹ Parra-Aranguren, above n 29, 17; Duncan, above n 1, 10-11; ‘Report on the Working Group’, above n 33, 5.

Hague Convention allows a receiving State to convert the adoption into a full adoption, provided that the law allows it and the consents in Article 4 of the Hague Convention have been given. The adoption will then be recognised by other Contracting States under Article 23 of the Hague Convention.¹²⁰ This has been provided for under Division 2 of Part 4 of the Queensland Act. If adoption orders are not finalised in the State of origin, the child will be under the guardianship of the Commonwealth Minister for Immigration and Multicultural Affairs until the adoption order comes into effect (usually 12 months).¹²¹ The DFYCCQ will normally have this responsibility delegated to them by the Commonwealth.¹²²

The recognition of adoptions is the most useful mechanism provided for under the Hague Convention. This mechanism eliminates the need to legalise the adoption yet again when the child arrives in the receiving State, it guarantees the rights of children in the receiving State and it gives adoptive parents duties and responsibilities regarding the child or children.

VI POST-ADOPTION ISSUES—CULTURE, RACE, RELIGION & LANGUAGE

The value of and the need for continuity in a child's ethnic or cultural background has now been widely acknowledged and accepted.¹²³ There is a growing body of opinion that cultural heritage is important to the development of a child's identity.¹²⁴ As noted earlier, under Article 16(1)(b) of the Hague Convention, the country of origin is to give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background. Intercountry adoption children (especially older children) are likely to undergo both a grieving process and a period of adjustment with a new family, language and culture.¹²⁵ It is therefore in the child's best interests to minimise the adjustments required by placing the child, where possible, in a familiar cultural environment.¹²⁶ With general adoptions, the chief executive is to have regard to the indigenous or ethnic background and the cultural background of the child and is to approve a prospective adopter who (or prospective adopters, one of whom) has a similar indigenous or ethnic background and cultural background, unless no adopters are available and cannot reasonably be expected to become available, or the best interests of the child could not be best served by doing so.¹²⁷ It is suggested that the same placement principle should apply with intercountry adoptions, as it could make children's adjustment into a new country easier and less traumatic.

In determining the persons' suitability, the chief executive considers the persons' ability and willingness to understand the child's background and to develop and maintain the child's 'indigenous, ethnic and cultural identity'.¹²⁸ Regulations 14(2)(a) and (b) of the Queensland Regulation require the chief executive to have regard to the persons':

¹²⁰ Article 27(2) *Hague Convention*.

¹²¹ Adoptions Australia 1998-1999, above n 14, 7-8.

¹²² Section 27C *Adoption of Children Act 1964* (Qld).

¹²³ NSW LRC R 81, above n 32, 318.

¹²⁴ *Ibid* 312.

¹²⁵ *Ibid* 318; Humphrey, above n 9, 314.

¹²⁶ NSW LRC R 81, above n 32, 318.

¹²⁷ Section 18A *Adoption of Children Act 1964* (Qld).

¹²⁸ Regulation 11(d) *Adoption of Children Regulation 1999* (Qld).

- (a) understanding of, and interest in, the country from which the child is to be adopted and the culture of that country; and
- (b) ability and willingness to continue to learn about the country and its culture, after placement of the adoptive child from that country with the persons and to help the child learn about the country and its culture.

However, neither the term ‘culture’ nor ‘ethnicity’ is defined in the Queensland Act or Regulation. The NSW LRC recommended that for the purpose of the legislation ‘cultural heritage’ be defined as: ‘beliefs, morals, laws, customs, religion, superstitions, language, diet, dress and race’.¹²⁹ Whether the Queensland Act or Regulation intended that the concept of ‘culture’ or ‘ethnicity’ be this expansive is unclear.

Whilst regulations 11 and 14 of the Queensland Regulation are valuable for ascertaining whether prospective adoptive parents will be prepared to continue a child’s cultural heritage, they neglect to mention specifically race, religion and language. Regulation 14, for instance, concentrates on the child’s ‘country’ and ‘its culture’. The NSW LRC, when examining this issue of cultural placement (‘the heritage placement principle’), recommended that if the applicants were of a different culture to the child they should demonstrate:

- the capacity to assist the child to develop a cultural identity; and
- a willingness to learn about and teach the child about his or her cultural heritage; and
- a willingness to foster links with that heritage; and
- the capacity to help the child should the child encounter racism.¹³⁰

The Queensland legislation already has in place the first two requirements, however, the last two requirements are equally important and should be incorporated. It is insufficient for parents to assert that they will be willing to help the child learn about the country and its culture if parents are not actively involved in seeking to have contact with the child’s cultural or ethnic community so that the child can also develop relationships with people from his or her cultural background. This will enable both adoptive parents, adopted children and siblings to take part in activities and events conducted by the particular ethnic community and to develop a support base, to which they can turn for assistance if experiencing difficulties. Making this contact may be more difficult in circumstances, for example, where the ethnic or cultural community in Queensland is relatively small or non-existent. Nonetheless, it should be encouraged and perhaps parents and children could be part of a larger community that shares the same cultural traditions as the country of origin. For instance, if a child is adopted from Colombia and that community in Queensland is too small or non-existent, then the Latin American community could be approached, as it shares the same culture and language.

The capacity and willingness of adoptive parents to help the child cope with racism should also be included amongst the factors considered. As was pointed out by the NSW LRC, that parents make the effort to acquaint a child with his or her cultural background is not enough to prepare that child for racial discrimination and prejudice which may be encountered at school or in the community.¹³¹ It would be difficult for

¹²⁹ NSW LRC R 81, above n 32, 302.

¹³⁰ Ibid 320.

¹³¹ Ibid 315.

parents who are not members of a minority group themselves to understand the importance and implications of race and discrimination.¹³² The issue of race and race identity and discrimination is one that would be more likely to emerge as a child grows older and is not solely under the parent's protection.¹³³ With a large number of the intercountry adoptions being of children from India, Korea, Sri Lanka and Thailand, adoptive parents should be especially aware of and prepared to help a child cope with racism and be able to engender in the child a positive sense of race identity.¹³⁴

Further matters for which provision should have been made in the Queensland Act are:

- the determination of whether adoptive parents would be willing to raise a child in a particular religious denomination; and
- adoptive parents' willingness to continue a child's first language.¹³⁵

The child's religion is a matter to be considered by the country of origin when preparing its report under Article 16 of the Hague Convention (which resembles Article 20(3) of the CRC).¹³⁶ Under Article 14(1) of the CRC, State Parties are to respect the right of a child to freedom of thought, conscience and *religion*.¹³⁷ The adoptive parents' attitude towards raising the child in a particular religion is therefore important if the child wishes to be of a particular religion, or in cases involving adoption of older children. As with cultural factors, this may be difficult if the religious group is a relatively small one. However, parents should endeavour to maintain the religious link if that is the child's wish and it is in the child's best interests.

Similarly, language should be a matter for consideration, particularly with older children with developed speech patterns, or where the child wished to maintain his or her first language. The continuation of the child's language may be important to the child and provide a connection to his or her culture and past.¹³⁸ Parents could also attempt to learn the child's language (or at least words and phrases), which may in turn assist with understanding the child, his or her background and culture. Moreover, under Article 30 of the CRC:

in those States in which ethnic, religious or linguistic minorities or persons of indigenous origins exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion or to use his or her own language.¹³⁹

¹³² Ibid.

¹³³ Ibid; Humphrey, above n 9, 129.

¹³⁴ C Bagley, *International Adoption and Transracial Adoption A Mental Health Perspective* (Avery: Aldershot, 1993) 74.

¹³⁵ Under paragraph 13C(c) of the *Adoption of Children Act 1964* (Qld), the chief executive is to have regard to the wishes of the child's parents, as expressed in the consent, with respect to religious upbringing, in cases of a special needs child or in adoptions by relatives.

¹³⁶ Article 16(1)(b) *Hague Convention*.

¹³⁷ 'Special Rapporteur on Religious Intolerance', Child Rights Advocacy Project at <<http://193.129.255.93/mcr/sri.htm>>.

¹³⁸ NSW LRC R 81, above n 32, 317.

¹³⁹ Detrick, above n 2, 531.

This is a right conferred on individual children belonging to minority groups or who are indigenous which is distinct from, and additional to, the other rights enjoyed under the CRC.¹⁴⁰ Also, under Article 29(1)(c) of the CRC an aim, as regards education of a child, is the development and respect for the child's parents and his or her own cultural identity, language and values of the country from which he or she may originate and for civilisations different from his or her own.¹⁴¹

VII FINAL RECOMMENDATIONS

A Consent

It is suggested that the Hague Convention and the Queensland Act should have provided children with the ability to revoke their consent or, at least, veto their own adoption.¹⁴² A child's ability to revoke his or her consent could have been easily included in Article 4(d) of the Hague Convention. If children's opinions and consent are considered to be important, then equally so, is their ability to revoke that consent. The NSW LRC recommended children, like parents, should have the ability to revoke consent.¹⁴³

Furthermore, Central Authorities must recognise and accept that children, especially older children, should be more actively involved in the adoption process and in deciding matters affecting their own future. Children and youth should be allowed to determine if they find the potential adoptive family suitable.¹⁴⁴ If the child or youth does not consent to the adoption, then an adoption should not proceed.¹⁴⁵

Further relevant factors are the consent and attitudes to the adoption of the children of the prospective adoptive parents.¹⁴⁶ If the children of the prospective adoptive parents disapprove or do not consent to the adoption, then this ought to be a strong indication that an adoption should not be allowed as it could have extremely adverse effects on the adopted child. This would obviously not be a welcoming environment for a child when, on arrival in his or her new family, he or she may be alienated or ignored by his or her new siblings. Hence, it would be in the best interests of both the adopted child and their future siblings for the latter to consent to, and approve of, the adoption and to be counselled as to the effects of the adoption.

When arranging adoptions of children from non-convention countries, Australia needs to enter into bilateral arrangements (as it has with China)¹⁴⁷ and to ensure that the consent of parents and children has been obtained freely and under the same guidelines

¹⁴⁰ Ibid 536.

¹⁴¹ Ibid 537.

¹⁴² 'Intercountry Adoption, Committee on the Rights of the Child, Guides to Implementation' at <<http://www.unicef-icdc.org/infor...y-adoption/committee/6-guides.htm>>.

¹⁴³ NSW LRC R 81, above n 32, 177.

¹⁴⁴ 'Intercountry Adoption, Committee on the Rights of the Child, Guides to Implementation', above n 142.

¹⁴⁵ NSW LRC R 81, above n 32, 177.

¹⁴⁶ 'Intercountry Adoption, Committee on the Rights of the Child, Guides to Implementation', above n 142.

¹⁴⁷ Sections 111C(3)-(8) *Family Law Act 1975* (Cth). The *Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 1998* (Cth) commenced on 14 July 1998. Australia entered into a bilateral agreement with China in December 1999. China signed the Hague Convention on 30 November 2000, but is yet to ratify it, at 'Status Sheet Convention # 33', see above n 4.

as for the Hague Convention. It is suggested that if Australia proposes to permit children to be adopted from non-convention countries, especially Guatemala (where abuses of children's rights take place)¹⁴⁸ it should adopt the practice of the United States and Canada, of requiring DNA tests to ensure parents providing consent are in fact the biological parents of that child and not persons passing off as the parents.¹⁴⁹ This would hamper child traffickers, or at least, make it more difficult to enable child traffickers to sell children for adoption.

B *Monitoring and accountability*

1 *Adoption progress*

Under Article 9(c) of the Hague Convention, Central Authorities are to take appropriate measures to promote the development of adoption counselling and post-adoption services. Presently, volunteer parent support groups provide support to parents after the adoption.¹⁵⁰ Assistance is provided to adopters and adopted children under section 57A of the Queensland Act, where it appears to the chief executive that the welfare of the child requires that assistance be given. The chief executive has discretion as to how that assistance is given and for how long.¹⁵¹ The DFYCCQ normally monitors adoption placements for the first 12 months. The visits by the DFYCCQ (as of 1 July 2000) are during the first, fourth, seventh and tenth month following placement.¹⁵² It is suggested that there should also be periodic reviews beyond the first 12 months, to ensure that both the adoptive parents and the child or children are adjusting to the new arrangements and to enable problems or difficulties to be detected at an early stage so that additional assistance may be provided. This way parents could feel free to call on the DYFCCQ for help and advice should the need arise.¹⁵³

2 *Convention implementation*

The only monitoring available under the Hague Convention is via the Special Commissions convened by the Secretary General of The Hague Conference on Private International Law under Article 42. The Special Commissions are convened at regular intervals to review the practical operation of the Hague Convention and to enable the Permanent Bureau of the Hague Conference on Private International Law to advise governments on how to implement the Convention.¹⁵⁴ All parties to the Hague Convention, as well as non-members and international organisations, may attend.¹⁵⁵ This process, however, does not monitor an individual's behaviour nor provide

¹⁴⁸ Calcetas-Santos, above n 1, 5-11, 20-24; 'Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption', 28 November-1 December 2000, Permanent Bureau, 27-30 at <http://www.hcch.net/e/conventions/adospec_e.html>.

¹⁴⁹ Calcetas-Santos, above n 1, 11; Cantwell, above n 9, 16; 'International Adoption—Guatemala' at <http://travel.state.gov/adoption_guatemala.html>.

¹⁵⁰ NSW LRC R 81, above n 32, 410.

¹⁵¹ Section 57A(1) *Adoption of Children Act 1964* (Qld).

¹⁵² Adoptions Newsletter (August 2000), above n 15, 2.

¹⁵³ Bagley, above n 134, 329.

¹⁵⁴ Cantwell, above n 9, 15. A Working Group met on 12-14 April 1994 to draft Recommendations and a Report for examination by the Special Commission. The latter convened on 17-21 October 1994 and again on 28 November to 1 December 2000, 'Special Commission Meeting on Convention #33' at <<http://www.hcch.net/e/>>.

¹⁵⁵ Parra-Aranguren, above n 29, 85.

individuals with an avenue to bring a complaint before an independent human rights committee.¹⁵⁶ The Hague Convention, like the Committee on the Rights of the Child (“the Committee”) does not have the power or resources to do so.¹⁵⁷ This method of enforcement is therefore the weakest one available under international law.¹⁵⁸

Arguably, another means of reviewing implementation of children’s rights in intercountry adoption could be via the Committee under Article 44 of the CRC.¹⁵⁹ The CRC requires governments to submit reports to the Committee every five years outlining the government’s measures of implementation.¹⁶⁰ A private meeting is held by a pre-sessional working group of the Committee to analyse the reports, generate a list of issues and highlight areas of concern.¹⁶¹ Governments then respond in writing to these questions in advance of a public plenary session.¹⁶² In the public plenary session the Committee examines all aspects of the reports.¹⁶³ Dialogues ensue between the Committee and the Governments to assess the implementation and the Committee makes recommendations.¹⁶⁴ Whilst recommendations are not legally binding, they are a means of scrutinising government policy and practice.¹⁶⁵ This review process does not allow for individual complaints to the Committee, but it does provide non-government organisations and advocate groups with an opportunity to be more actively involved in contributing to the preparation of the reports.¹⁶⁶ Since the Australian Government is required to provide reports every five years to the Committee, in order to make information collection easier and more efficient, there should be cooperation amongst the various departments to collect common sets of information, which can then be applied to the different Conventions and engrossed with specific information for the particular Committees.¹⁶⁷

Furthermore, the Central Authorities should ensure that reports made under the Hague Convention are widely known and available, as required under Article 44(6) of the CRC. Governments and competent authorities should disseminate information and reports regarding the Hague Convention in various languages through national and State campaigns.¹⁶⁸ Children and youth should be encouraged to take a proactive role in providing opinions and in the decision making process of matters affecting them.¹⁶⁹

¹⁵⁶ J Harvey, *et al*, *Implementing the UN Convention on the Rights of the Child in Australia* (South Australia’s Children’s Bureau: Adelaide, 1993) 49.

¹⁵⁷ ‘Who Monitors Implementation of the Convention?’, The Committee on the Rights of the Child, 2 at <<http://unicef.org/crc/monitoring.htm>>.

¹⁵⁸ Harvey, above n 156, 49.

¹⁵⁹ The Committee itself reports on its activities to the UN Economic and Social Council every two years.

¹⁶⁰ Reports are sent to the Office of the UN High Commissioner for Human Rights in Geneva, see ‘Who Monitors Implementation of the Convention?’, above n 157, 2.

¹⁶¹ *Ibid*, 3; ‘Fact Sheet No 10 (Rev 1) The Rights of the Child’, Office of the High Commissioner for Human Rights, 6 at <<http://www.unhchr.ch/html/menu6/2/fs10.htm>>.

¹⁶² ‘Who Monitors Implementation of the Convention?’, above n 157, 3.

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid*.

¹⁶⁶ *Ibid* 2.

¹⁶⁷ Harvey, above n 156, 50.

¹⁶⁸ *Toward Taking Australia’s Children Seriously A Commissioner for Children and Young People* (1998), Defence for Children International Australian Section, 69, 71; Cantwell, above n 9, 16.

¹⁶⁹ *Ibid*.

Under Article 13 of the CRC, children have a right to freedom of expression, which includes:

freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.¹⁷⁰

The experiences and views of adopted children and their families would provide valuable insight and information that could directly influence future proposals, action and changes to policy and legislation. Children's rights under the various Conventions, including the Hague Convention and the CRC (to which the former is closely connected), ought to be made part of the school curriculum for primary and secondary schools.¹⁷¹ Australia could perhaps adopt an approach similar to Costa Rica's National Plan of Action where a social rights audit monitors and evaluates the country's fulfilment of the CRC and involves children and communities in a process designed to analyse rights and to find solutions.¹⁷² The recommendations made during the World Summit for Children,¹⁷³ which Australia attended, should be heeded. Australia must therefore encourage in its National Plan of Action, the re-examination of national plans, programs and policies to determine whether children's programs are being prioritised.¹⁷⁴ Australia should allocate resources to the protection and development of children and encourage different bodies to take proactive roles in the decision-making process.¹⁷⁵ Ties and dialogues should be encouraged between adoptive families, the relevant government departments (eg the DFYCCQ) and ethnic communities.

Since neither the Hague Convention nor the CRC confer individuals with a right to bring complaints before the Special Commission or the Committee,¹⁷⁶ the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* and the *Optional Protocol to the Convention on the Rights of the child on the sale of children, child prostitution and child pornography* can provide greater protection of children's rights by allowing individuals access to the Committee when rights are violated. The UN General Assembly adopted both Optional Protocols on 25 May 2000.¹⁷⁷ The Optional Protocol on the sale of children entered into force on 18 January 2002.¹⁷⁸ The Optional Protocol on armed conflict entered into force on 12

¹⁷⁰ Detrick, above n 2, 231.

¹⁷¹ Ibid 42.

¹⁷² 'Who Monitors Implementation of the Convention?', above n 157, 4.

¹⁷³ World Summit conducted on 29-30 September 1990.

¹⁷⁴ R J Himes (ed), *Implementing the Convention on the Rights of the Child, Resource Mobilization in Low Income Countries* (Martinus Nijhoff Publishers: The Hague, 1995) 56.

¹⁷⁵ Ibid.

¹⁷⁶ P Alston (ed), *The United Nations and Human Rights A Critical Appraisal*, (Clarendon Press: Oxford, 1992) 420.

¹⁷⁷ 'Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict', Office of the High Commissioner for Human Rights at <<http://www.unhchr.ch/html/menu2/6/protocolchild.htm>>; 'Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography', Office of the High Commissioner for Human Rights at <<http://www.unhchr.ch/html/menu2/dopchild.htm>>.

¹⁷⁸ J M Petit, 'Report of the Special Rapporteur on the sale of children, child prostitution and child pornography' (4 February 2002) United Nations Economic and Social Council, Commission on Human Rights, 58th Session, at <<http://www.unhchr.ch/children/rapporteur.htm>>; 'Australian Treaty Series (not yet in force) Optional Protocol to the Convention on the Rights of the Child [of

February 2002.¹⁷⁹ Article 1 of the Optional Protocol on the sale of children requires State Parties to prohibit the sale of children, child prostitution and child pornography.¹⁸⁰ Under Article 2(a) sale of children means ‘any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.’¹⁸¹

State parties are to ensure that, as a minimum, improperly inducing consent (as an intermediary, for the adoption of a child in violation of international legal instruments on adoption) be an offence fully covered in criminal or penal laws, whether the offences are committed domestically, transnationally, individually or on an organised basis.¹⁸² Under Article 3(5), State Parties are to take all appropriate legal and administrative measures to ensure all persons involved in the adoption of a child act in conformity with applicable international instruments. Offences in Article 3 are taken to be extraditable offences in any extradition treaty existing between State Parties and are to be included as extraditable offences in subsequent extradition treaties.¹⁸³ Article 9(2) is also important as it requires State Parties to promote awareness in the public at large, including children, about the preventive measures and harmful effects of the offences referred to in the Protocol, through information (by all appropriate means), education and training. State Parties are to encourage the participation of the community, in particular children and child victims, in such information, education and training programmes, including at the international level.¹⁸⁴ Reporting obligations will also apply to State Parties, with an initial report two years after ratification and every five years thereafter.¹⁸⁵ Currently, Australia is only a signatory to the Optional Protocol on sale of children, but not to the Optional Protocol on armed conflict.¹⁸⁶ If Australia ratifies both Optional Protocols, children’s rights would be afforded greater protection.

C Adoptee’s access to information

Under section 39B of the Queensland Act, an adopted person can obtain the name and date of birth of his or her birth parent as at the date of consent to the adoption.¹⁸⁷ Under section 39A, an adopted person, for the purposes of Part 4A, means a person who has been adopted in accordance with the law of Queensland and who has attained the age of 18. Consequently, the right to information is not a right of a child but one of an adult.¹⁸⁸ Article 30(2) of the Hague Convention states that competent authorities are to ensure that the *child* or his or her representative has access to information preserved about the child’s origin, in particular information concerning the identity of his or her parents and

20 November 1989] on the Sale of Children, Child Prostitution and Child Pornography’ at <<http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2000/9.html>>.

¹⁷⁹ ‘Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict’, above n 177.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid* Article 3.

¹⁸³ *Ibid* Article 5(1).

¹⁸⁴ *Ibid* Article 9(2).

¹⁸⁵ *Ibid* Article 12.

¹⁸⁶ Australia signed the Optional Protocol on sale of children on 18 December 2001, ‘Status of ratifications’ at <http://www.unhcr.ch/hchr_un.htm>.

¹⁸⁷ *Adoption of Children Regulation 1999* (Qld) Schedule 1: \$50.00 fee, no fee for pensioners.

¹⁸⁸ K Funder, *Citizen Child—Australian Law and Children’s Rights* (Australian Institute of Family Studies: Melbourne, 1996) 47.

medical history.¹⁸⁹ Article 30(2) also states that such access is available as ‘permitted by the law of the State’. Thus, Contracting States ultimately determine when access is allowed.

During the drafting of the Hague Convention, the Special Commission considered when and whether unlimited access to information should be allowed to adopted children.¹⁹⁰ The right of a child to know about their adoption needs to be balanced against a biological parent’s, or parents’, right to privacy.¹⁹¹ Delegates believed that information should be given after appropriate measures had been taken, having regard to the age of the child and any conditions requiring special precautions.¹⁹² Under Article 4(d)(2) of the Hague Convention consideration must be given to the child’s wishes and opinions. This is similar to Article 12(1) of the CRC.¹⁹³

It is futile to draft provisions in the Hague Conventions giving children a right to obtain information about themselves and to express their views or opinions, if the ability to exercise that right is unavailable until they reach majority.¹⁹⁴ In those circumstances, ‘the right of the child’ is non-existent. Children can be considered sufficiently mature to be employed before reaching 18 years of age, yet they cannot obtain information about their origins until they reach majority. It is suggested that a mature, informed and counselled youth, for instance, should have access to information regarding him or herself, if they wished to access that information and it is in their best interests.

D *Non-accredited bodies*

Private adoption was a challenging issue for the Hague Convention.¹⁹⁵ This matter had been discussed at the third Special Commission in February 1993.¹⁹⁶ Some delegates and international organisations believed that this area was prone to abuse and bad practices, while other delegates, such as the United States, were concerned that a non-inclusion in the Hague Convention of private adoptions would imply that such adoptions were prohibited.¹⁹⁷

It is suggested that the compromise reached is not in the best interests of the child. Non-accredited bodies are able to pursue profitable objectives, which leaves room for abuses to occur. Bearing in mind that abuses in intercountry adoption seem to occur mainly in private adoptions,¹⁹⁸ non-accredited bodies or persons should either not be allowed to arrange adoptions, or at least, more restrictions should be placed on the functions those agencies perform. Furthermore, such bodies should not be pursuing profitable objectives. Particularly deficient is the default provision under Article 22(4), which is only effective if countries expressly object, as, otherwise, silence infers acceptance.¹⁹⁹ Moreover, the declaration under Article 22(4) can be rescinded at any

¹⁸⁹ Article 30(1) *Hague Convention*.

¹⁹⁰ Parra-Aranguren, above n 29, 75.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ Funder, above n 188, 47.

¹⁹⁵ Pfund, above n 3, 60.

¹⁹⁶ *Ibid* 61; Parra-Aranguren, above n 29, 54.

¹⁹⁷ Pfund, above n 3, 60.

¹⁹⁸ Cantwell, above n 9, 8.

¹⁹⁹ Parra-Aranguren, above n 29, 54.

time by giving notice to the depositary.²⁰⁰ Governments can therefore amend their policies, providing no guarantee that such adoptions will be prohibited. Australia has utilised Article 22(4) of the Hague Convention and declared that only persons who reside in countries where public authorities or accredited bodies perform the functions of the Central Authority may adopt children habitually resident in Australia.²⁰¹ However, this declaration only protects children if Australia is the sending country; not if Australia is the receiving country.

VIII CONCLUSION

The objectives of the Hague Convention have been effectively achieved to some extent. The mechanisms of cooperation under Articles 4 and 5 and the automatic recognition of adoptions under Article 23 are crucial steps in achieving international uniformity in adoption procedures. Equally important advances have been:

- requiring the consent of children and relinquishing parents to be freely given;
- recognising the need for counselling about the effects of the adoption to relinquishing parents, children and prospective adoptive parents; and
- requiring the mother's consent to be given only after the birth of the child.

Nonetheless, the Hague Convention could have been more effective in ensuring that adoptions take place in the child's best interests if financial gain had been prohibited under Articles 8 and 32 and if non-accredited bodies had not been permitted to arrange adoptions or pursue profitable objectives.

As regards the Queensland Act, which provides the mechanisms for implementing the Hague Convention, eligibility requirements of adoptive parents need to be in line with anti-discrimination legislation. The Queensland Act should allow for de facto spouses (same sex or heterosexual) and single persons to be on the expression of interest register. Single persons should not be solely limited to adoptions of special needs children or in exceptional circumstances. Provisions should also have been made regarding adoptive parents' willingness to help the adopted child to cope with racism and the new parents' willingness to continue a child's religion and language, if those were the wishes of the child and it is in the child's best interests. The ability of a child to revoke consent and to access information regarding their adoption before majority, are further matters that both the Queensland Act and the Hague Convention should have addressed.

A significant limitation to the effectiveness of the Hague Convention's objectives is the lack of enforceability if rights are infringed. Currently, the Hague Convention's only means of monitoring implementation is through the reports made by State Parties to the Special Commission, which does not allow for individual complaints. The Optional Protocols to the CRC provide a means of criminalising abuses of children's rights in respect to adoptions and provides individuals with an avenue of complaint to the Commission. Ultimately, the Hague Convention only provides minimum standards and guidelines for States to abide by, and it is the responsibility of individual States to fill in the gaps left by the Hague Convention and afford children greater protection. Arguably,

²⁰⁰ Ibid 57.

²⁰¹ 'Full Status Report Convention #33', above n 36.

the Hague Convention has failed to establish, and provide, sufficient mechanisms to protect children's rights and has not, therefore, achieved the best interests of children involved in intercountry adoptions.