New Zealand Law Society
Te Kāhui Ture o Aotearoa

Overseas Adoptions Legislation Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

23 June 2026

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Overseas Adoptions Legislation Bill (**Bill**), which seeks to replace the temporary legislative framework created by the Adoption Amendment Act 2025 (**2025 amendments**) with a more enduring system for international and overseas adoptions.[1]

1.2 This submission has been prepared with input from members of the Law Society's Family Law Section, Immigration and Refugee Law Committee, and Public Law Committee.[2]

1.3 The Law Society **wishes to be heard** in relation to this submission.

2 General comments

2.1 There have been significant developments in this area of law over the past years, particularly in respect of the increasing complexity of international surrogacy cases and the practical challenges that arise when New Zealand families engage with overseas jurisdictions.[3]

2.2 Legislative reform of the Act must therefore reflect contemporary circumstances, including the reality that New Zealanders increasingly live, work, and form families across international boundaries, and be both responsive to current concerns, and flexible enough to address future developments that cannot yet be fully anticipated.

2.3 This Bill sits within a challenging intersection of legislative frameworks, technological advancements and realities of modern families. While these have fundamentally changed since the enactment of the Adoption Act 1955 (**Act**) over 70 years ago, the core principles of child welfare and protection have remained paramount.

2.4 The purpose of this Bill is to create a framework that supports the well-being and best interests of adopted persons, aligns with New Zealand's international obligations, and upholds the integrity of New Zealand's immigration and citizenship systems.[4] While the Law Society supports these objectives, it is important to ensure that unintended consequences which can cause other harms to children are avoided at all costs.

2.5 As currently drafted, the amendments proposed in this Bill (and in particular, the proposal to restrict access to adoption orders in the Family Court) could give rise to

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1 Explanatory Note of the Bill.

2 The Family Law Section includes family lawyers who have extensive experience practising in adoption law, and specifically, those arising from international surrogacy arrangements and intercountry adoptions – see here for more information: https://my.lawsociety.org.nz/Portal/Portal/family-law-section/Family-Law-Section.aspx. Information about the Law Society's Immigration and Refugee Law, and Public Law Committees is available here: www.lawsociety.org.nz/professional-practice/law-reform-and-advocacy/law-reform-committees/.

3 These include adoptions from countries such as the United States, Canada, Argentina, Mexico, Colombia, Georgia, China, Kazakhstan, Vietnam, Cambodia, Sierra Leone, Ethiopia, Nigeria, Somalia and Kiribati, each presenting unique legal and procedural challenges.

4 Explanatory Note of the Bill.

circumstances where impacted children, through no fault of their own, are afforded lesser rights than they would enjoy but for the circumstances of their birth and adoption.

2.6 We also note the Bill does not seek to address certain issues that currently arise in relation to overseas adoptions, and are likely to persist under the new framework proposed in the Bill.

2.7 Finally, we note the advice prepared by the Crown Law Office on the Bill's consistency with the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**) appears to be deficient. The advice correctly identifies:[5]

(a) that the proposals in the Bill engage section 19 of the Bill of Rights Act (which affirms the right to freedom from discrimination on the basis of national origin);

(b) the relevant comparator groups as adopted children born overseas and their families, and adopted children born in New Zealand and their families (rather than children who are adopted under the Hague Convention, and those who are not); and

(c) the Bill prima facie limits this right.

2.8 However, its subsequent analysis of whether those limits are justified, and the conclusion that the limits are in fact justified because "it is difficult to see what alternatives would achieve the Government's purpose and in these circumstances"[6] appear to relate a *different* comparator group (i.e., children adopted who are adopted under the Hague Convention, and those who are not). This is despite earlier parts of the advice noting that Hague and non-Hague groups are not the correct comparators, and acknowledging that "the Courts have cautioned against manipulating the comparator groups to determine the outcome".[7]

2.9 In our view, New Zealand's legislative framework must strike an appropriate balance between the need to:

(a) provide legal certainty for families,

(b) enable appropriate legal recognition for a child of their parentage,

(c) uphold international law,

(d) protect children's best interests and welfare, and

(e) ensure any limits on the right to freedom from discrimination on the basis of national origin are justified.

2.10 The recommendations in the remainder of this submission seek to achieve this balance while ensuring the legislation is workable in practice.

5 Crown Law Office *Bill of Rights Vet Advice* at [8]-[12].
6 At [19].
7 At [10].

3 Definitions (clause 4)

3.1 Clause 4 of the Bill amends the interpretation provisions in section 2 of the Act. We note the following points in relation to this clause:

Definition of 'adopting parent'

3.2 The definition of 'adopting parent' could be better aligned with the proposed definition of 'adopted person'[8] if it is amended to state: 'adopting parent, in relation to an overseas adoption, means a person who adopts another person…'.

Definition of 'international surrogacy arrangement'

3.3 The drafting of this definition could be improved by referring to an arrangement in which *one or more* of the parties (rather than 'some or more of the parties') to the arrangement reside outside New Zealand (in the same or different countries).

Definition of 'ordinarily resident'

3.4 Clause 4 introduces a definition of 'ordinarily resident'. The Law Society does not support the use of 'ordinarily resident' as a jurisdictional gateway to bringing an adoption application to the Family Court, and recommends replacing the 'ordinarily resident' requirement with a requirement to demonstrate a 'substantial connection' to New Zealand through citizenship or residence (as we discuss in section 4 of this submission).

Definition of 'overseas adoption'

3.5 This definition refers to an adoption that was in accordance with the law of that place and is legally valid. It is unclear what the term 'legally valid' adds to this definition, given an adoption in accordance with the laws of another country would presumably be legally valid in that country. The implications of this term should therefore be made clear.

4 The jurisdiction of the Family Court (clause 5)

4.1 The 2025 amendments narrowed the Family Court's jurisdiction to granting adoption orders in limited circumstances. New section 3AAA(1)(a) in clause 5 of the Bill now proposes to further narrow the Court's jurisdiction – we consider this approach to be inconsistent with the fundamentally child-centred approach that should underpin all adoption decisions.

4.2 For more than 70 years, the Court has exercised its jurisdiction under the Act in a manner focused on the best interests and welfare of the child. It is therefore well-equipped to identify unsafe or inappropriate conduct, and to respond accordingly. In our view, the Family Court is best placed to undertake the important, complex, and sensitive task of determining applications that alter a child's legal parentage, and to do so in a manner that remains consistently focused on the child's welfare and best interests in each individual case.

8 Also in clause 4.

4.3 The 2025 amendments[9] provided that an application for an adoption order may be made only if the adoption arises out of an international surrogacy arrangement, or if –

(a) The applicant(s) and the child are ordinarily resident in New Zealand; *or*

(b) there are exceptional circumstances that justify the making of the application.

4.4 Where an overseas adoption does not involve an international surrogacy, new section 3AAA(1)(a) in clause 5 of the Bill proposes to further restrict the Family Court's jurisdiction to grant adoption orders by requiring:

(a) the applicant(s) and the child to be ordinarily resident in New Zealand (subsection (i)); *or*

(b) an applicant or the child to be ordinarily resident in New Zealand (subsection (ii)); *and*

(c) the existence of exceptional circumstances (subsection (ii)(A)); *and*

(d) that the welfare and best interests of the child will be promoted by the making of the application (subsection (ii)(B)).

4.5 This means if the Bill is enacted in its current form, applicants will need to satisfy a higher three-step threshold to obtain an adoption order under new section 3AAA(1)(a)(ii) (including by meeting the new requirement for either the applicant or child to be ordinarily resident in New Zealand). These restrictions could therefore create circumstances where families and children are left without a pathway to adoption in New Zealand, and children are left in limbo without clarity around their legal parenthood.

4.6 The Law Society does not support this more restrictive gateway to the Family Court's jurisdiction to grant adoption orders under the Act for several reasons, which we discuss below.

Policy rationale unclear

4.7 The policy objectives of this Bill are to support the well-being and best interests of adopted persons, align with New Zealand's international obligations, and uphold the integrity of New Zealand's immigration and citizenship systems.[10] It is unclear why these further restrictions on the Family Court's jurisdiction are considered necessary to achieve these objectives, or to what extent adoption applications to the Family Court contribute to the policy problems identified in the Bill's general policy statement (i.e., serious harm to adopted children and young people, and risks to the integrity of New Zealand's immigration system).

4.8 The Regulatory Impact Statement (**RIS**) for the Bill suggests this proposal may be a response to concerns about an increasing number of applications to the New Zealand Family Court because of the restraints introduced in section 17 of the Act, rather than a

9 Section 3(1A).
10 Explanatory Note of the Bill.

response to the policy problem identified.[11] In the Law Society's view, it would not be appropriate to limit or circumscribe access to the Court for this reason.

Intra-family adoptions

4.9 While the proposed amendments may serve to disincentivise New Zealanders from adopting from countries which are not designated as 'safe', this objective must be balanced against the reality that there may be good reasons for intra-family adoptions (i.e., where the adopted child is a relative of the adopting parent(s)) – these could include circumstances where the child's parents are deceased, or are unable to care for the child.

4.10 This can be the case with refugees who migrate to New Zealand and subsequently adopt the children of deceased family members in their home country, whose safety and wellbeing would otherwise be at risk if they were to remain in that country. While there may be visa pathways for these children through New Zealand's immigration and refugee systems, there can be barriers to accessing these (for example, with applications not currently being accepted under the Refugee Family Support Category Tier 2, high fees associated with submitting a resident visa application,[12] and with Ministerial intervention being at the absolute discretion of the Minister).[13]

4.11 In such circumstances, it is important to retain the Family Court's jurisdiction to grant adoption orders and to recognise there are a myriad of family arrangements that justify the making of an adoption order in the best interests of the adopted child. If the current jurisdiction of the Family Court is not retained, broader reform will be required, including, for example, to the immigration system, to ensure individuals are not disproportionately and adversely impacted by these proposals. We note that, while this issue appears to have been considered in the RIS,[14] a large portion of this discussion has been redacted, and the Bill does not propose amendments to the Immigration Act 2009.

4.12 A preferable approach in circumstances involving New Zealand family members and related children overseas would be to empower the Family Court to grant an adoption order in a way that does not transfer parentage in a manner that distorts legal familial relationships (for example, by enabling siblings to become adoptive parents). Instead, the order could provide for the caregiving relative to have care and guardianship of the child, but in a manner that is recognised for both immigration and citizenship purposes. This would recognise the complexity of family circumstances while ensuring the child at the heart of those circumstances is able to appropriately make New Zealand their home and avail themselves of resulting rights that will benefit their wellbeing.

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11 Ministry of Justice *Regulatory Impact Statement: Targeted reforms to international adoption system* (12 November 2025) (**RIS**) at [43].

12 A refugee lawyer offered an example of a Somali refugee whose sister died in Ethiopia and left behind 6 children. Their aunt travelled from New Zealand to Ethiopia to adopt these children as they did not have any other family. In this scenario, the aunt would need to pay nearly $20,000 in visa application fees (compared to just $1,500 in citizenship application fees).

13 Immigration Act 2009, section 61.

14 At [96].

Requirement to be 'ordinarily resident' in New Zealand

4.13 New section 3AAA(1)(a) provides no pathway to adoption through the Family Court for those families where neither the applicant nor the child is 'ordinarily resident' in New Zealand.[15]

4.14 The Law Society's view is that, even in such circumstances, there must remain an avenue for a child to have their parental relationships recognised even if both the child and the adoptive parents are not ordinarily resident in New Zealand. The 'ordinarily resident' requirement in the Bill is out of step with international approaches, is too restrictive and will leave families unable to seek adoptions that are genuinely in a child's best interests.

4.15 As it stands, the Bill creates the possibility that some New Zealanders will not be able to adopt a child under either New Zealand law or the domestic laws of the country they ordinarily reside in. We illustrate this point with the following case examples:

> *Example 1:*
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> A New Zealand man lives and works in Singapore. He marries a Thai woman he meets when travelling to Thailand for work. When they meet, she has a two-year-old daughter whose father has never been involved in the child's parenting. The wife and the child's father separated when the child was just two months old. The man and his wife go on to have two other daughters (who become New Zealand citizens by virtue of their biological father's New Zealand citizenship), and they all end up living in Singapore.
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> The man is unable to adopt his stepdaughter in Singapore because Singaporean law does not recognise his stepdaughter as his dependent. Proposed section 3AAA(1)(a) also prevents him from applying for an adoption order under the Act because he and his stepdaughter are not ordinarily resident in New Zealand. This leaves the family in limbo, with no option for the man to legally adopt his stepdaughter in either country and to ensure she can enjoy the same rights and receive the same treatment as his biological daughters.
>
> *Example 2:*
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> A New Zealand man travels abroad and ends up living and marrying in the United Kingdom. He and his wife have a child via surrogacy in India. The child is their genetic child. They return with the child to the UK where a parentage order is made. They go on to have two more biological children of their own.
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> When the surrogate born child is 15, the family decide to move to New Zealand only to learn the two younger biological children are considered citizens by descent, but that the older surrogate born child, despite also being their genetic child, is ineligible for citizenship or a visa (noting the immigration pathway in section 17 would apply only where there is an overseas *adoption*, and it may not extend to circumstances where a parentage order has been issued).[16]

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15 Clause 4(5) of the Bill provides that a person is 'ordinarily resident' if they have a permanent place of residence in the country, or they intend to reside in the country indefinitely.

16 How parentage is established following surrogacy varies from country to country, and not all parentage orders will easily fit into the proposed section 17 process depending on what the country where the family first lives does to establish parentage following an overseas surrogacy.

> Under the previous legislation, the family could have obtained an adoption order from the Family Court. However, this option is removed under the proposed section 3AAA(1)(a), meaning the family may not be able to relocate to New Zealand as an entire family unit, and the surrogate child may not be legally recognised as a child of her parents.

4.16 If there is a need to tie section 3AAA(1)(a) applications to some connection to New Zealand to meet the policy objectives of the Bill, a more appropriate way of achieving this would be to require applicants to have a 'substantial connection' to New Zealand through either residence or citizenship, rather than being 'ordinarily resident' in the country. This approach would ensure that, in the above examples, the parents would be able to apply to the Family Court for an adoption order on the basis of their substantial connection to New Zealand (despite not being ordinarily resident in New Zealand).

4.17 The 'substantial connection' requirement would also see New Zealand remain aligned with the current international approach.[17] In addition, there is existing jurisprudence internationally on the meaning of 'substantial connection'[18] which means there would be no need to define this term or 'reinvent the wheel' in this regard.

4.18 For these reasons, we have recommended at [3.4] above that the term 'ordinarily resident' in section 3AAA(1)(a) be replaced with the term 'substantial connection'. Doing so will mitigate against appropriate applications being shut out of the Family Court as will happen under the amendments proposed in the Bill.

The 'exceptional circumstances' threshold

4.19 The courts have traditionally interpreted the term 'exceptional circumstances' as setting a deliberately high threshold, consistent with the ordinary meaning of 'exceptional'.[19] In our view, its inclusion in section 3AAA(1)(a)(ii) sets an unreasonably high threshold for accessing the Family Court.

4.20 It is unnecessary and undesirable to limit the Family Court's jurisdiction to this degree. As we explain at [4.2] of this submission, applications to the Family Court generally pose a lower risk of abuse and exploitation, and the Court is best placed to recognise and determine an 'unsafe' application to adopt a child. Where the Court is charged with making such orders, it must first test the suitability of the applicants and ensure the order is in the best interests of the child. These are the very legal tests Parliament is concerned are not being applied in non-designated countries. In our view, these proposed impediments to obtaining an adoption order could be counterintuitive to ensuring safe adoptions.

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17 Hague Conference on Private International Law, Maintenance Convention (2 October 1973), Child Protection Convention (19 October 1996) (but noting New Zealand is not yet a signatory to this Convention).

18 See, for example, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (19 October 1996).

19 For example, in *Ye* v *Minister of Immigration* [2009] NZSC 76 at [34] per Tipping J, the Supreme Court emphasised to be an exceptional circumstance it must be well outside the normal run of cases and truly an exception rather than the rule.

4.21 A more appropriate way of responding to the policy problems identified would be to introduce a 'special circumstances' threshold, which has been defined by the Court of Appeal as "circumstances that are uncommon, not commonplace, out of the ordinary, abnormal".[20] We consider this term to be preferable as it is consistent with language already used elsewhere in the Act,[21] and benefits from an existing definition in case law. Whether special circumstances exist in a particular case could also be determined with reference to what would promote the welfare and best interests of the child.

Requirement to satisfy all three components of section 3AAA(1)(a)(ii)

4.22 The use of the term 'and' in between subsections of proposed section 3AAA(1)(a)(ii) have the effect of requiring all three conditions in that subsection to be satisfied (i.e., that the applicant or child is ordinarily resident, that exceptional circumstances exist, and that the application promotes the child's welfare and best interests). Consistent with our view that the term 'exceptional circumstances' sets too high a threshold, we consider this cumulative three-part test is also overly restrictive, and risks preventing appropriate applications from being considered by the Family Court, and leaving children with uncertain parentage.

4.23 We are further concerned that such a high threshold may create challenges in responding to unforeseen circumstances in future. This risk could be mitigated by allowing an application where either an applicant or child has a 'substantial connection' to New Zealand or 'special circumstances' are present. If these recommendations are not adopted, we alternatively suggest that the term 'and' between sections 3AAA(1)(a)(ii) ('ordinarily resident' requirement) and 3AAA(1)(a)(ii)(A) ('exceptional circumstances' requirement) should be replaced with 'or' to create two distinct grounds for bringing an application, and mitigating the risks associated with the proposed three-part test.

Summary of recommendations

4.24 For the above reasons, the Law Society recommends, in relation to section 3AAA(1)(a):

(a) the phrase 'ordinarily resident' be replaced with 'substantial connection" to New Zealand; and

(b) the phrase 'exceptional circumstances' be replaced with 'special circumstances'; or

(c) alternatively, the term 'and' between sections 3AAA(1)(a)(ii) and 3AAA(1)(a)(ii)(A) be replaced with 'or'.

5 International surrogacies (clause 5)

5.1 New section 3AAA(1)(b) in clause 5 of the Bill relates to adoption orders to formalise an international surrogacy arrangements. These provisions also give rise to several concerns, which we discuss below.

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20 *Rajan* v *Minister of Immigration* [2004] NZR 615 (CA) at [24] per Glazebrook J.

21 Section 5 of the Act enables the Court to make a final order in the first instance, rather than an interim order, if special circumstances render this desirable.

Interactions with Surrogacy Bill

5.2 Careful consideration must be given to the interaction between the Bill and the Improving Arrangements for Surrogacy Bill 72-2 (**Surrogacy Bill**). In its report to the House,[22] the Health Select Committee recommended a number of changes to the Surrogacy Bill and other legislation (including the Adoption Act).[23] These changes were recommended without further public consultation, and are in some respects inconsistent with recommendations from the Law Commission's *Te Kōpū Whāngai: He Arotake Review of Surrogacy* report.[24]

5.3 We note the RIS for this Bill was prepared prior to the publication of the Health Committee's report on the Surrogacy Bill. As a result, it is unclear whether the precise recommendations in the Health Committee's report were subsequently considered by officials prior to the drafting and introduction of this Bill.[25]

5.4 The Law Society is concerned that further amendments may be made to both the Surrogacy Bill and this Overseas Adoption Legislation Bill, which prevent the adoption and surrogacy frameworks from working in harmony with one another. If either Bill is to be enacted, Parliament needs to ensure they are consistent by ensuring the legislation puts the best interests of the child at the forefront of decision-making.

Recognition of a narrower range of international surrogacy arrangements

5.5 The 2025 amendments provided that an adoption application could be made if it arises out of an international surrogacy arrangement. New section 3AAA(1)(b) now seeks to restrict the scope of these adoption orders by providing that an application may only be made where the surrogacy arrangement was "entered into and conducted in line with the applicable laws (if any) of the relevant overseas country".

5.6 The Law Society recognises the intent of these provisions may be to send an unambiguous message against engaging in unlawful international surrogacy arrangements. We agree it is important that New Zealand upholds international law and does so in a way that avoids undermining other countries' legal frameworks.

5.7 However, the restriction in new section 3AAA(1)(b) risks penalising surrogate children for the (deliberate or inadvertent) actions of their parents by denying them access to adoption orders. The rigidity of the framework proposed in the Bill could leave children separated from their biological parents, and becoming either stateless or without legal recognition of their actual and biological family relationships. Such outcomes would defeat the Bill's stated purpose of "supporting the well-being and best interest of adopted persons".[26]

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22 Improving Arrangements for Surrogacy Bill 2021 (72-2) (select committee report, 31 March 2026).

23 See subpart 1 of new Part 8 of the Bill.

24 Law Commission *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (NZLC R146, 2022).

25 The RIS simply notes, at [137], that if the Surrogacy Bill progresses, the surrogacy exception to the Family Court's adoption jurisdiction will no longer apply as this will be covered by standalone surrogacy regime.

26 Explanatory Note of the Bill.

5.8 In cases where parents inadvertently or deliberately participate in an unlawful surrogacy arrangement overseas, a tension is created between giving effect to the child's rights and welfare while not condoning breaches of overseas law.

5.9 This tension is well illustrated in the recent decision of *Sov v Sov*, where the Family Court recognised that if New Zealand courts grant adoption orders conferring parentage and citizenship rights to children born of illegal surrogacy arrangements, that could be regarded as endorsing the process and upholding illegal contracts.[27] The Court went on to identify that the "ultimate issue" to be determined is whether the surrogate child should be penalised, and suffer the consequences of New Zealand law not recognising their biological parent, due to the concerns relating to their creation.[28]

5.10 *Sov* illustrates the Family Court's ability to satisfactorily address this tension in a child-focused manner, and in doing so, uphold the principles of UNCRC and avoid an untenable situation where the refusal to make an adoption order would leave the child stateless.

5.11 It follows that our preference would be for the legislation to convey that New Zealanders who act contrary to overseas laws will be held responsible for their actions, while avoiding penalising surrogate children for their parents' actions and decisions. This could be achieved by separating the child's status from the adults' wrongdoing – in other words, non-compliance with foreign surrogacy rules should not automatically bar the ability to seek an adoption order in New Zealand, but should trigger a heightened scrutiny process and/or an option for consequences for the *parents*, rather than for the child. Such an approach would be consistent with New Zealand's broader legal framework, which places emphasis on child welfare, legal parentage, and Court oversight, rather than treating surrogacy agreements themselves as enforceable contracts.

5.12 We therefore suggest amending the Bill to provide for a child-centred pathway in circumstances where the intended/adoptive parents entered a surrogacy arrangement overseas and failed to comply with all applicable laws. This would require the Court to undertake a child protective enquiry to ensure a child's entitlement to parentage is preserved, while separately enabling the Court to seek consequences for parents who failed to comply with applicable laws. There would need to be two aspects to this approach.

5.13 First, it requires creating a pathway to adoption in circumstances where the Family Court is satisfied that such recognition is in the particular child's best interests and that the arrangement did not involve trafficking, coercion, child sale, forged consents, or serious exploitation. This could be achieved by inserting the following provision into the Bill:

27 *Sov v Sov* [2025] NZFC 17372 at [47] per Pidwell J.
28 At [67] per Pidwell J.

> Where a child has been born as a result of an international surrogacy arrangement and the applicant(s) did not comply with all legal requirements of the place where the arrangement occurred, the Family Court may nevertheless make an adoption order if satisfied that:
>
> (a) making the order is in the child's best interests and will promote the child's welfare;
>
> (b) the child was not the subject of trafficking, sale, coercion, or exploitation;
>
> (c) the surrogate's consent, and any required spouse or partner consent, was free and informed;
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> (d) the child's identity, genetic origins, and birth history are sufficiently documented and preserved; and
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> (e) refusal of the order would create disproportionate harm to the child.

5.14 Such a provision would sit comfortably with the reality in New Zealand that adoption remains the mechanism that is used to recognise international surrogacy arrangements, while giving the Court a principled route to distinguish between irregular but meritorious cases, and fundamentally abusive ones.

5.15 The second aspect to this approach would be to empower the Court to refer parents to the Police for investigation in situations where the Court believes an egregious breach of overseas law has occurred in entering or undertaking the surrogacy arrangement.[29]

5.16 This approach clearly separates legal recognition of the child's parentage status from consequences for parents' illegal actions within the surrogacy arrangement. It also enables the Court to focus on its paramount consideration under UNCRC of the child's welfare and best interests, while avoiding condoning or legitimising potentially illegal actions undertaken by the parents in another state.

5.17 Alternatively, we recommend amending the Bill to include an express safeguard to prevent children born out of international surrogacy arrangements from becoming stateless. Such an amendment could provide that, even in circumstances where the international surrogacy arrangement was *not* entered into and carried out in accordance with all applicable laws, the Family Court may nevertheless make an adoption order if the surrogate child would otherwise become stateless.

6 DNA testing to determine genetic link (clause 5)

6.1 The Bill allows a Family Court Judge or Associate to recommend that the applicant(s) arrange for DNA testing where applications are made under exceptional circumstances (under new section 3AAA(1)(a)(ii)), and in international surrogacy cases where a genetic link is claimed (under new section 3AAA(1)(b)).

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29 We recognise the legal and practical challenges inherent in prosecuting a person for conduct that occurs extraterritorially. However, by way of example, we note that in Queensland, such a referral was made recently where a commercial surrogacy was undertaken outside Australia where domestic Queensland law specifically prohibited this: see *Lloyd v Compton* [2025] FedCFamC1F 28.

6.2 While we acknowledge the intent to strengthen evidential standards in certain applications, we consider that aspects of the current drafting create uncertainty, inconsistency, and potential inequity, as discussed below.

Limited power to recommend DNA testing

6.3 We note clause 5 does not empower the Family Court to recommend DNA testing in relation to applications made under new section 3AAA(1)(a)(i) (that is, where both the child and the applicant(s) are ordinarily resident in New Zealand). It is unclear why DNA testing cannot be recommended in such circumstances, given there is potential for the same evidential issue – verification of a claimed genetic link – to arise (for example, where an inter-family adoption is sought by a family member who is ordinarily resident in New Zealand). In such circumstances, establishing a familial connection will be integral to the application, at least in part to prevent child trafficking. Having the legislation provide for DNA testing being available when circumstances require would therefore be consistent with the policy concerns behind the proposed legislation.

6.4 For these reasons, we recommend amending new section 3AAB(1) to provide that a Family Court Judge or Associate can recommend DNA testing in *any* case where the applicants are relying on the existence of a genetic link, and it is possible to obtain a DNA test to verify this.

Definition of 'qualified person'

6.5 Section 3AAB(5) defines the term 'DNA report' as one that is compiled by a qualified person. However, the Bill does not define the term 'qualified person'. This may create uncertainty about who is authorised to compile a DNA report.

6.6 The Law Society therefore recommends either removing paragraph (b) under the definition of 'DNA report', or alternatively, providing a clear definition of a 'qualified person'.

Privacy and cultural considerations

6.7 DNA testing can raise significant privacy concerns for the individuals involved, and this is particularly likely to be the case for some international applicants. These concerns include:

(a) the storage, use, and potential misuse of genetic data;

(b) risk of uncovering unrelated medical or genetic information; and

(c) cultural differences in attitudes toward genetic information sharing.

6.8 Lawyers have also noted that there have been cases, including those involving international surrogacy arrangements, where applicants have opposed DNA testing on the basis that the appropriateness of the adoption should not depend on the existence of a genetic connection.

6.9 Where such concerns exist, the legislative framework should give the Court the flexibility to recognise alternative forms of evidence of a genetic connection, including:

(a) documentation from fertility clinics confirming any procedures that have been undertaken;

(b) records establishing the use of genetic material; and

(c) clinical records establishing a biological connection.

6.10 We therefore invite the Select Committee to consider amending sections 3AAA and 3AAB in clause 5 to enable Family Court Judges and Associates to consider other types of evidence in circumstances where the applicants or the child have legitimate concerns about the use of DNA testing, but nevertheless wish to rely on the existence of a genetic link to support their application for an adoption order.

Implications of DNA test results

6.11 New section 3AAB(4) provides that a DNA report submitted to the court stating the results of the DNA testing show a genetic link between the applicant(s) and the child is conclusive evidence of that fact. However, the Bill is silent on the treatment of negative results. This raises important questions of whether negative results give rise to adverse inferences, and what weight should be given to other evidence when no genetic link is established.

6.12 The Law Society therefore recommends amending new section 3AAB to expressly state that:

(a) a negative inference will not be assumed if a negative DNA result is provided, and

(b) where a negative result is provided, the determination of the adoption application will nevertheless be assessed against the welfare and best interests of the child.

7 Requirement to obtain social worker reports (clauses 5 and 7)

7.1 It has been a longstanding requirement under section 10 of the Act for the Court to obtain a social worker's report regarding an adoption application. New sections 3AAA(3) and (4) in clause 5 of the Bill now seek to empower the Court to direct the preparation of an additional social worker report to assist the Court:

(a) in ascertaining whether an applicant or the child are ordinarily resident in New Zealand; and

(b) in considering, for the purposes of section 3AAA(1)(a)(ii)(A), whether appropriate arrangements for the care of the child can be made by members of the child's family in any other country, and whether the applicant has a genetic or familial link to the child.

7.2 Clause 7(2) also inserts new section 10(1A), which provides that any social worker report required under subsection (1) is additional to any report under section 3AAA in clause 5 of the Bill.

7.3 The issue of whether someone is 'ordinarily resident' is fundamentally a legal question, and it is the Court's role to consider the facts presented, weigh those facts against case

law and to assess if that qualifies as ordinarily resident. This should, in our view, remain a judicial exercise.

7.4 The Law Society opposes these amendments for the following reasons:

(a) The combined effect of clauses 5 and 7 would be that two social worker reports (one addressing section 3AAA issues, and the other a more general section 10 report) could be prepared in relation to the same application. These could be prepared by different social workers, entailing greater family intrusion, less efficiency and cohesion, and requiring more witnesses at a hearing of the application. In our view, this is unnecessarily cumbersome and confusing.

(b) The requirement to produce additional social worker reports also risks duplicating work, and placing additional resource burdens on Oranga Tamariki's social work team. Where social worker reports are required, the Court should be able to direct their preparation under section 10 of the Act.

(c) New section 3AAA(4)(b) states the social worker "need not include any views or conclusions on the matters contained in the report".[30] This suggests that, while these views are not needed, the social worker may nevertheless include those views in reports prepared in accordance with new section 3AAA. In our view, social workers should not offer conclusions on whether someone is 'ordinarily resident' in New Zealand. A social worker can gather and report relevant facts such as where people are living, what property they own, their employment and community connections but should not determine whether this constitutes them being 'ordinarily resident'.

(d) Applicants would need to establish the legal basis for bringing their application, and in order to do so, provide evidence as to whether they satisfy the 'ordinarily resident' test by way of affidavit. The requirement in clause 28 of the Bill (which amends the Adoption Regulations 1959) that these affidavits must provide evidence of the country in which the applicants and the child ordinarily reside should be sufficient.

(e) Finally, we note these issues are not discussed in the RIS or the Departmental Disclosure Statement for the Bill. As a result, it is unclear what purpose the provisions seek to achieve, and whether the concerns identified above were considered when these provisions were being designed and drafted.

7.5 For these reasons, the Law Society's preference would be to maintain the current framework in section 10 without creating additional reporting requirements which simply duplicate existing processes. We therefore recommend deleting new sections 3AAA(3), 3AAA(4) and 10(1A) from the Bill.

7.6 It may be that the intention of these provisions is to identify the information that must be included in a social worker's report for the purposes of new section 3AAA – if that is the case, we recommend amending section 10 of the Act to include such guidance, rather than mandating separate reports (and we note such an amendment could be modelled on section 133 of the Care of Children Act 2004 (**CoCA**), which offers specific guidance on

30 New section 3AAA(4)(b) in clause 5.

matters that should be addressed in reports prepared for the purposes of that Act). This approach would have the benefit of promoting consistency in reports and maintaining judicial oversight about what matters need to be addressed in a social worker report. This would also mean the applicant would continue to have responsibility for providing evidence of whether they are ordinarily resident in New Zealand (as required under clause 28) and existing Court powers could be used to request additional information or to appoint a lawyer to assist if legal questions requiring additional guidance arise.

7.7 If new sections 3AAA(3), 3AAA(4) and 10(1A) (and the court's ability to require the preparation of additional social worker reports) are to remain despite the concerns we have raised in this submission, we recommend amending new section 3AAA(4)(b) to clarify that social workers 'should not' (rather than 'need not') include any views or conclusions on the matters contained in the report.

8 Effect of overseas adoptions (clause 8)

8.1 Clause 8 of the Bill seeks to replace subsections (2) to (4) of section 17 with new subsections which apply in circumstances where an overseas adoption is not a Hague Convention adoption. If enacted in their current form, these provisions will create a category of children who become legally recognised as members of a New Zealand family following a non-Hague Convention adoption, but then lack clear immigration and citizenship pathways to move to New Zealand to live with that family:

(a) Unlike biological children and children adopted in New Zealand, children who are adopted overseas will be barred from applying for a visa or entry permission under the Immigration Act unless they fall within one of the grounds in new section 17(3)(b).

(b) Even where an adopted child is eligible to apply for a visa under new section 17(3)(b) (for example, because the overseas adoption took place in a designated country and the adopting parents are ordinarily resident in New Zealand), that child will be unable to obtain citizenship by descent, and would need to apply for citizenship by grant. Citizenship by grant is not automatic, and would only be possible where the child is able to satisfy additional requirements (for example, requirements relating to English language proficiency, good character, and an intention to remain in New Zealand). If the adopting parent is not a New Zealand citizen (despite being ordinarily resident in New Zealand), the child would also need to show that they have been in New Zealand with resident status for 8 months or more in each of the past 5 years.

8.2 While Ministerial intervention for the grant of a visa or citizenship remains an option,[31] it is important to note these decisions are made at the discretion of the relevant Minister, and do not guarantee the grant of a visa or citizenship. We also note that where a visa is sought under section 61 of the Immigration Act, the Minister can exercise their *absolute* discretion to determine whether a visa should be granted in the circumstances. In doing so, the Minister need not apply any statutory decision-making criteria, or record or provide reasons for their decision. As a result, applicants will be unable to predict the

31 Under section 61 of the Immigration Act and section 9 of the Citizenship Act respectively.

likelihood of success, and will have limited scope for meaningful reviews of decisions. Therefore, these alternative pathways do not offer consistent outcomes or certainty for adopted children and their families.

8.3 We note that, prior to the 2025 amendments, children born to or adopted overseas by New Zealand expatriates could seek citizenship by descent. In denying these children the right to citizenship by descent as well as the right to apply for a visa, the Bill now creates a cohort of children who, by virtue of having been *adopted* by New Zealand parents (rather than being *born* to them), and through no wrongdoing of their own, are unable to access citizenship by descent, or obtain a visa. To illustrate these concerns in more detail, we offer the following examples of circumstances where a child might come within this cohort:

(a) **Example 1:** a same-sex New Zealand couple adopt a child in a country where adoption is legally recognised, but immigration or long-term residence for LGBTIQ+ families is not practicable. The adoption is valid and creates full legal parentage. However, under the Bill, the adoption cannot be relied upon for citizenship or immigration unless statutory conditions are met, and if those conditions are not met, the family must rely on discretionary pathways. If the child does not manage to obtain citizenship in either country, that child will become stateless. This could mean the child is unable to safely reside with their adopting parents in either jurisdiction, and their access to family life will depend on discretionary Ministerial decision-making.

(b) **Example 2:** New Zealand citizens residing overseas adopt a child in their country of residence, having fully complied with that country's legal processes. They later decide to return to New Zealand as a family. While this child is able to apply for a visa under new section 17(3)(b)(i), they would remain ineligible to receive citizenship by descent, and must look to obtain citizenship via Ministerial intervention or by grant.

Unlike citizenship by descent, citizenship by grant is subject to the applicant meeting certain criteria, and is not as immediate as the right to seek citizenship by descent, and require satisfaction of additional requirements (as discussed at [8.1] above). Therefore, while these children are treated more favourably than adopted children of New Zealand residents, they still move from an automatic legal entitlement to a discretionary or criteria-dependent outcome. This issue persists even if the child is adopted from a designated country due to the requirement in new section 17(3)(b)(ii) for the adopting parent(s) to be ordinarily resident in New Zealand.

(c) **Example 3:** a child in a non-designated country is unable to be cared for by their parents, perhaps due to illness or death. A close relative in New Zealand (for example, an aunt or grandparent) adopts the child through an overseas adoption process, and the process is deemed valid and, in the child's best interests. However, because the adopting relative is resident in New Zealand, and the country is not designated, the statutory criteria in section 17(3) cannot be met. As a result, the family will not be able to rely on the overseas adoption to migrate the child to New Zealand to live with their adopting relative.

In such circumstances, the family would have no option but to seek a second, domestic adoption order via the Family Court. This would require the child's relative to show there are exceptional circumstances which justify the making of an adoption order – this can be difficult to prove in the absence of a genetic link to the child, and where there are no documents to prove the existence of a familial link (and we note this may be the case, for example, where the adopted child is a refugee, and has no access to identification and other official documents).

(d) **Example 4:** a family adopts a child overseas and later has a biological child. Under the Bill, the biological child may acquire citizenship automatically. However, the adopted child may have no such entitlement, and their status may depend on whether discretionary Ministerial decisions are made in their favour. This creates intra-family inequality, and a cohort of children who grow up in New Zealand without secure citizenship status.

8.4 The children in these examples all encounter the same barrier under the Bill: while the Bill recognises the existence of a parent-child relationship in each case, and operates in an environment where adoption is still akin to the transfer of parentage, it denies the legal consequences that ordinarily flow from that relationship, and replaces those legal consequences with uncertain legal pathways to immigration and citizenship.

8.5 Parentage, in all other circumstances, confers certain rights on children including the right to be cared for by the parents, a right to a home with them, and rights to access education and health services. If these rights are to be divorced from adoption while retaining the concept that adoption transfers parentage, the Bill risks creating families where children have different classes of rights depending on the circumstances of their birth or adoption.

8.6 The framework proposed in the Bill could also prevent parents from bringing any children who were adopted overseas to New Zealand, even where it is in the child's best interests to do so, and where no other safe caregiving arrangements exist. In doing so, it could also produce outcomes that are at odds with the policy objective of the Bill to "support the well-being and best interests of adopted persons".

8.7 In light of these concerns, the Law Society recommends amending the Bill to establish a separate legislative mechanism which will enable children who fall outside Hague or designated country pathways to access a visa or citizenship. Such a mechanism would be particularly beneficial in circumstances where there are kinship care arrangements, or compelling welfare considerations. It could also help mitigate risks of adopted children becoming stateless (for example, in the circumstances illustrated in Example 1 above).

8.8 Any Ministerial decision-making which occurs within this bespoke mechanism must:

(a) Involve careful consideration of what is in the best interests of the child, recognise established legal parentage, and apply consistent, published criteria.

(b) Require decisions materially affecting a child's ability to reside with their parents to be accompanied by written reasons, and be subject to judicial review.

8.9 This mechanism could also require agencies to publish operational guidance to ensure transparency, consistency, and accessibility for affected families.

8.10 If the Select Committee considers a bespoke legislative mechanism would not be appropriate here, we recommend the Committee seek advice from officials to ensure children do not become stateless as a result of the framework proposed in the Bill.

9 Establishing the validity of overseas adoptions (clause 8)

9.1 New section 17(2) provides that an overseas adoption order will have the same effect as one made under the Act. We note that prior to the 2025 amendments, section 17 included the following subclause (2A) which stated:

> The production of a document purporting to be the original or a certified copy of an order or record of adoption made by a Court or a judicial or public authority in any place outside New Zealand shall, in the absence of proof to the contrary, be sufficient evidence that the adoption was made and that it is legally valid according to the law of that place."

9.2 We recommend including a similar provision in this Bill to provide certainty around what is required to establish that a valid adoption order was made.

10 Process for designating countries (clause 9)

10.1 Clause 9 inserts new section 17A, which empowers the Governor-General to make Orders in Council designating countries for the purposes of new section 17(3)(b)(ii). The Law Society supports the creation of a list of 'designated countries' that have appropriate, child-centred safeguards embedded within their domestic adoption systems.

10.2 However, we recommend amending the Bill as follows to improve the designation process proposed in new section 17A, and to help ensure New Zealand complies with its obligations under the UNCRC:

(a) The assessment that must be undertaken when designating a particular country should include consideration of whether the adoption processes in that country promote outcomes that are in the best interests of the child, having regard to their needs and lived circumstances.

(b) New section 17(3)(b) requires the Minister to be satisfied that the country's regulatory regime affords sufficient safeguards to prevent harm to adopted persons. We recommend amending this provision to reflect that any assessments of safeguards in other countries should seek to avoid abstract or generalised assumptions about what safeguards may or may not be appropriate in particular contexts.

(c) The Bill does not include a mechanism for regular review of the list of designated countries. A review process could help ensure the list remains fit for purpose over time (for example, by enabling countries to be added to the list in recognition of steps they take to maintain a robust and ethical adoption process, and to be removed from the list for any shortcomings in their domestic adoption process).

(d) The Bill could also provide for the establishment of an independent expert panel to provide informed, specialist advice to the Minister on the matters listed in new section 17(3)(b), and whether a particular country should be added to or removed from the list. This could be accompanied by a requirement for the Minister to have regard to this specialist advice when making a recommendation to the Governor-General about a proposed designation.

11 Consideration of additional amendments required to the Act

11.1 Further to our recommendations above, we consider some additional amendments to the Act are likely necessary to give effect to New Zealand's obligations under the United Nations Convention on the Rights of the Child (**UNCRC**), and to ensure consistency with the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**), as we discuss below.

11.2 In raising these matters here, we acknowledge they likely fall outside the direct scope of this Bill; however, we take this opportunity to draw attention to them, and to note that further work (and perhaps a more holistic review of the Act) is necessary to ensure New Zealand's adoption framework is consistent with its domestic and international obligations.

Consistency with the Bill of Rights Act

11.3 In 2016, the Human Rights Review Tribunal declared that sections 3(2), 4(1)(a), 4(2), 7(2)(b), 7(3)(b) and 8(1)(b) of the Act are inconsistent with the right to freedom from discrimination on the grounds of sex, marital status, sexual orientation, disability and age (a right affirmed by section 19 of the Bill of Rights Act).[32]

11.4 Some of these sections have remained unchanged since the commencement of the Act in 1955, and it would be desirable to undertake a review of the Act (or at the very least, sections 3(2), 4(1)(a), 4(2), 7(2)(b), 7(3)(b) and 8(1)(b)), and to carefully consider what amendments would be required to remedy any inconsistencies with rights affirmed in the Bill of Rights Act.

Recognition of the paramountcy principle

11.5 Section 4 of the CoCA and section 13 of the Oranga Tamariki Act 1989 (**OT Act**) expressly recognise that the welfare and best interests of the child must be the first and paramount consideration in all cases (the **paramountcy principle**). In doing so, these provisions give effect to New Zealand's obligations under Article 3 of the UNCRC, and enable a child-focused lens to be applied to each piece of legislation, which then informs and guides its interpretation and practical application.

11.6 The Adoption Act would benefit from a similar provision which explicitly recognises that the paramountcy principle also applies to adoptions[33] – such a provision could improve

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32 *Adoption Action Inc* v *Attorney-General* [2016] NZHRRT 9; [2016] NZFLR 113.

33 While section 11(b) of the Act and new section 3AAA(1)(a)(ii)(B) recognise this principle, there is no overarching provision in the Act which clarifies whether the principle applies more generally to the administration and application of the Act.

consistency in how the principle is applied, and provide clarity and certainty regarding its application.

Representation of children

11.7 Section 7 of the CoCA and section 159 of the OT Act provide for the appointment of a lawyer for child to ensure any views the child wishes to express on the subject matter of the proceeding are conveyed to the Court, and to ensure the child's welfare and best interests are advocated for. These provisions seek to give effect to New Zealand's obligations under Article 12 of the UNCRC.

11.8 It would be desirable to include a similar provision in the Adoption Act, which enables the appointment of a lawyer for child in circumstances where that is necessary. Such an amendment is likely to be cost neutral as it largely reflects current practice, where the Family Court often appoints lawyers to assist if the Court has concerns about a child's views being brought before it, or where it is necessary to hear independent perspectives on whether a particular application will ensure the welfare and best interests of the child.

Consent process

11.9 We suggest the Act be amended to simplify and codify arrangements for taking adoption consents of legal parents who are situated overseas. The current framework for adoption consent is rather complex:

(a) Section 7 of the Act currently requires consent to an adoption to be given by the parents and guardians of a child, and the spouse of an applicant where one spouse alone applies to adopt. Subsection (7) authorises a broad group of people to take consents, when the consent is taken in New Zealand, the Cook Islands or Niue. However, if consent is taken anywhere other than New Zealand, the Cook Islands or Niue (which lawyers have observed is almost always the case in overseas adoptions including international surrogacy arrangements), it must be taken by a Notary Public or Commonwealth representative who exercises his or her functions in that country.

(b) The person taking the consent of a parent or guardian has a significant role in the adoption process. They are required not only to witness the signature of the consent giver but also to certify that they have explained the effect of an adoption order under New Zealand law to the consent giver, and that they consider the consent giver understands those effects.

(c) The evolution of case law has provided guidance on the procedural and substantive steps that should be undertaken to ensure consent is fully and freely given. In summary, this involves:

(i) The consent taker meeting with the consent giver, asking the consent giver to read the consent document and the explanation of the effect of an adoption order contained within the consent document.

(ii) The consent taker would then read the printed explanation out loud to the consent giver and explain each point in their own words. It is prudent

to encourage the consent giver to ask questions and seek clarification of any points on which they are unclear. It is also good practice to ask the consent giver to reflect what they take each point to mean, so that their comprehension is clear.

(iii) The consent taker then provides time and space for the consent giver to reflect on their decision to give the consent, before asking the consent giver if they wish to sign the consent. If they do, then the consent taker must be assured that the consent is given freely and voluntarily. This is a judgement call informed by all the information available to the consent taker.

(d) When explaining the effect of the adoption order under New Zealand law, the consent taker should also explain that:

(i) 'Guardianship' means having all the duties, powers, rights and responsibilities that a parent has in relation to the upbringing of a child.

(ii) A withdrawal of the consent is exceptionally difficult to achieve (if at all) and that the consent giver should be certain of their position before signing.

Suggested solution

11.10 This framework effectively requires consent takers to provide New Zealand legal advice, and assess the consent giver's understanding and capacity to provide consent. Lawyers have observed that Notaries Public in many countries consider these requirements to be outside of their powers, and refuse to undertake this role on that basis. Similarly, New Zealand consulate officials are declining to undertake the role on the basis that they do not possess the necessary skills to effectively take consent.

11.11 The courts have responded to this issue by permitting a New Zealand lawyer to take consent via audio-visual link from New Zealand to wherever in the world the consent giver is located. This process was first judicially approved in *Re Raja*,[34] and has been applied extensively since.

11.12 The *Re Raja* process is robust and efficient: it sets out procedural requirements and requires an affidavit from the consent taker that those requirements have been followed. Lawyers have noted this process is much more user-friendly, and less stressful for the consent giver, particularly in the immediate post-birth period.

11.13 Consideration could therefore be given to amending the Act to enable consent to be given by audio-visual link. This would require amending:

(a) Section 7(8) of the Act to include the following:

> Except where it is given by the chief executive, a document signifying consent to an adoption shall not be admissible unless it is witnessed and certified by a Barrister and/or Solicitor of the High Court of New Zealand, in person or via audio-visual link.

34 *Re Raja* [2023] NZFC 11507.

(b) The Family Court Rules 2002 to require an affidavit from the consent taker to be filed with the adoption application, that covers what is currently required by the *Re Raja* process, specifically:

(i) The quality of the audio-visual link was sufficient to enable the documents in the consent giver's possession and the consent giver to be clearly seen.

(ii) Who else, beyond the consent giver, was on the audio-visual link (for example, an interpreter).

(iii) The process by which they received a copy of the signed consent form from the consent giver (for example, by email) and that they are satisfied that the document they received was the document they witnessed being signed via the audio-visual link.

Jesse Savage
Vice-President