2

The legal framework for overseas adoptions

The Hague Convention on Intercountry Adoption

2.1 The Hague Convention on Intercountry Adoption is the cornerstone of intercountry adoption in Australia. It states the principles and conditions under which intercountry adoption will operate. In evidence, the Attorney-General's Department noted the importance it places on countries of origin complying with the Hague Convention:

> The concern of government is to ensure that there are very transparent and obvious procedures, guidelines and protections relating to intercountry adoption. Governments have taken the view that they are best set down in the Hague Convention on Intercountry Adoption….
>
> … One thing that we have done during our time is to ensure, to the extent that we can, that the bilateral arrangements that we have with these countries meet the standards that are set down in the Hague convention. We understand that a number of these countries are considering joining the convention and that is certainly, at the moment, Australia's preferred position.[1]

2.2 The convention was developed under the auspices of the Hague Conference on Private International Law.

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1 Duggan K, transcript, 9 May 2005, p 43.

The Hague Conference on Private International Law

2.3 The conference is an international body that comprises 64 member states, the majority of which are from Europe. Other member states include China, Japan, South Africa, New Zealand and all the countries in North America. Australia became a member in 1973.

2.4 The aim of the conference is to progressively unify civil legal systems in member states where those systems operate internationally. The area that concerns this inquiry is intercountry adoption, but member states have also made agreements in relation to civil procedure, child maintenance, recognition of divorces, taking of evidence and child abduction. By working cooperatively, member states reduce the risk, uncertainty, cost and delays in international legal matters.

2.5 The first session of the conference was convened in 1893. A statute (the conference's constitution) making the conference a permanent intergovernmental organisation came into force on 15 July 1955. Nations become members of the conference by depositing a signed instrument of acceptance of the statute with the Netherlands Government.[2]

2.6 Since 1956, regular plenary sessions of the conference have been held every four years. The plenary sessions discuss and agree on draft conventions that have been drawn up earlier by government experts during special commissions.

2.7 Once a convention is made, the conference monitors and reviews its operation and supports its implementation, such as through good practice guides and practical handbooks. The conference's activities are supported by a secretariat called the Permanent Bureau based in The Hague. The bureau must comprise different nationalities.

2.8 Parties overseas may wish to enforce compliance by an individual or an Australian government with the provisions of a Hague convention. Such compliance would not be enforced on the basis of the convention itself, but on the basis of the legislation passed by our governments to implement that convention.

2.9 Australia's contribution to the conference for 2004-05 was approximately $170,000.[3] In evidence, the Attorney-General's Department stated that Australia received significant benefits from its contribution:

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2 Personal communication, Fitch C, Attorney-General's Department, 10 November 2005.

3 Discussion drawn from Attorney-General's Department 'Hague Conference on Private International Law' exhibit 25, pp 1-3.

> … there are a whole range of benefits that flow to Australia by being party to numerous Hague conventions, not just in family law but in civil law generally. This country has always been a very active participant in the Hague convention procedures, both in civil law and in other areas. Indeed, a member of my staff has been recently seconded to the Hague Convention…[4]

The Hague Convention

2.10 The preamble to the Hague Convention sets out its aims, and these aims neatly summarise much of what the committee has set out in chapter one of this report:

- children should grow up in a family environment;
- each member state should attempt to keep children in their families of origin;
- intercountry adoption can offer a permanent family to a child where a suitable family cannot be found in their state of origin;
- the abduction and trafficking of children should be prevented; and
- intercountry adoptions should be made in the best interests of the child.[5]

2.11 The convention is attached as Appendix F. The key features of the Hague Convention include:

- the competent authorities of the state of origin must have established that the child is adoptable and that a family for it cannot be found within its state of origin (article 4);
- an intercountry adoption must be in the best interests of the child (article 4);
- a mother must be counselled before giving consent to the adoption (article 4);
- the consent cannot have been induced by any payment or compensation (article 4);
- governments are to designate a central authority to manage intercountry adoptions (articles 6 and 7);

4 Duggan K, transcript, 9 May 2005, p 43.

5 Hague Conference on Private International Law, 'Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,' exhibit 26, p 1.

- central authorities and competent authorities have a duty to expedite intercountry adoptions (articles 9 and 35);
- central authorities may delegate their functions to accredited bodies (articles 10 and 11);
- member countries are required to recognise each others' adoption orders (article 23); and
- no-one should derive improper financial gain from intercountry adoption; all fees should only relate to costs and expenses incurred (article 32).

Negotiations to implement the convention

2.12 The Hague Convention was concluded in May 1993 and entered into force in May 1995.[6] The Australian community services ministers then commenced negotiations on how the convention could be implemented within Australia. These discussions culminated in the signing of the *Commonwealth-State Agreement for the Implementation of the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption* between the ministers in early 1998. A copy of the this document is at Appendix F.

2.13 This Commonwealth-State memorandum of understanding (MOU) takes a minimalist approach to implementing the convention. It states that:

- Australia's existing standards are sufficient to meet the convention (paragraph C);
- a signature by a state minister on the agreement is in effect a statement of compliance with the convention (article 11); and
- there shall be a minimum of disruption to existing state and territory legislation and procedures (article 3).

2.14 The document provides that Australia can enter into new agreements with countries that are not party to the convention 'on the basis of compliance' with its requirements (article 18).

2.15 The Commonwealth-State MOU also fills in many of the gaps in relation to the requirements for an accredited body. Article 11 of the convention only provides broad requirements, namely that accredited bodies in Australia should be:

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6 Hague Conference on Private International Law, 'Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,' exhibit 26, p 1.

- non-profit organisations;
- staffed by qualified personnel; and
- supervised by competent authorities in relation to their composition, operation and finances.

2.16 The agreement makes more specific requirements in its Schedule:

- the body cannot undertake negotiations to establish adoption arrangements in an overseas country (articles 6 and 7);
- it must have suitable accommodation, which cannot be adjacent to or form part of the accommodation used by an aid organisation or an adoption group (article 11);
- it cannot be associated with an overseas aid program (article 14);
- it must have suitable facilities for the confidential storage of records (article 15);
- it must provide biannual reports to the state central authority (article 20); and
- staff members must avoid conflicts of interest, including the acceptance of gifts or benefits that could be seen as causing them to deviate from a proper course of action (articles 26 and 27).

2.17 Article 19 of the Commonwealth-State MOU states that it does not give rise to any legally enforceable rights. The agreement, therefore, is equivalent to a memorandum of understanding - an 'agreement to agree' rather than a contract. Article 24 provides that the agreement can only be amended by a unanimous vote of the Community Service Ministers' Council.

2.18 Throughout this report, the committee makes recommendations to change state and territory practices and to enhance the role of the Commonwealth, consistent with its position as Australia's central authority under the Hague Convention. The MOU currently states that implementing the convention on intercountry adoption will only require minimal change to current state and territory practices and in the committee's view, this philosophy needs to be changed.

2.19 Many of the recommendations in this report will be based on initially changing the MOU, which should then flow through to legislation and practice. The committee believes that the Attorney-General should initiate these renegotiations in relation to the memorandum. Many of the committee's proposals will need to be actioned through this process.

Recommendation 1

2.20 **The committee recommends that the Attorney-General renegotiate the *Commonwealth-State Agreement for the Implementation of the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption* (hereinafter referred to as the Commonwealth-State Agreement) with the states and territories.**

Intercountry adoption regulations

2.21 Section 111C(1) of the *Family Law Act 1975* permits the Commonwealth to make regulations to allow Australia to meet its obligations under the Hague Convention. Articles 5-10 of the Commonwealth-State MOU states that the Commonwealth is to make all such necessary regulations under the Family Law Act.

2.22 Section 111C(3) of the Family Law Act gives the Commonwealth the power to make regulations to give effect to a bilateral agreement on intercountry adoption. Such a bilateral agreement would typically be made with a country that has not signed the convention but is regarded as largely compliant. These agreements define the relationships between two countries and are specifically nation-to-nation documents.

2.23 The Attorney-General's Department advised the committee that one of the main intercountry adoption regulations is the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998*.[7] The main functions of the regulations are to:

- make the Commonwealth Attorney-General's Department Australia's central authority for the convention (clause 5);
- give the Commonwealth a consultation and co-ordination role with the states and territories and overseas governments (clause 6);
- allow the states and territories to continue to conduct the day-to-day operations of intercountry adoption (clause 6);
- allow for state and territory departments to be designated as central authorities under the convention (clauses 9 and 10);
- create a framework to legally recognise the adoption of children from overseas (Part 4); and

7 Attorney-General's Department, sub 80, p 2.

- invest state and territory courts with jurisdiction to legally recognise the adoption of children from overseas (Part 5).

2.24 Broadly, the Commonwealth currently acts as a 'post-box', with all the other functions in intercountry adoption being handled by the states and territories. The Attorney-General's Department allocates less than one full time staff member to the Commonwealth's role as a central authority.[8]

2.25 In its submission, the Attorney-General's Department confirmed this division of responsibilities:

> In practical terms, this role extends to assisting with liaison with overseas Central Authorities about intercountry adoption programs as well as assisting with establishing new programs. The Commonwealth Central Authority meets regularly with the State and Territory adoption authorities to discuss particular issues relating to intercountry adoption as they arise.
>
> The State and Territory Central Authorities retain responsibility for all practical aspects of adoption, including the processing of intercountry adoption applications and therefore have their own legislation to regulate intercountry adoption.[9]

2.26 Clause 34 of the regulations provides that if a state or territory passes legislation to the same effect as the regulations, then the Commonwealth regulations do not apply to that state or territory. In other words, if a state or territory wishes to make its own arrangements to implement the convention, then the Commonwealth is permitting that jurisdiction to legislate for itself. This arrangement is consistent with the Commonwealth's non-interventionist policy in the Commonwealth-State MOU and in evidence provided above by the Attorney-General's Department.

2.27 The other relevant regulations are the *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998*. These provisions declare that, for children adopted from certain countries, their adoption is officially recognised in Australia when the adoption is legally finalised in the country of origin (see clause 5). The only country for which this arrangement applies is China.

8 Harding L and R, sub 46, p 2.

9 Attorney-General's Department, sub 80, p 3.

2.28 These regulations were made because the Chinese authorities would not permit their children to be taken overseas without the assurance that the adoption was complete.[10]

The states and territories

State and territory adoption legislation

2.29 The Commonwealth-State MOU requires that intercountry adoption be implemented with as little change to state and territory arrangements as possible. Hence, all the administrative and legal procedures for intercountry adoptions are conducted under state and territory legislation.

2.30 Several governments made the point that their legislation is largely similar to the legislation of the other governments.[11] Taking the New South Wales *Adoption Act 2000* as an example, typical provisions include:

- principles to be applied in conducting adoptions, such as only acting in the best interests of the child (sections 6 to 9);
- accrediting non-government organisations to provide adoption services for both local and intercountry adoptions (sections 10 to 21). No group in Australia is currently accredited to provide the full range of intercountry adoption services;
- assessment of potential parents, including both quantitative requirements, such as age, and qualitative requirements, such as the standard of care they are likely to give the child (sections 26 to 30). There are significant differences between the states and territories, particularly in relation to the quantitative requirements;
- counselling of relinquishing parents and requiring their formal consent to relinquish (sections 52 to 74);
- the guardianship of a child by the Director-General of the relevant department pending the child's adoption (sections 75 to 79);
- the legal aspects of adoption proceedings, including the effect of an adoption order (sections 80 to 101 and 118 to 129);

10 Victorian Government, sub 206, p 6.

11 Australian Capital Territory Government, sub 200, p 4 and South Australian Government, sub 245, p 4.

- control of adoption information, including reunion and information registers (sections 133 to 175);
- probity offences, such as making false statements or impersonating a party to an adoption (sections 176 to 179 and 181 to 188);
- recognising intercountry adoptions (sections 103 to 117);
- setting fees and charges for services provided (section 200); and
- publicity offences, which focus on identifying the parties to an adoption (section 180).

2.31 As an example of some of these provisions, section 180 of the New South Wales *Adoption Act 2000* states:

> (1) A person must not publish in relation to an application under this Act or under a law of another State for the adoption of a child or in relation to the proceedings on such an application:
>
> > (a) the name of an applicant, the child, or the father or mother or a guardian of the child, or
> >
> > (b) any matter reasonably likely to enable any of those persons to be identified.
>
> Maximum penalty: 25 penalty units or imprisonment for 12 months, or both.
>
> (2) This section does not apply in relation to the publication of any matter with the authority of the Court to which the application was made.

2.32 The various acts permit the making of regulations. Many important requirements can be found in subordinate legislation that are subject to reduced parliamentary scrutiny. Administrative matters such as setting fees, for instance, are commonly found in regulations.

2.33 In a small number of cases, provisions are too removed from parliamentary scrutiny. In New South Wales for example, the criteria for assessing potential adoptive parents are published in the New South Wales Government Gazette under the authority of clause 12 of the *Adoption Regulation 2003*.[12]

2.34 There are variations between the jurisdictions. For example, Western Australia uses an adoption applications committee to assess adoptive

12 Niland C, 'Criteria for Assessment of Adoption Applicants,' *New South Wales Government Gazette* No. 144, 24 December 1999, pp 12533-12534.

parents.[13] In other jurisdictions, however, such decisions are made under the delegation of the department's chief executive officer or by the principal officer of an adoption agency.[14]

The Hague Convention

2.35 Not all jurisdictions fully address intercountry adoptions in their legislation. The jurisdictions that have taken advantage of the exemption in clause 34 of the Commonwealth regulations and implemented the Hague Convention in their adoption legislation are New South Wales, Victoria, Queensland and Western Australia.[15] In the other jurisdictions, the Hague Convention on Intercountry Adoption operates through the Commonwealth regulations where necessary.

2.36 This arrangement permits the states and territories ownership of the intercountry adoption policy area. It also sends the signal that the Commonwealth does not wish to exercise leadership in developing intercountry adoption policy.

2.37 The Commonwealth-State MOU authorises states and territories to accredit non profit organisations to provide intercountry adoption services. New South Wales, Victoria and Western Australia have incorporated the authority to credit into their own regulations. [16] The other states and territories rely on the authority of the Commonwealth-State MOU. [17]

2.38 No body is currently accredited to provide the full range of intercountry adoption services. There is a range of other licensing arrangements, however. For example, three agencies are licensed to provide local adoption services in New South Wales. Two agencies are licensed in Western Australia to provide some intercountry adoption services, rather than covering the whole process.[18]

2.39 Until earlier this year, South Australia accredited Australians Aiding Children Adoption Agency (AACAA) to provide intercountry adoption services. The government resumed these services on 1 April 2005.

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13 *Adoption Act 1994* (WA), section 13.

14 For example, see the New South Wales *Adoption Regulation 2003*, clause 13.

15 Attorney-General's Department, sub 187, p 5.

16 Schedule 1, New South Wales *Adoption Regulation 2003;* clauses 10B and 10C, Victorian *Adoption Regulations 1998;* clause 23C, Western Australian *Adoption Regulations 1995*.

17 As of October 2005, New South Wales is in the process of establishing a process to accredit non-government bodies to provide intercountry adoption services.

18 Australians Adopting European Children, sub 16, p 14.

Interestingly, South Australia has no specific criteria for accreditation in its legislation. Instead, the *Adoption Act 1988* (SA) allows services to be provided by 'a person or organisation approved by the Chief Executive'.[19]

Coordinating the states and territories

2.40 From the mid 1970s until 1982, state and territory adoption officers held regular meetings on intercountry adoptions. After that time, it appears that these meetings were either discontinued or infrequent, and inconsistencies developed between states and territories in how they managed intercountry adoptions.[20]

2.41 In 1986, a Joint Committee on Intercountry Adoption met to review intercountry adoption practice in Australia. One of its recommendations was that a Standing Sub-Committee on Intercountry Adoption meet regularly and provide an annual report to the Council of Social Welfare Ministers.[21]

2.42 From 1999, this committee has met every six months in different locations around Australia. The meetings are chaired by the host jurisdictions.[22]

2.43 Later in the report, the committee makes recommendations that the Commonwealth should take a greater role in intercountry adoption, especially in managing its international aspects. Further, the Commonwealth has a key coordinating role under the framework established to implement the Hague Convention. Therefore, the committee believes that the Commonwealth should continue to take an active role in coordinating these meetings.

Recommendation 2

2.44 **The Attorney-General's Department continue to be the permanent chair of the Intercountry Adoption Central Authorities Meetings to oversee the agenda which will drive the commonality of adoption policy, resources and quality frameworks.**

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19 *Adoption Act 1988* (SA), section 29(2)(b).

20 Joint Committee on Inter-country Adoption, *Report to the Council of Social Welfare Ministers and the Minister for Immigration and Ethnic Affairs of the Joint Committee on Intercountry Adoption Together with the Ministerial Response to the Report* (1986), p 82.

21 Joint Committee on Inter-country Adoption, *Report to the Council of Social Welfare Ministers,* p 82.

22 Attorney-General's Department, sub 187, pp 9, 34-205.

Countries of origin

2.45 Countries of origin have their own processes and requirements to which they must adhere. In general, their administrations seek to ensure that the children are genuinely adoptable and cannot otherwise be placed within the country of origin.

2.46 Below are overviews of the six programs that resulted in the highest number of adoptions in 2003-04.

China

2.47 In 2003-04, 112 children were adopted from China. This represents 30% of total intercountry adoptions that year.

South Korea

2.48 As noted earlier in the report, adoptions out of South Korea commenced during the Korean War. The South Korean Government initially intended to cease all intercountry adoptions out of their country by 1980. The program closed in the late 1980s but was reopened.

2.49 The South Korean Government strongly prefers to place all children within South Korea, if possible. Therefore, there is no formal agreement with Australia for the program. The only countries that the South Korean Government permits to receive their children are Australia and the United States.

2.50 The Ministry of Health and Welfare has authorised specific agencies to handle particular types of adoptions. The Eastern Social Welfare Society (ESWS) is the only agency authorised to handle adoptions from South Korea to Australia. Children receive a high level of care. The Attorney-General's Department advised:

> The program is largely compliant with the principles and standards of the Hague Convention and is a very effective and well organised program. ESWS is very responsive to any requests for any type of information…[23]

2.51 A quota system applies. ESWS advises Australia of the number of files it can accept for that year, which is distributed on a per capita basis between the states and territories. Some delays have developed in the program, in particular lengthening periods to allocation and advice to travel. Further,

23 Attorney-General's Department, sub 249, p 3.

the South Korean Government sets a separate quota for exit visas for adopted children, which means some children have to wait for the next calendar year before they are able to travel.[24]

2.52 In 2003-04, 98 children were adopted from South Korea. This represents 26% of total intercountry adoptions that year.

Ethiopia

2.53 This program originated in April 1992 when the Australian African Children's Aid Support Association submitted a proposal to develop a program with Ethiopia. The agreement was negotiated by the relevant Queensland department and was finalised in March 1994. The two parties to the agreement are the Ethiopian Ministry of Labour and Social Affairs and the Australian Council of Social Welfare Ministers. This arrangement is apparently unique as Ethiopia's programs with other countries operate through non-government organisations.

2.54 The Australian states and territories have appointed Ato Lakew Gebeyehu Likelew and his wife Misrak Getahun Zewde (Misrak) to represent them and Australian families in managing the adoption process in Ethiopia. A service agreement, signed in May 2004, manages this relationship.

2.55 The Attorney-General's Department advised:

> Since the program commenced significant matters of concern have been addressed by Queensland and other States in regular telephone and written communication with Lakew and in meetings with him and the States in Australia in 1996, 1999, 2000, and 2004.
>
> Visits to Ethiopia have been undertaken by the Queensland Director-General and Manager, Adoption Services in 1998. In 2003, a delegation of Departmental officers from Queensland, South Australia and Victorian intercountry adoption services visited Ethiopia to review the program with MOLSA [the Ministry] and witness the operation of program within the context of the environment in which it functions. A number of ongoing concerns relating to the integrity of the program were able to be more fully explored with key stakeholders in the country and enhancements made to its operation which were also incorporated into the Service Agreement referred to above.[25]

24 Discussion drawn from Attorney-General's Department, sub 249, pp 1-6.

25 Attorney-General's Department, sub 251, pp 1-2.

2.56 Whilst awaiting adoption, many of the children have suffered malnutrition and illness from a young age. It is not unusual for special needs or hidden health problems to arise after they return to Australia.

2.57 The Attorney-General's Department advised that, 'The program is compliant with the principles and standards of the Hague Convention' (p 4).[26]

2.58 In 2003-04, there were 45 adoptions from Ethiopia. This represents 12% of the total intercountry adoptions during that year.

Thailand

2.59 In 2003-04, 39 children were adopted from Thailand. This represents 11% of total intercountry adoptions that year.

India

2.60 In 2003-04, 29 children were adopted from India. This represents 8% of total intercountry adoptions that year.

Philippines

2.61 The Australian states and territories have had a long standing intercountry adoption program with the Philippines that predates the Hague Convention. The Convention came into force in the Philippines before it did in Australia (1996) and the arrangements between the two countries are now under the Convention.

2.62 As with other countries, the Philippines have set an upper limit on the number of international adoptions each year so that only 400 – 500 children per year are placed for overseas adoption, primarily to the United States, Norway and Australia.[27]

2.63 The Intercountry Adoption Board (ICAB) is the central adoption authority in the Philippines and it strictly regulates the adoption process. Australian states and territories manage their applications directly with the ICAB, which draws children from a number of public and accredited private centres.

2.64 The ICAB has advised the Australian government that there are now fewer healthy children under two years old in the Philippines available for

26 Discussion drawn from Attorney-General's Department, sub 251, pp 1-6.

27 Attorney-General's Department, sub 259, p 1.

intercountry adoptions. Prospective parents will have to wait longer to be matched with such children or accept older children or those with medical conditions. The ICAB is, accordingly, looking for families who are more flexible in the children they will consider of adoption. [28]

2.65 In 2004-05, 48 children were adopted from the Philippines. This represents 11% of total intercountry adoptions that year.

Origin countries' eligibility requirements for parents

2.66 Table 2.1 on the next page shows the eligibility requirements for potential adoptive parents that are imposed by overseas governments. The six countries of origin shown are those that resulted in the highest number of adoptions in 2003-04.

2.67 The first point the committee would like to make is that these requirements are not negotiable. We must accept the requirements imposed by the countries of origin and it would be improper for Australian adoptive parents or governments to attempt to put a case to overseas authorities to make changes to them.

2.68 The second observation is that many of these countries' requirements are more restrictive than those imposed by Australian states and territories (discussed in chapter three). Relaxing domestic minimum requirements will not assist applicants in Australia if the barrier is caused by overseas regulations. On the other hand, potential adoptive parents usually have a choice of jurisdictions, which means they can select the country of origin that best suits their circumstances.[29]

Establishment and maintenance of programs

2.69 In 1991, the states, territories and Commonwealth agreed on the procedures for establishing programs with new countries in the document *Protocols and Procedures for the Development of New Programs for Intercountry Adoption with New Countries*. Broadly, the procedure outlined is:

- state or territory ministers initiate proposals, possibly following correspondence from the community. A minister who wishes to make a proposal prepares a scoping study;
- the scoping study should take into account Commonwealth advice, any financial impact, the attitude to intercountry adoption of the country of

28 Attorney-General's Department, sub 259, p 2.

29 Byerley S, International Adoptive Families of Queensland, transcript, 21 July 2005, p 84.

origin, the risk of child trafficking and the commitment of Australia's governments to deal only with agencies overseas recognised by their respective governments;

- the welfare ministers should formally decide to investigate the proposal;
- a state or territory officer is to investigate the proposal in the country of origin. The investigation should include the matters listed above, including compliance with the convention;
- the welfare ministers decide whether to implement the new program;
- the state and territory ministers who wish to be a party to the agreement and a representative of the relinquishing country draw up and sign the agreement;
- the Department of Foreign Affairs and Trade arranges for the exchange of diplomatic notes to finalise the arrangement; and
- states and territories monitor all programs.

2.70 Once Australia ratified the convention, programs were classified as either Hague programs or bilateral programs. The 1998 agreement provided that, where Australia had an existing bilateral agreement with a country, the agreement should be renegotiated to ensure compliance with the convention if that country did not become a party to the convention within the next three years. In evidence, the committee asked the Attorney-General's Department whether Australia had conducted these renegotiations:

> No. As I understand it, we have assessed the agreements as complying with the Hague convention procedures. As outlined in our submission, that was done last year.
>
> It was a unilateral review by this country. So I suspect that the other countries would not regard that as a renegotiation.[30]

2.71 The memorandum also stated that if a country was neither a member of the convention nor a party to a bilateral agreement with Australia, then any future bilateral agreement would be made on the basis of compliance with the convention and in line with the 1991 *Protocols and Procedures* document.

30 Duggan K, transcript, 9 May 2005, p 59.

Table 2.1: Selected minimum eligibility criteria for major countries of origin

	China	South Korea	Ethiopia	Thailand	India	Philippines
Minimum age	30	25	25	25	28	27
Maximum age	55 with some flexibility for the older applicant to be over 55. Single applicants need to be 50 years 0 months and under	44	Age gap of no more than 40 years, with flexibility up to 50	Applicants under 44 years are matched with children 0 – 4 years and applicants over 44 years are matched with older children	55 – agencies may set a limit as low as 40 for the placement of an infant	Preference for gap of no more than 45 years between the oldest parent and the child
Can singles apply?	Yes – quota applies	No	Women only	Women only, but only for a child with disabilities or a serious medical condition	Yes – single men can only adopt boys	Yes – but only for a child with disabilities or a serious medical condition
Can de facto couples apply?	No	No	Yes	No	No	No
Minimum length of relationship	Must be married and demonstrate stable relationship	3 years	1 year	None	5 years	3 years
Family restrictions	- maximum of 4 other children - adoptee at least 12 months younger than youngest child in the family	Maximum of 4 other children	Several families with biological children have subsequently adopted children	- priority given to childless couples - any child in the family over 12 must agree to the adoption	- priority given to childless couples - maximum of 3 other children for couples and 1 for singles	- priority given to childless couples - any child in the family over 10 must agree to the adoption
Fees	USD $4,500 plus travel fees between USD $1,100 – USD $1,900 per person	USD $8,000	USD $3,600	AUD $1,000	US $1500 to US $3000	USD $2,000 approx.
Other	-	- no more than 30% overweight - minimum income of USD $30,000	Must show sufficient income to parent the child	Preference given to families of Thai origin	Preference given to families of Indian origin	Preference given to families of Filipino origin. Applicants should be Christian

Source: See Appendix E.

2.72 One of the implications of this history is that programs are managed by state and territory governments, with one particular jurisdiction having 'lead state' status for overall responsibility for that program.[31]

2.73 Table 2.2 lists the status of programs and which state or territory has responsibility for them.

2.74 There are two main conclusions that can be drawn from the table. The first is that the two largest jurisdictions, New South Wales and Victoria, have responsibility for 70% of the programs. This may be due to their greater economies of scale. Secondly, only half the programs are active. The reason for this will be explored in chapter five.

Table 2.2: Allocation of programs between states and territories

State or Territory	**Program and status**			
	Active	*Heritage*	*Under negotiation*	*Inactive*
New South Wales	Chile, Colombia, South Korea, Taiwan		Bolivia, Costa Rica	
Victoria	China, Hong Kong, Lithuania, Mexico, Philippines, Thailand	Latvia, Mauritius, Sri Lanka		Estonia, Guatemala, Moldova, Romania
Queensland	Ethiopia, Fiji			
South Australia	India	Turkey		
Western Australia			Brazil	Burkino Faso
Tasmania			South Africa	
ACT	Poland			
Northern Territory				

Source: Attorney-General's Department, sub 187, pp 11-14. 'Heritage' programs are only open to applicants of that country's heritage.

2.75 Officials from state and territory departments occasionally visit countries of origin to monitor the programs, especially those for which they are the lead state. For example, in the last 10 years, Victorian officials visited China six times, South Korea twice, and Ethiopia once. New South Wales officials once visited China and South Korea. Queensland visited Ethiopia once during this period.[32]

31 Australian Capital Territory Government, sub 200, p 4.

32 Attorney-General's Department, sub 187, pp 11-14.

2.76 Following Australia's ratification of the convention, it appears no further bilateral programs have been established except for with China in December 1999. In October 2004, the Community Services Ministers' Advisory Council (comprising relevant officials from government departments) agreed that new programs will only be established with countries that are a party to the convention.[33]

2.77 The committee understands that programs with Hague countries are established and maintained under a similar process to that outlined in the 1991 *Protocols and Procedures* document, except that the Attorney-General's Department has a role in making the initial approach to the overseas central authority.

2.78 Although adoptions with Hague countries give a certain level assurance that processes will be of a certain standard, the focus on Hague countries has meant that Australia does not process adoptions with non-Hague countries. The committee is concerned that adoptions cannot be undertaken with democratic nations, such as the United States, which are either in the process of ratifying the Hague Convention or which have regulated internal adoption processes. This is an anomaly which should be rectified in order to satisfy the occasional request for an adoption with a non-Hague country that has good standards of governance.

2.79 The committee also has a number of wider concerns about how the states and territories have conducted these programs, which require Australia to manage its relationships with other countries. In principle, matters of external affairs are the Commonwealth's responsibility. The committee supports the Commonwealth taking a greater role in managing these programs and this will be discussed further in chapter five.

Cross border requirements

Immigration

2.80 The adoption of overseas children by Australian citizens in their countries of origin does not of itself change the nationality of those children. They remain citizens of their country of origin. Under section 14 of the *Migration Act 1958*, if these children were to enter Australia without a visa, they would be classified as unlawful non-citizens. Under section 189 of that Act, immigration officers are required to detain unlawful non-citizens.

33 Australian Capital Territory Government, sub 200, p 4.

2.81 Schedule 2 of the *Migration Regulations 1994* creates the adoption visa (clause 102), which Australians resident in Australia must arrange for their adopted children. There are a large number of criteria that must be satisfied for a child to receive this visa, although few, such as the health checks, are likely to pose difficulty. The visa fee is $1,305.[34]

2.82 The first set of criteria revolves around the type of adoption (clause 102.211). The categories include:

- the child was adopted overseas by an Australian who has lived at least 12 months overseas, provided the parent was not attempting to circumvent adoption visa requirements (as noted later in the chapter, these children now need an adoption visa as a condition of applying for citizenship overseas);
- the overseas and local authorities have approved the adoption and the adoption is either in accordance with the Hague convention or the adoption may be recognised by the *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998*. The second case, in effect, means the adoption is from China; and
- the child is adopted in a convention country in accordance with the convention.

2.83 There are a number of requirements that the child must meet that were not raised as problematic during the inquiry:

- the child must be sponsored (clause 102.212);
- the laws of the country of origin must be complied with (clause 102.213);
- the child must be outside Australia when the visa is granted (clause 102.4);
- the child must become established in Australia without undue personal difficulty and without imposing any undue burden on the Australian community (clause 102.223).

2.84 The adopted children are also subject to requirements which, although they were not cause for concern to participants in the inquiry, seem to be of little application for adoptions. The children must:

- pass a character test;
- not be a risk to Australian security;

34 Viewed on 15 October 2005 at http://www.immi.gov.au/allforms/990i/990i_booklet2.htm.

- not prejudice, through their presence, Australia's relationships with foreign countries;
- not be associated with weapons of mass destruction;
- not have outstanding debts to the Commonwealth; and
- intend to live permanently in Australia (clause 102.223).

2.85 As noted earlier, to receive the visa, children must pass a health check (clause 102.223). Clause 4007 of Schedule 2 lists the requirements, which include:

- being free of tuberculosis;
- being free of a disease or condition that would make the applicant a threat to Australia's public health or a danger to the Australian community – at a minimum, this includes HIV and Hepatitis B;[35] and
- being free of a disease or condition that would require health or community services which, in turn, would either result in significant cost to the Australian community or prevent an Australian citizen using those services.

2.86 Under clause 4007, the health check can be waived. In 2003 and 2004 there were five children who did not meet the health requirements. In two cases, the parents did not proceed with the adoption and in the other three the requirements were waived.[36]

Guardianship of children

2.87 The *Immigration (Guardianship of Children) Act 1946* was passed to help manage the adoption of children from the United Kingdom after the Second World War. Broadly, it makes the relevant Commonwealth minister the guardian of a child that enters Australia that is not a citizen and is not in the care of a parent or relative ('non-citizen child,' see sections 4AAA and 6). The minister currently responsible for this legislation is the Minister for Immigration and Multicultural and Indigenous Affairs.[37]

2.88 The minister may delegate this responsibility to any official of the Commonwealth or state or territory. The committee understands that the

35 Department of Immigration and Multicultural and Indigenous Affairs, sub 90, p 1.

36 Department of Immigration and Multicultural and Indigenous Affairs, sub 205, p 2.

37 Administrative Arrangements Order, 21 July p2005, p 28, viewed on 25 October 2005 at http://www.pmc.gov.au/parliamentary/index/cfm.

minister has delegated this responsibility to the relevant agencies in all states and territories. For example, section 77 of the New South Wales *Adoption Act 2000* includes a note stating that the Commonwealth minister has delegated their authority to the Director-General of the state department.

2.89 Generally, children adopted from overseas and brought into the country without having previously obtained citizenship are subject to the legislation. The relevant community service department in that state or territory supervises the adoption until the final adoption order is made, whereupon the child is in the custody of its parents and no longer meets the definition of a non-citizen child.

2.90 If the child was awarded citizenship during this interim period, it would also be removed from these requirements. Any such application is unlikely, however, because the adoptive parents are not yet the child's legal parents and would probably have no standing to make an application for citizenship on the child's behalf.

2.91 This legislation does not apply to children adopted from China. Under clause 5 of the *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998*, adoptions of Chinese children are recognised when the adoption is finalised in China. Therefore, these children are in the custody of their parents when they enter the country and are not non-citizen children.

2.92 Similarly, the act does not apply to children who are adopted overseas by expatriate Australians and then apply for and receive Australian citizenship. If these expatriates then return to Australia with their children, the legislation does not apply because they are citizens.

Citizenship

2.93 The main provision in the *Australian Citizenship Act 1948* is section 10A, which states that a child (which is not an Australian citizen) gains citizenship if they are legally adopted under Australian law and the adoption is finalised in Australia.

2.94 In 2003-04, 70% of intercountry adoptions that were legally finalised and included processing through state and territory governments would have gained citizenship through section 10A. These adoptions comprise adoptions from all countries except China.[38]

38 Australian Institute of Health and Welfare, sub 135, p 6.

2.95 China adoptions make up the other 30%. Since these adoptions are legally finalised under Australian law in China, section 10A does not apply. The parents must instead apply for citizenship for the child under section 13(9)(a) of the *Australian Citizenship Act 1948*. This provision gives the minister a general discretion in deciding whether to grant citizenship to an applicant who is under 18. Applicants under this section do not have an automatic right to citizenship, such as that in section 10A. This issue is addressed in more detail in chapter four.

2.96 In a press release on 8 May 2005, the Acting Minister for Immigration and Multicultural and Indigenous Affairs stated that approximately 20% of adopted children were applying for citizenship overseas, rather than first obtaining the adoption visa.[39] Upon receiving citizenship, those children could legally enter Australia without a visa. One advantage for parents of this practice was that the citizenship fee is only $120,[40] compared with $1,305 for the visa.

2.97 The Acting Minister announced that obtaining an adoption visa or other permanent visa would become a requirement for the grant of citizenship for these children. The press release states:

> … the checks required before a visa is granted provide assurance that the child is genuinely available for adoption.
>
> 'To date, there is no evidence or suggestion that private overseas adoptions have not been genuine.
>
> 'However it is essential to make sure there are checks in place to guard against the trafficking, abduction and sale of children,' Minister McGauran said.[41]

2.98 In evidence, the Department of Immigration and Multicultural and Ethnic Affairs stated that another reason for the change was, 'to ensure that all are treated in the same way'.[42]

2.99 Also in evidence, the department said that the visa requirement would not be placed in legislation, but would be a matter of policy for when the

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39 Hon P McGauran MP, 'Extra Protection for Adopted Children,' media release, 8 May 2005, viewed on 29 August 2005 at http://www.minister.immi.gov.au/cam/media/media-releases/medrel05/05085.htm.

40 Department of Immigration and Multicultural and Indigenous Affairs, 'How to apply for Australian citizenship,' viewed on 19 October 2005 at http://www.citizenship.gov.au/how.htm#step3.

41 Hon P McGauran MP, 'Extra Protection for Adopted Children'.

42 Ellis M-A, transcript, 9 May 2005, p 65.

minister exercises their discretion in considering applications under the *Australian Citizenship Act 1948*.[43]

Discussion

2.100 The main theme from this analysis of cross border requirements is that the different way adoptions from China are treated under the *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998* means that many of the other legal systems that affect adoption work differently for China adoptions. It appears that these other pieces of legislation have not stayed up to date with the bilateral arrangements regulations. This will be discussed further in chapter four.

43 Ellis M-A, transcript, 9 May 2005, p 74.