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# Law Talk

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## **Does adoption law need updating?**

Sasha Borissenko speaks to academics,  
politicians, lawyers and other interested  
parties calling for legislative change



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# Does adoption law need updating?

Since the introduction of the Adoption Act 1955, medical records indicate that over 80,000 people in New Zealand have been adopted. *LawTalk* journalist Sasha Borissenko spoke to academics, politicians, lawyers and other interested parties who call for legislative change.



**A**fter nine months forming a symbiotic relationship in the womb of his mother, John (name withheld) was born blue in the face with his umbilical cord wrapped around his neck. It was

1971 in the Hawkes Bay.

He was then wrapped up, and “left in [his] misery to be cared for by hospital shift workers for three weeks before [his] adopted parents – a very button-downed, strictly religious, quite unimaginative, very straight and unadventurous family” – chose him, he says.

“It was a very different time back then. Hospital wards in the sixties and seventies would have children lined up and potential families would walk through and say ‘I like the look of that baby’ before they would pick their new child.”

Adoptees are often broken people, he says, who spend their lives trying to recover from the trauma of the primal wound – the immediate severed relationship with their mothers.

John didn’t have a particularly happy childhood, he says. His parents, who “fought like cats and dogs”, separated when he was 11.

“Looking back, it was another form of rejection. At that point in my life I was the odd one out and there were arguments as to who would take me. If I didn’t behave, threats were made that I would become a ward of the state. That was very incredibly difficult, especially heading into puberty and adolescence.”

Aside from the dysfunctional relationship of his adopted parents, John felt his family were always very different to him, in both temperament and personality. He was the youngest of three children; his two older sisters were his adopted parents’ biological children.

Taking illegitimate children home and making them your own was something that socially conscious people did in those days, he says.

“If you are a person who reads a pamphlet and believe everything you hear, you think everything will be fine. Meanwhile attachment theory was in its infancy. It is of course quite a bit more complex than that.

“For all intents and purposes you would think I would feel completely a part of my family but I didn’t really have that sense.

“They are different people. I wanted something more to be there but there

**"Adoptees are often broken people who spend their lives trying to recover from the trauma of the primal wound"**



Sasha Borissenko

really isn't. I've kind of accepted that now. Where it's difficult is actually talking about those feelings with them and being shut down. I was told not to be stupid, that I was treated exactly the same and I had no right having those feelings."

John dropped out of school and was living on the streets by the age of 15. Drugs, for him, filled the void, he says. When he reached the legal age to find his birth parents at age 20, he decided against it. It was the fear of being rejected again, he says.

After years of living a transient life overseas, he came back to New Zealand in 2009 and sought rehabilitation services, which just happened to be at the same hospital where he was born, he says.

"I guess what I'm saying is that start to life really screws adopted people up, (screws with your sense of self) and in my case I've essentially spent my entire life recovering from that particular form of scarring."

While he was recovering, he decided to find his birth family three years ago. He found he had a number of siblings but his mother had died after a life of drug abuse in 1981.

"It was very difficult. On an intellectual level I couldn't understand why I was reacting in such a way towards someone I didn't know but on an emotional level I was devastated," he says. "Shedding tears over slabs of granite in a cemetery wasn't the reunion I had hoped for."

Otherwise, his family has a pretty colourful history. There were lots of deviants who were into vices, be it gambling, addiction or crime, he says. "Funnily enough, my adopted family were quite straight but I was quite deviant so it was a bit of a relief to hear I came from a long line of misfits. I was lucky enough to come out of it the other side, my mother not so."

Even when John met his family, there was still a sense of disconnect, he says. "You expect or at least long for that 'click' or that connection. I've never felt that. I've always been unsentimental that way."

"I've tried to do the whole 'it hasn't affected me', but for me the last few years have been getting over that denial and recognising how messed up I was. I'm not going to be a victim to that stuff or my childhood. Hand in hand, this stuff did muck me up. I still do feel that sense of alienation quite strongly. I'm a lone wolf and I'm very wary, so I keep a distance – possibly due to a fear of being rejected. It's almost second nature to be deflective."

His experiences aren't all negative. He's not confined to a specific identity and is very open-minded as a result. What's more, adopted people are very resilient, he says.

"I went from being on the streets and sniffing solvents to getting through university by myself. That early thrust into the world taught me to hit the ground running. It's really crucial to know your identity and where you come from. In my case I inherited unhelpful traits but they're my traits nonetheless. I'm colourful and interesting and I've had an interesting life with all my exploits."

Gaining a bachelor of arts in sociology and political science, John now works in policy around alcohol and drug abuse. He also has two children – an 11-year-old daughter and 16-year-old son – who he is very close with.

As for the way forward, John thinks there needs to be more recognition afforded to the complexities adoptees and families of adopted people face.

Open adoption is a lot better now but the legislation hasn't caught up. Judgement and negative assumptions around adoption needs to be addressed, he says.

"Sure a mother might not be in a place to support their child at that time, but they decided to give you life and offer you a stable home environment by giving you away. There shouldn't be any judgement."

"It needs to be recognised that adoption isn't a smooth kind of process. Families and individuals are very complex. You can put all your efforts and energy into a child and they'll be totally different. That whole process is amplified with adoptees."

"I don't know how you can address this stuff with legislation. But any legislation that encourages dialogue, transparency and puts mechanisms in place that allow adopted people to find their identity can only be a positive thing."

"Shedding tears over slabs of granite in a cemetery wasn't the reunion I had hoped for."

"Open adoption is a lot better but now the legislation hasn't caught up"

# A psychology perspective

**Massey University School** of Psychology lecturer Dr Denise Blake worked in the health sector as a drug and alcohol abuse counsellor for almost 20 years before she decided to complete a PhD thesis titled, *Wade in the Water: Storying Adoptee's Experiences' through the Adoption Act 1955*.

Dr Blake, who has personal insight into adoption, decided to complete the qualitative research in the hope of “articulating the lived-on effects of adoption for all parties, including society as a whole and in response to the legal climate”.

The “unjust, inhumane and archaic” Adoption Act 1955 created a legal fiction with regard to an adopted person’s identity, and it also severed any ties with birth families, she says.

“Adoptees in a legal sense have a constructed identity where they are ‘born to’ a new family, which renders their birth parents as insignificant. The legislation fails to recognise the relationship of the birth parents – it was an attempt to overcome illegitimacy but it didn’t do anything to fix that.”

The Act reflected the social and political discourse of the time – that you could take children from one family and give them to another irrespective of genetics or kinship, she says.

There was a principle that children could be shaped to be just like the new family. What some adoptees found is that they didn’t quite “fit” with their new family – even if they were not told of their origins.

It wasn’t about not being loved enough. There’s just a difference; adoptees can experience living in “no man’s land” which is not necessarily understood. Here, they are neither born to the birth family nor born as if to the adopted family. Society doesn’t recognise that difference because the law and society are based in a world

of non-adopted people so the difference is not recognised, she says.

Severing ties with the birth family effectively forces adopted people to be disconnected and rejected. Instead the law should provide for all parties to work together because in a sense an adopted person has a hybrid identity, she says.

“It’s strange – I don’t think we as a society are ready to comprehend the fact that adopted people and birth families are a minority who are discriminated against.

“For my PhD, I wanted to articulate an experience that doesn’t exist within the language we use to make sense of our lives. For example, I have to use metaphors such as ‘no man’s land’ to try and describe the situation.”

There’s a genetic memory for adopted people, she says. The phantom limb analogy is used to describe the missing relationship with the birth family, where the presence of an amputated limb is absent but the feeling is there.

“Adoptees are made to become the same as non adopted people even despite the obvious ‘I don’t look like you, I don’t smell like you, I don’t have the same sense of taste, I might not have the same “personality” or sense of humour and yet I should feel like I should’.

“Ultimately, we don’t celebrate adopted people as being different. There’s a lack of acceptance or positive rhetoric around being adopted.”

There was and still remains a lot of shame around adopted people. It made sense in the fifties, where adopted people were the product of illegitimacy that was construed as a negative. This extended to the new family also, where there was a sense of shame with the inability to conceive children, she says.

The Adult Adoption Information Act 1985 was a great triumph in some respects, because it attempts to facilitate a connection between the birth family and adoptee, but there are problems, she says.

“Reunions can be quite sensitive. You are uniting people who might not want to be united. The reason for adoption in the first place can be quite sad and circumstantial. What’s more, you’ll have adopted people who adore and cherish their adopted parents but still want to retrieve their biological information.”

The veto clause, which allows parties to opt for non-disclosure of information is also problematic, she says.



In the case of the veto clause, adoptees are denied access to their biological history which has ongoing effects.

Going to the doctor can be an issue, for example, where an adopted person might not know their medical history – whether that be a history of cardiovascular disease, cancer, diabetes – they’re essentially denied health care, she says.

Inheritance can also be an issue, where an adopted person is denied any claim to their birth parents’ estate.

These are further examples for adopted people to feel excluded, second best or illegitimate – even despite the legislation trying to make them feel legitimate, she says.

The veto only lasts for 10 years, she says, and there have been many incidents where one party has sought information and the other party has not re-issued the veto, resulting in a “door in the face” situation.

Furthermore, before retrieving that information the law requires the involved parties to seek counselling. In the instance a veto situation arises, the interested party – either birth parent or adoptee – will receive a letter in the mail that outlines the declined request but they don’t get the same counselling services.

“You’ve got countless incidents where people will be rejected over and over again.”

Recognition and understanding is the way forward, she says. A new Adoption Act could recognise many of the issues and experiences adopted people and families face, new legislation would give them a voice, she says.

“The exclusion still exists. It still matters. It is still affecting the next generations. If there is a huge history of hurting, surely the legislation should reflect that? Just because we are dealing with a small constituency, it doesn’t mean the discrimination doesn’t exist.

“Prostitution has been dealt with [in Parliament], civil unions have been addressed. The same goes for same sex marriages and de facto relationships. Adoption is always left by the wayside – again there’s this theme of being second best. Adopted people are made to feel ‘not as important’.

“There are no new arguments – it’s the same stuff we’ve been saying for a very long time. It’s just a matter of the Government actually deciding to take it upon themselves to tackle this situation.”

# What the politicians say

**Green MP Kevin Hague**, together with National’s Nikki Kaye, started drafting a Bill in 2012 that attempts to completely overhaul adoption law. As it stands, the member’s bill sits in the ballot “waiting its turn, hoping to be drawn out of the biscuit tin,” Mr Hague says.

“Fundamentally the existing 1955 Act has, at its heart, a wrong assumption. It effectively fossilises the attitudes to children from the 1950s – children are seen by the law as the property of their parents, and the process of adoption is constructed in the law akin to a property transaction.

“This underlying attitude pervades the law, and we quickly realised that it wouldn’t be possible to just amend the existing act. We needed to rip it up and start again, so that’s what we did.”

Mr Hague believes there are two reasons why successive parliaments have not dealt with the issue: the reason for change is the slow evolution of societal values rather than an “incident” demonstrating the failure of the law; and secondly, at least until 2013 “politicians from both Labour and National have been scared of the issue because of the highly polarised views about adoption by same sex couples”.

“If I knew of a way of speeding up the process I would have done it! When the Honourable Simon Power left Parliament, one of the surprising comments in his Valedictory was that he regretted Parliament had not acted to reform adoption law. Yet it is still not on the legislative agenda for the Government. I am attempting to change that.”

ACC, civil defence and youth affairs minister Nikki Kaye says the law in this area is both old and complex, which is why she was involved with Mr Hague in drafting the private member’s bill.

“The government is addressing a wide range of social and economic issues, and must prioritise its areas of focus accordingly.

“In terms of scale, adoption and surrogacy law does not impact as many people as other pressing social issues, but for people affected it matters a lot.”

Labour’s Jacinda Ardern attempted to tackle the issues with her Care of Children Law Reform Bill in 2011 that called on the Law Commission to review and update adoption law to better reflect modern New Zealand and put the interests of children at the heart of any decision-making, she says.

The Bill was voted down due to “priority issues”, “which was a great shame and really baffling”, she says.

“There are so many discriminatory elements that need fixing – from gay couples to the incorporation of Whangai adoptions. We’ll keep lobbying, hoping that the current government takes a stand.”

There are other pieces of legislation that touch on the issues – the Vulnerable Children Bill amendments look at strengthening relationships around guardianship, for example, but “this is just a plaster on top of the real problem – we need a complete overhaul of adoption legislation”.

**“If there is a huge history of hurting, surely the legislation should reflect that?”**

# From a law professor

**Victoria University Faculty** of Law Professor Bill Atkin is a member of Adoption Action Incorporated, a group dedicated to enhancing the rights of children and other persons affected by outdated adoption laws.

Adoption Action brought proceedings against the Attorney-General to the Human Rights Tribunal seeking declarations that the current legislation was inconsistent with human rights law. The hearing commenced on 18 November 2013 and continued until January 2014. The Human Rights Tribunal is yet to reach a decision and release its findings.

A Ministry of Justice spokesperson said the ministry could not comment on adoption until after the findings are released.

"A lot depends on the outcome of the tribunal. At this stage any comment would be speculative."

Adoption Action claimed that New Zealand's Adoption Act 1955 and the Adult Adoption Information Act 1985 discriminate against certain classes of people on 10 grounds, including sex, race, age, disability, sexual orientation and marital status.

With regard to sex, a man on his own cannot adopt a female child, for example. Couples in a civil union are discriminated against, where they cannot jointly adopt a child while married couples and opposite-sex couples

in a de facto relationship can. Meanwhile, same-sex couples cannot jointly adopt a child unless they are married to each other.

When the Adoption Act was implemented 60 years ago, it was a very different time, Professor Atkin says.

Specifically, the legislation created a statutory guillotine, where legal adoption replaced the rights of the birth parents entirely. The birth parents had no rights in the transaction – namely because there was a pretence that the birth parents never existed, he says.

Thirty years ago there was a revolution in thinking with the introduction of the Adult Adoption Information Act 1985, insofar as there was a quest for adopted people to find their biological origins.

There was a consensus that the adoption laws in place breached people's rights to their identity – and the rights extended to generations, he says.

To enable identification, people could

"The legislation was created 60 years ago and desperately needs fixing."

be adopted but without the same pretence that it never really happened.

"It was a carefully crafted piece of legislation that was a major development and addressed a crying need, almost literally, to change the legal climate."

The law still contains a statutory guillotine, however, where it doesn't provide for adoption in a positive way. The legislation was created 60 years ago and desperately needs fixing, he says.

"Informal agreements work but if a birth family were to go to court with the question of contact, the ball falls entirely in the new family's court. The birth family has no legal leg to stand on.

"While it is the adoptive parents who retain legal rights the law needs to address the place of the birth family in that child's life," Professor Atkin says.

## From the Law Commission

The Law Commission published a report, *Adoption and Its Alternatives: A Different Approach and a New Framework* in 2000, Law Commission general manager Roland Daysh says.

Since then the Law Commission has not undertaken any review of the adoption laws in New Zealand, neither has it been invited to, or sought to do so, he says.

"The legislation created a statutory guillotine, where legal adoption replaced the rights of the birth parents entirely."

# From the Law Society

**Family law barrister**, mediator and chair of the Law Society Family Law Section Dr Allan Cooke says the Adoption Act is outmoded and needs to be brought up to date. His views are also informed by the Law Society's submission on the Government's response to the United Nations Convention on the Rights of the Child (UNCROC), which was submitted on 15 March 2015.

The Act was passed well before New Zealand acceded to and adopted UNCROC, he says.

"In this respect it fails to reflect what are now accepted principles/precepts arising from our having adopted the convention.

"For example, it does not take into account cultural and ethnic background of a child who is being adopted, [which raises] the concern that children who are indigenous or from a minority culture may be adopted into a new culture and be denied the right to enjoy their own culture, language and trace their lineage."

A child cannot get access to his or her birth certificate until they attain the age of 20 years – if they want to know who they are and where they have come from. They are thus deprived of knowledge of their natural family and the right to maintain personal relationships with them, he says.

There is also no provision for the voice of the child to be heard – as the Act does not allow for the appointment of lawyer for child. Rather, the Court is forced to appoint a lawyer to assist the court to ensure that this occurs, he says.

Equally the limits on who can adopt are reflective of its time. Section 3 of the Act outlines when an adoption order may be made on an application of two spouses jointly – or by the mother or father of the child either alone or jointly with his or her spouse, for example, he says.

For many years, therefore, the Act has not reflected changing societal norms. This is a major issue and in part has been addressed by the High Court in *Re application by AMM and KJO to Adopt a child* [2010] NZFLR 629 where it took the lead in finding that a de facto couple of the opposite sex were spouses for the purpose of the Act.

The Attorney General there intervened and accepted that the Adoption Act was discriminatory and breached the New Zealand Bill of Rights Act. At the time of deciding that case, the issue of civil unions and same-sex de facto couples was left hanging. That situation remains as the Marriage (definition of Marriage) Amendment Act 2013 has not come into force, Dr Cooke says.

"The Law Commission's Report on Adoption made a number of pertinent observations and recommendations, which sadly have not been further taken up by successive governments. My own view is those recommendations would provide an appropriate way of addressing the concerns that exist in respect of the Adoption Act."

"Those recommendations would provide an appropriate way of addressing the concerns that exist in respect of the Adoption Act."