

**HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON
FAMILY AND HUMAN SERVICES INQUIRY INTO ADOPTION
OF CHILDREN FROM OVERSEAS
ATTORNEY-GENERAL'S DEPARTMENT**

The Department agreed to provide the following material to the Committee at the Hearing on 10 October 2005:

Conclusions and Recommendations of the Special Commission on Intercountry Adoption. See **Attachment 1**.

The Committee asked the following questions at the Hearing on 10 October 2005:

- 1. Is there a possibility of the Commonwealth government giving children adopted in China Australian Birth Certificates (Page FHS 34).**

The answer to the Committee's question is as follows:

Issuing a birth certificate is a power that is exercised by the States and Territories.

The current arrangement is that the Registrar of Births, Deaths and Marriages issues birth certificates for the state or territory in which the birth took place. If a child is born overseas and a birth certificate was never issued a parent can lodge an application for a certificate of evidence of Australian citizenship with the Department of Immigration and Multicultural and Indigenous Affairs.¹

- 2. Whether or not there would be provision in the agreement which was negotiated between Australia and China - not the states and China - for the states to give a state birth certificate in addition to the relinquishing certificate?**

The answer to the Committee's question is as follows:

Under Australian law, signature of a treaty and ratification of that treaty has no effect on the law of Australia. The well established rule is that 'the

¹ See application form at < <http://www.immi.gov.au/allforms/pdf/119.pdf>>

making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.’²

The Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998, together with amendments to section 111C of the *Family Law Act 1975* (Cth) relating to International Agreements about Adoption, give effect to the Adoption agreement with China (**Attachment 2**).

There is no provision in the Regulations that would override a specific requirement in State or Territory legislation relating to Birth Certificates only being issued to persons born in that jurisdiction.

The legislation relating to registration of births and issuing of Certificates in the States and Territories are premised on births occurring in the particular jurisdiction. Hence, in the Births, Deaths and Marriages Registration Act 1996 (Vic) section 12 provides that ‘When a child is born in the State...’.

Hence, the issue of such a document would require specific amendment of the relevant State and Territory legislation to provide a power to receive an application and issue such a birth certificate.

3. Do the family law regulations pertain to the question of birth certificates?

The answer to the Committee’s question is as follows:

The Family Law Regulations 1984 do not touch on issues relating to birth certificates.

² *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, at 347

4. Why did the Australian government introduce new adoption visa requirements recently? (Page FHS 37)

The answer to the Committee's question is as follows:

Advice has been sought from the Department of Immigration and Multicultural and Indigenous Affairs and will be forwarded to the Committee Secretariat upon its receipt.

5. Australia does not allow for the adoption of adoptable refugee children - to provide the reference.

The answer to the Committee's question is as follows:

The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption had a recommendation (not a protocol and therefore not binding) attached in relation to refugee children.

At the time of ratification it was Australia's position, stated in the instrument of ratification, that Australia would not be bound by the recommendation. The text of the recommendation is at **Attachment 3**.

Australia made the following declaration with respect to the recommendation:

Australia: Declarations

6. Australia further declares that, while Australia accepts the obligations imposed by the Convention in its application to refugee children and children who are internationally displaced as a result of disturbances occurring in their country of origin, Australia does not accept that it is bound by the Recommendation in respect of refugee children made in October 1994 by the Special Commission on Implementation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption.³

³ See Hague Permanent Bureau website <
http://www.hcch.net/index_en.php?act=conventions.text&cid=69>

**Conclusions and Recommendations of the second meeting of the
Special Commission on the practical operation of the
Hague Convention of 29 May 1993 on Protection of Children and
Co-operation in Respect of Intercountry Adoption
(17-23 SEPTEMBER 2005)**

Guide to Good Practice

1 The Special Commission gives its general endorsement to the draft Guide to Good Practice dealing with Implementation of the 1993 Convention prepared by the Permanent Bureau. It requests the Permanent Bureau, with the assistance of a group of experts appointed by the Special Commission, to review the draft in the light of comments made in the Special Commission on which there was consensus, and in particular by the addition of appropriate references to the situation of children with special needs. The revised text should then be circulated for their comments / approval to Contracting States, Member States of the Hague Conference and organisations represented at the Special Commission. Once there is a consensus, the Permanent Bureau will prepare the text for publication. The Permanent Bureau is authorised, in preparing the Guide to Good Practice for publication, to make changes of an editorial nature, to update where necessary any factual information contained in the Guide, to determine the presentation of the material in the Guide, provided that this does not involve any changes in substance or emphasis.

2 The Special Commission recommends that the Permanent Bureau, in consultation with Contracting States and non-governmental organisations, collect information on issues including, *inter alia*, the financial aspects of intercountry adoption, reports on prospective adoptive parents, preparation of prospective adoptive parents, and post-adoption reports, with the view to the possible development of future Parts of the Guide to Good Practice.

Designation of Central Authorities, other authorities and bodies under the Convention

3 The Special Commission reaffirms Recommendation No 2 of the Special Commission of November / December 2000, and underlines, in

particular, the importance of designating Central Authorities without delay:

“2 The following recommendations are designed to improve communication under the Convention, as well as understanding of how the Convention operates in the different Contracting States:

- a) The designation of the Central Authorities, required by Article 13, as well as their contact details, should be communicated to the Permanent Bureau not later than the date of the entry into force of the Convention in that State.*
- b) Such communication should, in accordance with Article 13 and paragraph 274 of the Explanatory Report on the Convention by G. Parra-Aranguren (Proceedings of the Seventeenth Session (1993), Tome II, Adoption – co-operation, page 591), give notice of any other public authorities (including their contact details) which, under Article 8 or 9 discharge functions assigned to the Central Authorities.*
- c) The extent of the functions of the Central Authorities and any such public authorities should be explained.*
- d) The designation of accredited bodies, required by Article 13, as well as their contact details, should be communicated to the Permanent Bureau at the time of their accreditation.*
- e) Where a body accredited in one Contracting State is, in accordance with Article 12, authorised to act in another Contracting State, such authorisation should be communicated to the Permanent Bureau by the competent authorities of both States without delay.*
- f) The extent of the functions of accredited bodies should also be explained.*

- g) *All the information referred to above should be kept up-to-date and the Permanent Bureau informed promptly of any changes, including in particular any withdrawals of accreditation or authorisation to act.*
- h) *Designations, in accordance with Article 23, of authorities competent to certify an adoption as having been made in accordance with the Convention should also be kept up-to-date."*

Accreditation

4 The Special Commission recommends that the Permanent Bureau should continue to gather information from different Contracting States regarding accreditation with the view to the development of a future Part of the Guide to Good Practice dealing with accreditation. The experience of non-governmental organisations in this field should be taken into account. Such information should include financial matters and should also be considered in the development of a set of model accreditation criteria.

5 The Special Commission reaffirms Recommendations Nos 6-9 of the Special Commission of November / December 2000:

"6 Accreditation requirements for agencies providing intercountry adoption services should include evidence of a sound financial basis and an effective internal system of financial control, as well as external auditing. Accredited bodies should be required to maintain accounts, to be submitted to the supervising authority, including an itemised statement of the average costs and charges associated with different categories of adoptions.

7 Prospective adopters should be provided in advance with an itemised list of the costs and expenses likely to arise from the adoption process itself. Authorities and agencies in the receiving State and the State of origin should co-operate in ensuring that this information is made available.

8 *Information concerning the costs and expenses and fees charged for the provision of intercountry adoption services by different agencies should be made available to the public.*

9 *Donations by prospective adopters to bodies concerned in the adoption process must not be sought, offered or made."*

Collection and dissemination of information

6 The Special Commission reaffirms the usefulness of the Model Form – Medical Report on the Child and notes the usefulness, in particular in the case of very young children, of the supplement to this form as proposed in Working Document No 6, pp. 8-9.

7 The Special Commission recommends that the Permanent Bureau, in consultation with Contracting States and non-governmental organisations, develop a model form for the consent of the child (Article 4(d)(3)) as well as model forms or protocols regarding the operation of Articles 15 and 16 of the Convention.

8 To further the work commenced by the development of the organigram (Appendix 6 of Prel. Doc. No 2), the Special Commission invites the Permanent Bureau, to collect specific information from Contracting States, including, *inter alia*, procedures, website addresses and how the various responsibilities and tasks under the Convention are divided between Central Authorities, public authorities, accredited bodies and any bodies and persons under Article 22(2). This information should be made available on the website of the Hague Conference

Statistics

9 The Special Commission welcomes the development of the draft forms for the gathering of general statistical information (Appendix 5 of Prel. Doc. No 2) and underlines the importance for States Parties to submit general statistics to the Permanent Bureau using these forms on an annual basis.

Co-operation and communication

10 The Special Commission stresses the importance of enhancing co-operation and exchange of information between Central Authorities, public authorities, accredited bodies and any bodies and persons under Article 22(2), notably with a view to promoting good practice and to ensuring that illegal and unethical procedures prior to the adoption of a child be effectively and systematically combatted.

11 Contracting States are encouraged to undertake and participate in regional and / or bilateral meetings to exchange information and good practices.

12 The Special Commission recognises the importance of States of origin sending information to receiving States on the needs of children to better identify prospective adoptive parents.

13 The Special Commission recognises that as a matter of good practice, authorities in receiving States should co-operate with authorities in States of origin in order to better understand the needs of children in States of origin.

14 The Special Commission reminds States Parties to the Convention of their obligations under Article 35 to act expeditiously in the process of adoption, and notes in particular the need to avoid unnecessary delay in finding a permanent family for the child.

15 The Special Commission recommends that States actively discourage direct contacts between prospective adoptive parents and authorities in the State of origin until authorised to do so. Exceptionally, such contact at the appropriate time may be desirable, for example in the case of a child with special needs.

16 The Special Commission recommends the use of flexible and efficient systems of communication taking into account, where available, advances in technology.

Nationality

17 The Special Commission recommends that the child be accorded automatically the nationality of one of the adoptive parents or of the receiving State, without the need to rely on any action of the adoptive parents. Where this is not possible, the receiving States are encouraged to provide the necessary assistance to ensure the child obtains such citizenship. The policy of Contracting States regarding the nationality of the child should be guided by the overriding importance of avoiding a situation in which an adopted child is stateless.

Post-adoption reporting

18 The Special Commission recommends to receiving States to encourage compliance with post-adoption reporting requirements of States of origin; a model form might be developed for this purpose. Similarly, the Special Commission recommends to States of origin to limit the period in which they require post-adoption reporting in recognition of the mutual confidence which provides the framework for co-operation under the Convention.

Application of Convention principles to non-Convention countries

19 The Special Commission reaffirms Recommendation No 11 of the Special Commission of November / December 2000:

“11 Recognising that the Convention of 1993 is founded on universally accepted principles and that States Parties are “convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children”, the Special Commission recommends that States Parties, as far as practicable, apply the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of non-Contracting States. States Parties should also encourage such States without delay to take all necessary steps, possibly including the enactment of legislation and the creation of a Central Authority, so as to enable them to accede to or ratify the Convention.”

Other Conventions

20 The Special Commission stresses the usefulness of linking the application of the Hague Adoption Convention of 1993 to the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (the Apostille Convention). In the light of the high number of public documents included in a typical adoption procedure, the Special Commission recommends that States Parties to the Adoption Convention but not to the Apostille Convention, consider the possibility of becoming a party to the latter.

21 The Special Commission recognises the need to consider how best to regulate the different types of international placement falling outside the scope of the Convention. The value in this context of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, in particular Article 33, was recognised. The Special Commission also recognised the reference to this Convention in the important Decision of the United Nations Committee on the Rights of the Child, 37th Session, “Children without parental care”, October 2004.

Implementation of the Convention in Guatemala

22 The Special Commission:

- a) Recognises the initiative of the Government of Guatemala, which led to the visit of the Secretary General to Guatemala from 31 May-3 June 2005;
- b) Takes note of the Report of the Secretary General of 15 June 2005, in particular the “action points”⁴ (Work. Doc. No 8) on which a consensus emerged during this visit;
- c) Appreciates the presence at the Special Commission of a high-level delegation from Guatemala, including the Vice Minister of Foreign Affairs; the *Procurador General de la Nación* (the Central Authority under the Convention); Chairmen of three Parliamentary Committees, and others;
- d) Recognises the efforts being made by the Government of Guatemala towards the full implementation of the Convention;
- e) Urges Guatemala to confirm, as soon as possible, the legal effect of the Convention within its legal order consistent with Guatemala’s international obligations under the Convention;
- f) Having regard to the request for support made during the Special Commission by the delegation of Guatemala, calls upon the States and international organisations represented at the Special Commission to co-operate with the Government in its endeavours to fully implement the Convention.

⁴ The “action points” refer to commitments by the Government of Guatemala (1) to send a high-level delegation to the Special Commission, (2) to respond positively to an offer made in 2003 on behalf of 13 States to provide assistance to Guatemala in respect of implementation of the 1993 Convention, (3) to propose to Congress the formal withdrawal of the reservations made to Articles 11 and 12 of the Vienna Convention on the Law of Treaties, which were identified by the Constitutional Court of Guatemala in its ruling of 13 August 2003 as reasons for considering that *Decreto 50-2002*, by which Guatemala had approved the accession to the 1993 Convention, was unconstitutional, and (4) to take urgent steps to resubmit the 1993 Convention to Congress for it to confirm its legal effect within Guatemala.

Division 3—International agreements about adoption etc.

111C International agreements about adoption etc.

- (1) The regulations may make such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption signed at The Hague on 29 May 1993.
- (2) The regulations do not come into force until the day on which the Convention enters into force for Australia.
- (3) The regulations may make such provision as is necessary or convenient to give effect to any bilateral agreement or arrangement on the adoption of children made between:
 - (a) Australia, or a State or Territory of Australia; and
 - (b) a prescribed overseas jurisdiction.
- (4) Regulations made for the purposes of subsection (3) may, in particular:
 - (a) provide for the recognition of adoptions made under a law of the prescribed overseas jurisdiction; and
 - (b) provide that the regulations do not affect the operation of laws of a State or Territory that relate to adoptions; and
 - (c) if a State or Territory has made such a bilateral agreement or arrangement on behalf of other States or Territories—give effect to the agreement or arrangement so far as it relates to all of those States or Territories, or to such of them as the regulations specify.
- (5) Regulations made for the purposes of this section may:
 - (a) confer jurisdiction on a federal court (other than the High Court) or a court of a Territory; or
 - (b) invest a court of a State with federal jurisdiction.Such jurisdiction is in addition to any other jurisdiction provided for under this Act.
- (6) Regulations made for the purposes of subsection (5) may make different provision in respect of matters arising in relation to different States or Territories. (This subsection does not, by implication, limit subsection 33(3A) of the *Acts Interpretation Act 1901*.)

- (7) Subsections (4), (5) and (6) of this section do not, by implication, limit subsections (1) and (3) of this section.
- (7A) The power of the Judges, or a majority of them, under section 123 to make Rules of Court extends to making Rules of Court for or in relation to the making of adoption orders.
- (8) In this section, despite subsection 4(1), *Territory* includes each external Territory.



Statutory Rules 1998 No. 248¹

Family Law (Bilateral Arrangements— Intercountry Adoption) Regulations 1998

I, WILLIAM PATRICK DEANE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Family Law Act 1975*.

Dated 30 July 1998.

WILLIAM DEANE
Governor-General

By His Excellency's Command,

DARYL WILLIAMS
Attorney-General

Name of Regulations

1. These Regulations are the *Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 1998*.

Commencement

2. These Regulations commence on the same date that item 4 in Schedule 1 of the *Family Law Amendment Act (No. 1) 1998* commences.

Definitions

3. In these Regulations:

Act means the *Family Law Act 1975*.

adoption compliance certificate, in relation to an adoption, means a document issued by a competent authority in the prescribed overseas jurisdiction in which the child to whom the document relates was habitually resident before being adopted, stating that:

- (a) the adoption took place in accordance with the laws of that overseas jurisdiction; and
- (b) the competent authority of the State in which the person adopting the child habitually resides agreed that the adoption may proceed.

child means an individual who is under 18 years.

competent authority means:

- (a) for a prescribed overseas jurisdiction—a person, body or office in the jurisdiction responsible for approving the adoption of children; and
- (b) for the State in which the person adopting the child habitually resides—a person, body or office in the State's jurisdiction responsible for approving the adoption of children.

parental responsibility, in relation to a child, has the same meaning as in section 61B of the Act.

prescribed overseas jurisdiction means an overseas jurisdiction mentioned in Schedule 1.

State includes Territory.

Note Subsection 111C (8) of the Act provides that, for section 111C of the Act, *Territory* includes an external Territory.

Prescribed overseas jurisdictions

4. For subsection 111C (3) of the Act, the overseas jurisdictions mentioned in Schedule 1 are prescribed.

Australian adoption in a prescribed overseas jurisdiction of a child from that overseas jurisdiction

5. (1) This regulation applies if:
 - (a) an adoption, by a person who is habitually resident in Australia, of a child who is habitually resident in a prescribed overseas jurisdiction is granted in accordance with the laws of that overseas jurisdiction; and
 - (b) an adoption compliance certificate issued by a competent authority of that overseas jurisdiction is in force in relation to the adoption.
- (2) The adoption is recognised and effective, for the laws of the Commonwealth and each State, on and after the date that the adoption takes effect in the overseas jurisdiction.

Note For the application of these Regulations to a State, see regulation 8.

Effect of recognition of an adoption

6. Recognition of the adoption of a child includes the recognition, for the laws of the Commonwealth and each State, that, under those laws:
 - (a) the relationship between the child and each of the child's adoptive parents is the relationship of child and parent; and
 - (b) each adoptive parent of the child has parental responsibility for the child; and
 - (c) the adoption of the child ends the legal relationship between the child and the individuals who were, immediately before the adoption, the child's parents; and
 - (d) the child has the same rights as a child who is adopted under the laws of a State.

Evidential value of adoption certificate

7. An adoption compliance certificate is evidence, for the laws of the Commonwealth and each State, that the adoption to which the certificate relates was carried out in accordance with the laws of the overseas jurisdiction whose competent authority issued the certificate.

Application

8. (1) A provision of these Regulations does not apply to a State in which there is in force a law (an *overseas jurisdiction adoption law*) having the same effect as, or comparable effect to, that which the provision would, except for this regulation, have for the adoption.
 - (2) Nothing in these Regulations affects:
 - (a) the jurisdiction of a court of the Commonwealth or a State, or the power of an authority, under an overseas jurisdiction adoption law, to entertain proceedings, make an order or take any other action in relation to an overseas jurisdiction adoption; or
 - (b) any such order or action; or
 - (c) the operation, within a State, of an overseas jurisdiction adoption law of the State.
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SCHEDULE 1

Regulation 4

PRESCRIBED OVERSEAS JURISDICTIONS

People's Republic of China

NOTE

1. Notified in the *Commonwealth of Australia Gazette* on 6 August 1998.

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Attachment 3

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

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Special Commission
on the implementation
of the Convention of 29 May 1993
Adoption-co-operation

17-21 October 1994

Distribution:

21 October 1994

TEXT ADOPTED BY THE SPECIAL COMMISSION

Pursuant to the Decision of the Seventeenth Session of the Hague Conference on Private International Law, held at The Hague from 10 to 29 May 1993, to convene a Special Commission to study the specific questions concerning the application to refugee children and other internationally displaced children of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*,

The Special Commission gathering at The Hague from 17 to 21 October 1994, in consultation with the Office of the United Nations High Commissioner for Refugees,

Adopts the following Recommendation -

RECOMMENDATION

Whereas the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* was concluded at The Hague on 29 May 1993,

Considering that in the application of the Convention to refugee children and to children who are, as a result of disturbances in their countries, internationally displaced, account should be taken of their particularly vulnerable situation,

Recalling that according to the Preamble of the Convention each State should take as a matter of priority appropriate measures to enable the child to remain in the care of his or her family of origin, and that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State,

The Hague Conference on Private International Law recommends to the States which are, or become, Parties to the Convention that they take into consideration the following principles in applying the Convention with respect to refugee children and to children who are, as a result of disturbances in their countries, internationally displaced -

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- 2 -

- 1 For the application of Article 2, paragraph 1 of the Convention, a State shall not discriminate in any way in respect of these children in determining whether they are habitually resident in that State.

With respect to these children, the State of origin referred to in Article 2, paragraph 1 of the Convention, is the State where the child is residing after being displaced.

- 2 The competent authorities of the State to which the child has been displaced shall take particular care to ensure that -
 - a before any intercountry adoption procedure is initiated,
 - all reasonable measures have been taken in order to trace and reunite the child with his or her parents or family members where the child is separated from them; and
 - the repatriation of the child to his or her country, for purposes of such reunion, would not be feasible or desirable, because of the fact that the child cannot receive appropriate care, or benefit from satisfactory protection, in that country;
 - b an intercountry adoption only takes place if
 - the consents referred to in Article 4 c of the Convention have been obtained; and
 - the information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, the child's upbringing, his or her ethnic, religious and cultural origins, and any special needs of the child, has been collected in so far as is possible under the circumstances.

In carrying out the requirements of sub-paragraphs a and b, these authorities will seek information from the international and national bodies, in particular the Office of the United Nations High Commissioner for Refugees, and will request their co-operation as needed.

- 3 The competent authorities shall take particular care not to harm the well-being of persons still within the child's country, especially the child's family members, in obtaining and preserving the information collected in connection with paragraph 2, as well as to preserve the confidentiality of that information according to the Convention.
- 4 The States shall facilitate the fulfilment, in respect to children referred to in this Recommendation, of the protection mandate of the United Nations High Commissioner for Refugees.

The Hague Conference also recommends that each State take these principles and those of the Convention into account for adoptions creating a permanent parent-child relationship between, on the one hand, spouses or a person habitually resident in that State and, on the other hand, a refugee or internationally displaced child in the same State.