



Australian Government

Attorney-General's Department

Access to Justice Division



Discussion Paper: Co-operation between Central Authorities to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases

Introduction

Background and scope of the paper

The *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* ('Hague Convention') sets out a framework for co-operation between States parties, both States of origin and receiving States. That co-operation is designed to prevent the abduction, the sale of, or traffic in children for intercountry adoption. However, despite our best efforts, there are some cases where illicit practices occur and a child is illegally obtained for adoption, even if the subsequent intercountry adoption proceeds through the proper channels.

At the Special Commission Meeting in June 2010, it was agreed that:

An informal group co-ordinated by the Australian Central Authority with the participation of the Permanent Bureau will consider the development of more effective and practical forms of co-operation between States to prevent and address specific instances of abuse. Australia will co-ordinate an informal working group, with the participation of the Permanent Bureau of the Hague Conference on Private International Law, to consider the development of more effective and practical forms of co-operation between States to prevent and address specific instances of abuse. The result of this work will be circulated by the Permanent Bureau for consideration by Contracting States.¹

In this paper, the term "illicit practices" refers to situations where a child has been adopted without respect for the rights of the child or for the safeguards of the Hague Convention. Such situations may arise where an individual or body has, directly or indirectly, misrepresented information to the biological parents, falsified documents about the child's origins, engaged in the abduction, sale or trafficking of a child for the purpose of intercountry adoption, or otherwise used fraudulent methods to facilitate an adoption, regardless of the benefit obtained (financial gain or other).

Key objectives of the paper

This document sets out principles and co-operative measures to prevent and address illicit practices in individual intercountry adoption cases to guide the Working Group² in its discussion of practical form of co-operation, in accordance with the Conclusions and Recommendations of the 2010 Special Commission.

¹ See paragraph 2 of the Conclusions and Recommendations Adopted by the Special Commission, available on the Hague Conference website under < www.hcch.net >, "Adoption Section" and "Special Commissions".

² The informal group was made up of receiving States, States of origin and non-governmental organisations. The members of the group were officials from the Central Authorities of Canada, Chile, Denmark, the Philippines, the Netherlands, the United States of America and representatives from the Permanent Bureau of the Hague Conference on Private International Law, the Nordic Adoption Council, Terre des Hommes, the and the International Social Service (ISS).

Framework guiding the common approach to preventing and addressing illicit practices

The fundamental principles of the Hague Convention are discussed in detail in *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice Guide No 1* (“Guide to Good Practice No 1”). These principles should guide all actions and decisions relating to intercountry adoption. They are central to the prevention of the abduction, sale of, or traffic in children. Key principles include:

1. Best interests principle: ensuring adoptions take place in the best interests of the child and with respect to his or her fundamental rights;
2. Safeguards principle: the development of safeguards is necessary to prevent the abduction, sale of, or traffic in children; and
3. Co-operation principle: effective co-operation between States and within States must be established and maintained to ensure safeguards are effective.

The formation of the informal working group provided the opportunity for the elaboration of a set of principles for preventing and addressing specific instances of abuse. These principles may serve as a point of reference for developing practical co-operative measures to prevent instances of abuse and set up measures to resolve situations where abuse has already taken place. The principles are:

1. Principle of co-operation and information sharing to prevent illicit practices in intercountry adoption cases
2. Principle of preventing undue pressure on States of origin, and
3. Principle of co-operation to address and respond to specific cases of illicit practices.

1 Principles of co-operation and information sharing to prevent illicit practices in intercountry adoption cases

Co-operation to prevent abuses and avoidance of the Convention is an obligation referred to in Articles 7³, 8⁴ and 33⁵ of the Convention. Article 33 names the Central Authority as responsible for ensuring “appropriate measures” are taken to prevent or respond to any provision of the Convention being contravened. Those measures will vary depending on the circumstances of the case.

Co-operation between States is necessary to ensure a mutual understanding about the needs of children in the State of origin. The Guide to Good Practice No 1 notes that co-operation is improved through meetings and the exchange of information, including regional meetings of Central Authorities⁶. Many States are part of broader regional groups and inter-embassy groups.

³“(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.

(2) They shall take directly all appropriate measures to - a) provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms; b) keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.” Art. 7.

⁴“Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.” Art. 8.

⁵“A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.” Art. 33.

⁶ See paragraphs 126-27 of *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice, Guide No 1*, Family Law (Jordan Publishing Ltd) for the Hague Conference on Private International Law,

Co-operative measures to prevent abuses of the Convention include:

1. Sharing of information;
2. Reporting and monitoring; and
3. Assistance to States of origin

1.1 Sharing of information

The sharing of information is an essential part of co-operating to prevent illicit practices in intercountry adoption. Information sharing facilitates the exchange of ideas, the resolution of international difficulties and the sharing of good practice. Co-operative measures to share information could include:

- States to share information about concerns or irregularities regarding intercountry adoption. Concerns may relate to the intercountry adoption procedures in a particular State, an individual case or a programme more broadly. Such information sharing should also include information on best practice in intercountry adoption;
- States to share information in relation to document verification. For example States of origin could provide a sample of all relevant adoption documentation, including official seals, signatures of adoption authorities and court officials. Updates regarding any changes to these documents could be provided; and
- States should endeavour to share information as soon as the information is known.

The Guide to Good Practice No 1 notes that co-operation is improved through meetings and the exchange of information, including regional meetings of Central Authorities.⁷ Specific forums in which co-operation and information sharing should be encouraged are:

- teleconferences and videoconferences between States and within States;
- in-country meetings with Embassies between States and within the State of origin;⁸
- *ad hoc* meetings between States at international conferences;
- electronic information sharing, including via website updates, electronic newsletters, and emails;
- regional meetings of adoption practitioners especially within States of origin⁹; and
- meetings between Central Authorities and stakeholders within each country, including for example, UNICEF, Save the Children, Plan International, and World Vision.

1.2 Reporting and monitoring

The collection and dissemination of information about issues in intercountry adoption is an important safeguard in facilitating practices and procedures to prevent illicit practices in intercountry adoption, including through the identification of trends and areas of particular concern. Notification about the

2008. Available on the Hague Conference website < www.hcch.net > under “Intercountry Adoption Section” and “Guides to Good Practice”

⁷ *Ibid.*

⁸ Many States are part of broader regional groups and inter-embassy groups.

⁹ Australia notes that South Africa has a National Adoption Coalition which is made up of representatives from child protection organisations (accredited bodies) and the South African Central Authority.

existence and application of criminal sanctions is a strong safeguard.¹⁰ Co-operative measures could include:

- States should report on concerns or irregularities regarding intercountry adoption to the Central Authority [*or responsible body if a non-Convention State*] of both the State of origin and the relevant receiving States. Discussion about eliciting information from the State of origin about their acknowledgement and investigation of concerns is contained in chapter 4.3 of this paper;
- In order to monitor trends and concerns States should report issues centrally [for example, to the Permanent Bureau or International Social Service (ISS)] to build up a repository of relevant information. This could include reports of instances of possible illicit practices, responses to possible illicit practices, and the existence and application of criminal sanctions; and
- A new section of the Country profile should be added to ask: how does your Central Authority respond to cases of alleged or actual illicit practices?

1.3 Assistance to States of origin

States and particular regions can co-operate to help enhance safeguards in the State of origin at the request of the State of origin and through the Intercountry Adoption Technical Assistance Programme (ICATAP). Working groups may assist the work of ICATAP to review a State of origin's adoption legislation framework and case management practices, provide training to States of origin on the Hague Convention, and identify gaps in basic procedures and minimum standards of the Hague Convention.

The Guide to Good Practice No 1 also identifies a number of practical measures that States could introduce to help prevent illicit practices. These include taking steps to prohibit private and independent adoptions¹¹ and applying Convention principles to non-Convention adoptions.¹² The Guide to Good Practice No 1 highlights the importance of ensuring that any development assistance or aid offered by receiving States to States of origin does not compromise the arrangements for intercountry adoptions¹³. As such, development assistance should not be linked to the intercountry adoption programme or be funded by adoptive parents' contributions for adoptions.

2 Principle of preventing undue pressure on States of origin

It is important for States to take necessary action to avoid creating undue pressure on States of origin to find children for families. The Guide to Good Practice No 1 identifies a number of situations in which undue pressure on States of origin may occur, including too many applications being sent by a receiving State and too many accredited bodies operating in the State of origin.¹⁴

¹⁰ Guide to Good Practice No 1, para. 76.

¹¹ *Ibid.*, para. 626, which provides that purely private intercountry adoptions and independent adoptions are not consistent with the Convention.

¹² *Ibid.*, para. 635.

¹³ *Ibid.*, para. 96.

¹⁴ *Ibid.*, para. 638.

The Guide¹⁵ provides that receiving States could assist in limiting unreasonable pressures on States of origin by informing prospective adoptive parents about the realities of contemporary intercountry adoption and the difficulties that may arise.¹⁶ States should:

- take any necessary action to avoid competition or pressure between States;
- take any necessary action to avoid competition or pressure between accredited bodies; and
- educate prospective adoptive parents about the types of children in need of intercountry adoption and about the realities and risks of intercountry adoption.

2.1 Avoiding competition or pressure between States

The Guide to Good Practice No 1 stipulates that contracting States are not bound to engage in any particular level of intercountry adoption.¹⁷ There are a number of ways in which competition or pressure between States may be lessened which relate to the number of applications sent by a receiving State. Suggested strategies include:

- where appropriate, receiving States to limit the number of applications sent to a State of origin;
- States to take a pilot programme approach when adoption arrangements are planned with a new State of origin, to limit the number of applications accepted for at least the first year in order to evaluate the programme;
- if a State of origin has not set a quota the receiving State could consider initiating a self imposed quota for at least the first year of sending applications; and
- programmes should then be evaluated, including, for example, by conducting anonymous surveys of adoptive parents¹⁸.

2.2 Avoiding competition or pressure between accredited bodies

Undue pressure may be placed on States of origin through too many accredited bodies operating in those States. While the authorisation of accredited bodies to operate in a State of origin, pursuant to Article 12 of the Hague Convention, is an important mechanism to control the number of accredited bodies operating in a State of origin, States should work together to prevent pressure on States of origin from too many bodies seeking authorisation.¹⁹

The Guide on *Accreditation and Adoption Accredited Bodies: General Principles and Guide to Good Practice No 2* (“Guide to Good Practice No 2”) will be published in 2012.²⁰ It sets out proposed accreditation and authorisation principles and procedures. This paper does not seek to repeat or reformulate the content of that Guide. The requirements for accreditation and authorisation need to be

¹⁵ *Ibid.*, para. 641.

¹⁶ The Australian Central Authority has produced a document entitled ‘Information Statement on the Realities of Intercountry Adoption’. This document is provided to Australia’s prospective adoptive parents as part of their intercountry adoption education and preparation process. It provides prospective adoptive parents with information about the realities associated with intercountry adoption and is available on the Australian Central Authority’s website at < http://www.ag.gov.au/www/agd/agd.nsf/Page/Intercountry_AdoptionAdoption_Fundamentals >.

¹⁷ *Ibid.*, para. 448.

¹⁸ See Guide to Good Practice No 1, para. 625, which suggests anonymous post-adoption surveys of adoptive parents to elicit information about the adoption process and the actual costs paid by the parents.

¹⁹ *Ibid.*, para. 639.

²⁰ The draft Guide is available on the Hague Conference website < www.hcch.net >, under “Adoption Section” and “Guides to Good Practice”.

stringent. Consistent with the Accreditation Guide, some suggested co-operative measures to avoid competition or pressure between accredited bodies include:

- States of origin should publicly inform all receiving States of the number of foreign accredited bodies required in the State of origin;
- receiving States should not grant authorisations to accredited bodies for the provision of services in a State of origin where those services are not needed;
- to receive accreditation, bodies should demonstrate country specific expertise and the capability to recommend prospective adoptive parents who meet the national requirements of the States of origin;
- if an accredited body is found to have been involved in illicit practices their accreditation should be revoked;
- receiving States should list publicly the agencies accredited and authorised by their jurisdictions and the regions in which they work;
- the Central Authority of the receiving State should be the main point of contact regarding all questions / concerns from accredited bodies and should disseminate information to all accredited bodies in their State;
- accredited bodies should be subject to regular supervision by the competent authorities of its State; and
- to meet the professional competence required by Article 10, the accredited body should comprise a team of multidisciplinary professionals who are able to demonstrate the appropriate level of qualifications and practical experience.

2.3 Educating Prospective Adoptive Parents

States should provide information to prospective adoptive parents informing them of the risks that they might encounter during their adoption process. States can do so by reference to the ISS Geneva pamphlet ‘Intercountry Adoption and its risks: a guide for prospective adopters’.²¹

Prospective adoptive parents should be educated about appropriate communication channels. As a general rule, prospective adoptive parents should not directly contact the Central Authorities in States of origin, unless they need to report abuses or illicit practices. Pre-adoption education should include information about the range of possibilities that might occur if a child is found to have been trafficked. Prospective adoptive parents should also be educated against undertaking private or independent adoptions.

It is also important for prospective adoptive parents to be made aware of the types of children in need of intercountry adoption. States of origin can ensure that applications they receive from receiving States reflect the characteristics of children most in need within their country by:

- assessing the number of children in need of intercountry adoption and recording a clear and accurate description of those children’s profiles. This information should be held centrally in the State of origin and included in the State of origin’s Hague Country profile. This information should also be provided to all receiving States and accredited bodies; and
- returning applications for specific children if they do not have those children in need of intercountry adoption, for example, healthy infant children.

²¹ “Intercountry Adoption and its risks: a guide for prospective adopters”, authors Hervé Boéchat, Mia Dambach, Cécile Maurin, Stéphanie Romanens-Pythoud, published by International Social Services, and funded in part by the Government of Canada. The pamphlet is available for purchase by writing an e-mail to < irc-cir@iss-ssi.org >.

3 Principle of co-operation to address and respond to specific cases of illicit practices

When allegations or concerns of illicit practices in intercountry adoption arise the circumstances can be tragic for all, particularly the child or children involved. Complex issues are raised including privacy and the type of assistance or support that is, or should be, provided to the families involved; both biological and adoptive.

It is important that States co-operate in order to work towards reaching the best possible outcome in the circumstances, including sharing information and co-operating to provide support to the parties to an adoption. Where difficulties in co-operation between States arise, assistance by the Permanent Bureau may be appropriate, if practicable and if resources permit such assistance.

It may be difficult to obtain information regarding the circumstances of the case or investigations being undertaken in the State of origin. Concerns may arise if a State of origin fails to respond to illicit practice allegations. It is important for the responsible body or Central Authority in the State of origin to investigate allegations or refer cases to the appropriate law enforcement organisations to undertake investigations.

Possible co-operative measures in this respect may include:

- [*Responsible body or Central Authority in*] State of origin to acknowledge and respond to concerns raised with them and provide a nominated contact person. The initial contact should usually be on a Central Authority to Central Authority [or Government to Government if a non-Convention State] basis;
- If the [*responsible body or Central Authority in*] the State of origin refers the case to an investigative body, the [*responsible body or Central Authority*] should advise the affected parties of this referral;
- [*Responsible body or Central Authority in*] the State of origin to investigate the circumstances of a specific case or cases where abuse has already taken place to the extent practicable and advise affected State(s) of the outcome through the [*responsible body or Central Authority*];
- If, at the time a concern is raised in relation to a particular application, the adoption is not yet completed, the process should be placed on hold by the [*responsible body or Central Authority in*] the State of origin; and
- Where there is a risk of ongoing non-compliance with principles, States have an obligation to keep each other informed in accordance with Article 7 of the Convention. This should be via notices and alerts on government websites and e-mail advice to other receiving States when there are concerns about illegal / unethical practices. This could be extended to keeping the Permanent Bureau informed.

The Guide to Good Practice No 1 provides that as “a matter of public policy adoptions procured through the abduction of children should not be recognised”.²² The Guide makes it clear that the child’s best interest is a key consideration. Practical measures that States may take to respond to allegations and provide support to the affected parties will depend on the laws, resources and procedures of each State.

Practical measures that States may take to respond to allegations include:

- [*Responsible bodies or Central Authorities*] facilitating the:
 - reunion / contact visit of the child and birth family if it is in the child’s best interests;

²² Guide to Good Practice No 1, para. 75.

- referral to appropriate support services and provision of information about domestic legal services in-country to adoptive parents and birth parents;
- exchange of photos, letters and other documentation;
- [*Responsible body or Central Authority in*] State of origin to keep the receiving State informed of the status of the case including if the case has been referred to an investigative body;
- [*Responsible body or Central Authorities in both*] States to consider the appropriateness of mediation through a third party, such as ISS;
- [*Responsible body or Central Authority in*] the receiving State to consider making alternative temporary arrangements for the child’s custody if it is in the child’s best interests (and in accordance with the laws of the State);
- [*Responsible bodies or Central Authorities in both*] States to refer families involved, both biological and adoptive, to in-country services, for example counselling, mediation and legal advice services; and
- [*Responsible bodies or Central Authorities in both*] States to consider whether DNA testing²³ is appropriate and in the child’s best interests (and in accordance with the laws of the State).

If necessary, illicit practices and any illegal activity should be investigated and offenders prosecuted. Factual information including advising States and the general public about the existence and application of criminal sanctions is seen as a strong safeguard in preventing future instances of improper or illegal behaviour.²⁴

The role of the Permanent Bureau

Consistent with the co-operation-based nature of the Hague Convention, the Permanent Bureau has no compliance or policing mandate to redress specific cases of illicit practice. The role of the Permanent Bureau, if a specific case has arisen or is alleged, could include:

- “a resource page” to provide links to State websites with lists of mediators, referral services and related information;
- facilitating communication and co-operation between the two States involved in such cases; and
- enlisting the aid of other concerned States to develop a collaborative response to systemic abuses.

²³ A framework for DNA testing that covers issues of confidentiality, insurance and security of information will need to be developed.

²⁴ Guide to Good Practice No 1, para. 75.