

## **Extended National Interest Analysis**

### **Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.**

#### **Executive Summary**

1. The Ministry of Justice proposes that New Zealand accede to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. (the Convention).
2. The Convention is one of three modern Hague Children's Conventions which aim to protect children across international borders. The Convention complements the Convention on the Civil Aspects of International Child Abduction (Child Abduction Convention) and the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (Intercountry Adoption Convention). New Zealand is a party to both these conventions.
3. Conflicts in jurisdiction are an area of difficulty in family law matters. The lack of internationally agreed jurisdictional rules creates uncertainty for litigants and difficulty for the courts in determining the appropriate forum for resolving disputes.
4. Acceding to the Convention will provide significant practical benefits for New Zealand children. The Convention establishes rules in respect of jurisdiction and applicable law; enables the automatic recognition of court orders and other agreements made in one Contracting State to be recognised in other Contracting States; and provides a basic framework for the exchange of information and co-operation between judicial and administrative authorities in Contracting States.
5. There are no significant disadvantages in New Zealand acceding to the Convention. The Convention will require New Zealand to accept some limitations on the jurisdiction of its judicial and administrative authorities in order to avoid conflicts in matters of jurisdiction, applicable law and recognition and enforcement of measures. However, the benefits of accession outweigh any such disadvantages.
6. The Convention requires that a Central Authority is established as the central point of contact between Contracting States. It is proposed that the Secretary of Justice be designated as the Central Authority under the Convention.
7. There are no anticipated cost increases for the existing Central Authority or the Ministry of Justice in acceding to the Convention. In contrast there is the potential for a significant reduction in some Crown costs, and workload pressures in the Family Court.
8. Accession to the Convention will simplify case management for the Ministry of Social Development (MSD) resulting in savings in time and resources. Child, Youth and Family should not incur additional costs in relation to the management of international care and protection cases.

## Nature and timing of proposed treaty action

9. We propose that New Zealand accede to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the Convention). To date 19 countries including Australia are parties to the Convention. Seventy per cent of New Zealand's international cases are with Australia. Australia has indicated support for New Zealand's accession.
10. Legislation is required to implement the Convention in New Zealand. The Convention will enter into force for New Zealand during 2012 if implementing legislation has been enacted and any necessary regulations and court rules have been promulgated during 2011.
11. Once the legislation is in place New Zealand may accede to the Convention by depositing an instrument of accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands in accordance with Article 58. A period of six months is provided for other Contracting States to notify objections. The Convention shall enter into force between New Zealand and any Contracting State which does not raise an objection on the first day of the month after the expiry of a further period of three months.
12. The Ministry of Justice proposes a reservation under Article 55 of the Convention to preserve the jurisdiction of New Zealand authorities to take measures directed to the protection of the property of the child situated on its territory. The measures referred to in relation to property include those that bear on the administration, conservation or disposal of the child's property. This is a broad formulation that encompasses all the operations concerned with the property of a child, including acquisitions, considered as investments or as assignments disposing of the property transferred in consideration of the acquisition.
13. A reservation is necessary to protect:
  - a Māori child's interest in Māori land
  - a non-Māori child's interest in Māori land (this is possible for various historic reasons)
  - a child's interests in collectively owned assets held by, for example, an incorporation established under Te Ture Whenua Māori Act 1993
  - a child's interest deriving from their affiliation to an iwi.
14. Allowing a foreign jurisdiction to make decisions about Māori land would be contrary to the principles underpinning Te Ture Whenua Māori Act 1993 (and the status of land as taonga tuku iho of special significance to Māori). It would have significant consequences for the rights of other individuals or groups. The same concern applies in respect of interests related to other collectively held property owned, for example, an incorporation set up under Te Ture Whenua Māori Act 1993 or a post-settlement entity.
15. A general reservation in respect of children's property is proposed. However, in appropriate cases, for example, where the issues did not concern Māori land or

collectively held interests, it would still be possible for a foreign jurisdiction to take measures in relation to a child's property by using the provisions in the Convention enabling transfer of jurisdiction by agreement.

16. Consultation will be undertaken with Tokelau to determine whether New Zealand's accession to the Convention will extend to Tokelau as a non-self governing territory of New Zealand.

## **Reasons for New Zealand taking the treaty action**

### *Background to the treaty*

17. The Hague Conference on Private International Law is an inter-governmental organisation that works towards harmonising private international law rules at a global level. It does this primarily through negotiating multilateral treaties known as Hague Conventions. New Zealand is a member of the Hague Conference.
18. Over the last 25 years the international protection of children has seen a focus on the development of three modern Hague Children's Conventions:
  - the Convention on the Civil Aspects of International Child Abduction (Child Abduction Convention)
  - the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (Intercountry Adoption Convention)
  - the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.
19. The Convention complements the two earlier Conventions. The Convention covers both public and private family law "measures of protection" concerning children caught up in international disputes about their care, contact, welfare or property.
20. The Convention arose out of, and replaces, the Hague Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors. Only 11 countries (not including New Zealand) became parties to the 1961 Convention. Take-up of the 1961 Convention was poor because it did not provide clear jurisdictional rules. Nor did it facilitate co-operation between authorities of interested States. The 1961 Convention did not have mechanisms for the recognition and enforcement of orders between Contracting States. The Convention also replaces the Hague Convention of 12 June 1902 Governing the Guardianship of Minors.
21. On 15 December 2009, the Minister of Justice approved the work necessary to progress New Zealand's accession to the Convention.

### *Key features of the current situation*

22. When relationships end there can be difficulties making arrangements concerning children if one parent wishes to return to or leave New Zealand. The following scenarios are the most common:
  - a child lives in New Zealand and a parent wishes to relocate to another country with the child

- a child lives in New Zealand and has contact with a parent in another country
  - a child lives in New Zealand and is retained by the overseas parent during contact
  - a child visits a parent in New Zealand and is retained by that parent in New Zealand.
23. Conflicts in jurisdiction are an area of difficulty in family law matters. The lack of internationally agreed jurisdictional rules creates uncertainty for litigants and difficulty for the courts in determining the appropriate forum for resolving disputes. This uncertainty is not in the best interests of the children involved.
24. In some cases vulnerable children “fall through the cracks” as jurisdictions fail to act believing that another jurisdiction will deal with the matter. In other cases it leads to conflicting orders about the same child being made in New Zealand and overseas. This then involves significant costs both for litigants and the court system while these uncertainties are resolved. Issuing court proceedings in an overseas jurisdiction is time consuming and is further complicated by there often being no obvious central point of contact for advice on the filing of an application.
25. An overseas jurisdiction may not recognise a New Zealand Court order. A parent will have to make a fresh application to obtain an equivalent order in the overseas jurisdiction. The current lack of reciprocal recognition and enforcement arrangements can create difficulties. For example, judges may be reluctant to allow relocation by a parent and children to another country or to grant contact in favour of a non-custodial parent intending to live or living overseas.
26. Further, parental rights that are recognised by New Zealand law may not provide a basis for issuing proceedings in an overseas jurisdiction. For example, some jurisdictions do not recognise the parental responsibility of fathers not married to the child’s mother leaving these fathers without legal recourse.
27. Co-operation among states is also an area of difficulty. At present, many countries do not have a central point of contact to which to address requests for information or assistance. This can slow down the resolution of cases, and limit options for children.
28. Cross-border information sharing practices vary and there is uncertainty as to application of privacy laws. In some cases the court asked to make a decision does not have access to information from other countries’ authorities and must make significant decisions concerning children with limited information.
29. In child protection matters, MSD is experiencing an increasing volume of international child protection cases. The following scenarios are the most common:
- a care and protection issue arises for a child present in New Zealand, but the child lives in another country
  - care and protection issues arise when a New Zealand child travels overseas
  - a child subject to care and protection orders may need to travel overseas, perhaps for contact with a parent

- the most suitable placement for the child may be with family or whanau in another country.
30. Again, the lack of a clear central point of contact in many overseas countries, no agreed common jurisdictional rules and a general inability to have child protection orders enforced internationally can cause delays and limit options for the care of vulnerable children. At worst, there is potential for children to be put at risk by delays in taking protective action or where children subject to court orders travel without a clear mechanism to enforce the order in the other country.

*How the Convention addresses these issues*

31. The Convention addresses these issues by providing conflict of law rules that apply to matters falling within the Convention's scope. Under the Convention measures of protection include court orders or arrangements made by parents or administrative authorities (eg, Child, Youth and Family) concerning the care of children. Measures of protection are not defined in the Convention, but Article 3 provides a non-exhaustive list of measures that would fall within its scope:
- the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation
  - rights of custody, including the right to determine the child's place of residence and rights of access
  - guardianship, curatorship and analogous institutions
  - the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child
  - the placement of the child in a foster family or in institutional care
  - the supervision by a public authority of the care of a child by any person having charge of the child
  - the administration, conservation or disposal of the child's property.
32. The Convention does not apply to:
- the establishment or contesting of a parent-child relationship
  - decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption
  - the names of the child
  - emancipation
  - maintenance obligations
  - trusts or succession
  - social security
  - public measures of education or health
  - measures taken as a result of penal offences committed by children
  - decisions on the right of asylum and on immigration.

### *Key reasons why New Zealand should take Treaty action*

33. If New Zealand accedes to the Convention this will allow New Zealand to provide better protection for children in cross-border disputes. These rules promote co-operation between the authorities of Contracting States by eliminating potential conflicts of jurisdiction and clarifying the responsibilities of judicial and administrative authorities taking measures of protection. The Convention also ensures the recognition and enforcement of New Zealand orders in other Contracting States.
34. The Convention will clarify which country's courts or child protection authorities have jurisdiction to take measures in relation to a child. This will provide certainty and avoid conflicting orders being made in relation to the same children. The Family Court and MSD will have confidence in enabling children to travel overseas as court orders and other measures will be automatically recognised in other Contracting States.

### *Policy objectives*

35. The Government's policy objective in taking treaty action is to provide more effective protection for children who are the subject of cross-border cases involving their care, contact, property or welfare. The Convention provides clear jurisdictional rules for judicial and administrative authorities in New Zealand and other Contracting States. The recognition and enforcement of New Zealand court orders provides an assurance to parents when children are moving across borders or relocating overseas.
36. In this respect the aims of the Convention are consistent with the principles underpinning New Zealand's key family law legislation: the Care of Children Act 2004, and the Children, Young Persons, and Their Families Act 1989. These principles stress the importance to children of maintaining relationships with both parents and extended family despite changes in family circumstances. Consistent with the United Nations Convention on the Rights of the Child, the Convention affirms that the best interests of the child are a primary consideration.

### *Major and like-minded parties to the treaty*

37. The Convention entered into force on 1 January 2002. To date 19 countries, including Albania, Armenia, Australia, Bulgaria, Croatia, the Czech Republic, the Dominican Republic, Ecuador, Estonia, Hungary, Latvia, Lithuania, Monaco, Morocco, Slovakia, Slovenia, Switzerland, Ukraine and Uruguay are parties. Nineteen members of the European Union, including the United Kingdom, anticipate being in a position to become parties in September 2010. Canada and the United States of America are also actively considering the case for accession.
38. The advantages of accession will increase as like-minded countries, and other countries with which New Zealand has close ties (eg, the United Kingdom, Germany and the Netherlands) become Contracting States.

## **Advantages and disadvantages to New Zealand of the treaty entering into force and not entering into force for New Zealand**

### *Advantages of treaty action*

39. There are a number of significant advantages in New Zealand taking treaty action:
- 39.1 The Convention complements the other two Hague Children's Conventions to which New Zealand is a party. Together these three conventions enable co-operation between States that share a common interest in protecting children across international borders. This is of increasing importance in family law matters due to the growing number of cases with a cross-border connection.
  - 39.2 Acceding to the Convention would be consistent with and demonstrate New Zealand's longstanding commitment to co-operate in multilateral efforts to provide better protection for children in cross-border situations.
  - 39.3 The Convention's aims complement New Zealand's existing obligations under the United Nations Convention on the Rights of the Child.
  - 39.4 Establishing jurisdictional rules will eliminate or reduce conflicts of jurisdiction arising from nationality or citizenship and will directly benefit children and parents.
  - 39.5 The Convention confirms that the law which applies to parental responsibility is the law of the child's habitual residence. This means that other Contracting States whose law does not recognise the parental responsibility of a father not married to his child's mother will recognise a New Zealand father's rights if the child is habitually resident in the other Contracting State.
  - 39.6 The Convention enhances the Child Abduction Convention by enabling a New Zealand court to impose enforceable conditions on an order for a child's return where there are concerns for a child's well-being. Such orders remain in place until the authorities in the other country have taken measures and these have been recognised by the New Zealand court. The Convention also has superior provisions to those in the Child Abduction Convention enabling parents to organise or secure contact.
  - 39.7 New Zealand court orders will be automatically recognised by operation of law in another Contracting State unless one of the limited grounds for non-recognition applies. This will:
    - promote finality in cross-border litigation which has cross-border elements
    - discourage "forum shopping"
    - discourage the breach of New Zealand parenting orders in other Contracting States and vice versa

- recognise the reasonable expectation of New Zealand parents that domestic orders should be recognised and be capable of being enforced internationally
- reduce the need for time-consuming and expensive access applications to be pursued under the Child Abduction Convention
- reduce the number of child abductions by providing certainty about the enforceability of orders
- protect children subject to New Zealand child protection orders who are placed in or who travel to other Contracting States and vice versa.

39.8 Acceding to the Convention will enable confirmation from another Contracting State that an order will be recognised and enforced (if necessary) by that State. This ability to confirm in advance that existing care arrangements for children will be recognised and enforced is a significant advantage to a parent who may have concerns about agreeing to their child having contact in or relocating to another country.

39.9 A further advantage is the establishment of a Central Authority as the main point of contact in international matters. This will facilitate co-operation and exchange of information between Courts and administrative authorities of Contracting States. There is already a well-developed level of co-operation under the Child Abduction Convention and New Zealand is at the forefront of this.

*Statement of feasible options for achieving the desired objectives*

*Retain the status quo*

40. An alternative to acceding to the Convention would be to retain the status quo. Subpart 3 of the Care of Children Act 2004 provides for the enforcement of parenting orders for day-to-day care or contact between prescribed countries. These provisions enable a party from a prescribed country to register an overseas court order in New Zealand, or to register a New Zealand court order in a prescribed overseas country.
41. An overseas order once registered in New Zealand may be enforced, varied or discharged as if it were an order made by a New Zealand Court under the Act. Similarly, a New Zealand court order may be registered and enforced overseas. Currently Australia is the only prescribed country under the Act in a reciprocal arrangement included in the Australian Family Law Act 1976 (Cth).
42. New Zealand does not have formal arrangements for dealing with international child protection matters with any country, other than Australia. Part 3A of the Children, Young Persons, and Their Families Act 1989 contains provisions allowing for the transfer of child protection orders and proceedings from New Zealand to Australian States and Territories and vice versa. Legislation in the Australian States and Territories contains similar legislative provisions to those in the Children, Young Persons, and Their Families Act 1989.
43. The *Protocol for the Transfer of Care and Protection Orders and Proceedings and Interstate Assistance* sets out agreement between New Zealand and Australia on the means by which child protection authorities will implement the relevant

legislative provisions and how they will operate in trans-Tasman cases. They provide agreed processes for the exchange of information and placement of children for the purposes of a holiday or on a longer term basis.

44. The advantage of continuing with the status quo is that the majority of international cases are with Australia with whom New Zealand has bilateral agreements in both family law and child protection.
45. The disadvantages in the status quo remaining are that the existing provisions only apply to Australia, are limited in their scope, and do not provide all the benefits that the Convention does.

#### *Enter into further bilateral arrangements with other countries*

46. New Zealand could actively pursue more bilateral relationships with other countries under the existing provisions in legislation as an alternative to acceding to the Convention. Further countries could be prescribed under the provisions of the Care of Children Act 2004 and New Zealand could enter into reciprocal child protection arrangements with other countries in addition to Australia.
47. This course of action has the advantage that New Zealand can choose which countries it would like to enter into arrangements with. However, replicating the trans-Tasman arrangements with other countries is likely to be expensive and time consuming. It could also mean different arrangements with different countries, which could be complicated for courts and agencies to implement and the public to understand.
48. In child protection matters the existing provisions are suited to use where a child is to be placed permanently in Australia. They are not designed for situations where a child is travelling to Australia or vice versa on a less permanent basis, (eg, for a holiday or where a placement has not been finalised).
49. The existing provisions are also limited to recognition and enforcement and do not provide all the benefits of accession to the Convention. They do not contain rules for determining jurisdiction or applicable law and for co-operation and information sharing. The Convention offers these advantages, while allowing the existing arrangements in the Care of Children Act 2004 and the Children, Young Persons, and Their Families Act 1989 to continue to operate where more appropriate in a particular situation.

#### *Acceding to the Convention*

50. Accession to the Convention will protect New Zealand children caught up in cross-border cases in a greater range of situations. As the Convention applies to both private family law matters (eg, disputes between parents) and public law matters (eg, intervention by Child, Youth and Family), it will provide certainty for parents, judicial and administrative authorities about the rules that apply and confidence in allowing children to travel or relocate overseas. It will also provide assurance to overseas jurisdictions that New Zealand can protect their citizen children while they are in New Zealand.
51. In the majority of cases, it is likely to be in the best interests of the child for the country of the child's habitual residence to have primary jurisdiction to take measures for the protection of the child. This recognises that the authorities

where the child resides would most often be best placed to assess the best interests of the child and the measures necessary for the protection of the child.

52. The Convention provides appropriate exceptions to the rule as to jurisdiction, in particular by providing for Contracting States to agree that jurisdiction will be exercised by another Contracting State and for the exercise of jurisdiction in cases of urgency.
53. Clarifying when the New Zealand Family Court may exercise jurisdiction in cross-border situations could have significant advantages. For example, it would clarify any doubt that the Family Court may take measures during a child's temporary absence from the country, thereby ensuring that the orders necessary for the child's protection are in place immediately upon the child's return. This would avoid the risk of gap in time after the child's return and before the matter could be brought before the Court.
54. The standardised approach the Convention offers to international cases would be applicable to relationships with what is likely to be an increasing number of countries. With the exception of the arrangements with Australia, no such arrangements currently exist. The Convention provides an agreed process for resolving international matters involving children with other Contracting States.
55. To date 19 countries have acceded to the Convention. However, Hague Conventions enjoy a high degree of respect internationally as evidenced by the large number of parties to the Child Abduction and Intercountry Adoption Conventions. With Australia already a party, the European Union countries to become parties later this year and the United States and Canada actively considering accession, membership is likely to increase quickly.

#### *Disadvantages of treaty action*

56. There are no significant disadvantages to New Zealand acceding to the Convention. Accession will require New Zealand to accept some limitations on the jurisdiction of its judicial and administrative authorities in order to avoid conflicts in matters of jurisdiction, applicable law and recognition and enforcement measures for the protection of children.
57. Unless one of the exceptions apply, New Zealand may have to accept orders made in other Contracting States which reflect different attitudes and cultural values than those held by New Zealand courts and government agencies. However, the benefits of accession outweigh any such disadvantages.
58. Article 58 of the Convention provides that Contracting States may lodge an objection to an acceding State at the time of its accession. The objection means the Convention does not affect relations between the State lodging the objection and the acceding State. It provides a mechanism by which New Zealand could avoid being bound by the Convention requirements in relation to a country with inadequate family law or child protection systems.
59. New Zealand would need to assess the standard of the family law and child protection systems of a new Contracting State at the time of its accession and raise an objection at that stage. If New Zealand does not do this, it would be

bound to recognise the jurisdiction of the other Contracting State in future cases involving a child habitually resident in that State.

60. The same option is not available in respect of countries that are already Contracting States at the time that New Zealand might accede. This means that if New Zealand elects to accede to the Convention, the Convention will apply as between New Zealand and all other States that have ratified or acceded at that time (unless, of course, any of them were to lodge an objection to New Zealand's accession).

*Disadvantages of not taking treaty action*

61. Not acceding to the Convention will mean that New Zealand children will not benefit from the protections it affords. Parents, and judicial and administrative authorities will continue to experience difficulties in cross-border cases involving children because of the uncertainty about the international rules affecting:
- when a New Zealand court has jurisdiction to hear an international proceeding about children
  - which country's laws are to be applied
  - whether New Zealand's orders will be recognised (and enforced if necessary) overseas and vice versa
  - courts' and public authorities' obligations to co-operate in the protection of children.

*How will NZ's position under Hague Conference be affected by not acceding?*

62. In becoming a member of the Hague Conference New Zealand has assumed an obligation to actively support and promote the benefits of the Convention. New Zealand is also expected to show leadership in the Asia/Pacific region in encouraging other States to become parties to the Convention. If New Zealand does not accede to the Convention it may damage our standing among other member States, particularly those in the Asia/Pacific region.

**Legal obligations which would be imposed on New Zealand by the treaty action, the position for reservations to the treaty, and an outline of any dispute settlement mechanisms**

63. By taking treaty action, New Zealand will be legally obliged to:
- provide for jurisdictional rules, ie, a general jurisdictional rule based on habitual residence of the child (Article 5)
  - provide for exceptions and limitations to the general jurisdictional rule as provided for in the Convention [Article 6 (refugee child or child without habitual residence); Article 7 (child abduction); Article 10 (proceedings for dissolution); Article 11 (urgency); and Article 12 (provisional matters)]
  - provide for the transfer of jurisdiction, either as a request to or request from another Contracting State (Articles 8 and 9)
  - recognise the parental responsibility of a parent from a Contracting State (Article 16)

- provide a simple and rapid procedure to recognise and enforce measures of protection taken by another Contracting State subject to the grounds for refusal as provided for in the Convention (Articles 23, 26 and 28)
  - set out the procedure for an interested person to request the recognition or non recognition of a measure of protection taken in another Contracting State (Article 24)
  - designate competent authorities (eg, public authorities such as Child, Youth and Family and the New Zealand Family Court) to undertake various functions required by the Convention under Articles 8, 9 and 33 (Article 44)
  - set out the obligations on child protection authorities to consult and obtain consent prior to cross-border placements of children subject to child protection measures (Article 33)
  - establish a New Zealand Central Authority to discharge the duties imposed by the Convention, including general obligations to co-operate with other Central Authorities available in their State relating to matters covered by the Convention (Articles 29 to 32 and 35).
64. Reciprocal obligations will apply to other Contracting States.
65. Article 54 of the Convention provides that any communication sent to a Central Authority or another authority of a Contracting State shall be in the original language and accompanied by a translation into the official language of the Contracting State or where that is not possible a translation into English or French. A Contracting State may make a reservation under Article 60 and object to the use of English or French but not to both.
66. Under Article 38 of the Convention Central Authorities and public authorities (not courts) bear their own costs. However, they may impose reasonable charges for the provision of services, eg, in locating a child or assisting in the return of a child. These can be in the form of reimbursement of costs or payment for a service prior to it being undertaken. Contracting States may enter into arrangements between themselves concerning the allocation of these costs.
67. The Convention allows for reservations in relation to measures directed to the protection of property, or certain categories of property, of a child situated on a State's territory (Article 55). The scope of property matters is fairly narrow as issues arising out of trusts and succession are specifically excluded.
68. There are no dispute resolution processes in the Convention. However, under Article 56 the Secretary General of the Hague Conference may call a Special Commission in order to review the practical operation of the Convention. These meetings occur approximately every four to five years and are open to all parties to the Convention to attend. The first Special Commission in relation to the Convention took place in 2006.

## **Measures which the Government could or should adopt to implement the treaty action, including specific reference to implementing legislation**

### *Summary of the range of options available for implementing the Convention*

69. Legislation is necessary for New Zealand to meet the legal obligations under the Convention outlined in paragraph 62. Non-regulatory solutions are not feasible. No final view has been reached on what form legislation might take. The legislative options for implementing the Convention are set out below. Options 1-3 are the preferred options to implement the Convention. The costs associated with each of these options would be similar. The best option for implementing the Convention will be decided in consultation with MSD and Parliamentary Counsel's Office.

### *Separate Act*

70. One option is a separate Act incorporating the obligations to be undertaken by New Zealand on accession to the Convention. The advantage of this approach is that the Convention is easily accessible to lawyers and the general public. It also has the advantage of not only having the text of the Convention in legislation but specific obligations are dealt with under specific provisions in the Act itself. In this way the Convention's obligations can be articulated in a way that is responsive to specific issues in a New Zealand context.

### *Separate Act summarising some of the Convention's obligations*

71. A further option is a separate Act summarising some of the obligations to be undertaken under the Convention and attaching the Convention as a Schedule. An example of this approach is the Adoption (Intercountry) Act 1997.
72. The advantages of this approach is that it provides assistance in understanding some of the more significant provisions of the Convention and does not leave them open to interpretation. The disadvantage with this approach is that if only some of the obligations are specified, those relying on the Convention need to refer to the Act and the Schedule attaching the Convention. This can result in inconsistencies.

### *Amendment to existing Acts*

73. A further option is to amend existing Acts incorporating some of the obligations of the Convention and attaching the Convention as a Schedule. An example of this approach is Subpart 3 of the Care of Children Act 2004 which incorporates the Hague Child Abduction Convention into New Zealand law. Because the Convention affects the Care of Children Act 2004 and the Children, Young Persons, and Their Families Act 1989 it would be necessary to make amendments to both these Acts. This would have the advantage of the Convention becoming part of each Act with ease of accessibility to the Convention's provisions. A disadvantage of this approach is that the Convention's provisions would be in two separate Acts with some resulting duplication and the potential for inconsistent interpretation.

### *Separate Act annexing the Convention*

74. The simplest option is a separate Act attaching the Convention and stating that the Convention shall have force of law in New Zealand and giving jurisdiction to New Zealand's courts and administrative authorities. While this is the simplest option in terms of statutory amendment, it provides little assistance to lawyers, courts, administrative authorities and the general public in understanding and accessing the Convention. It may make the law less transparent. It would also mean that the courts would have to develop procedural machinery so that the Convention could be implemented in practice.

### *Incorporating the Convention in Regulations*

75. The Convention could be incorporated in regulations made under one or more statutes. This is the means by which the Australian Federal Government has given effect to the Hague Child Abduction Convention. The advantage of this approach is that provisions can be more easily changed. Promulgating regulations is a faster and less costly option as it would not involve the Select Committee process.
76. However, the Convention impinges on fundamental human rights in some areas and involves important issues of international co-operation. It would not be appropriate to limit public opportunity for comment or Select Committee scrutiny. It is probable that the Regulations Review Committee would comment unfavourably on this option.

### *Obligations requiring legislative implementation*

77. Legislation to implement the Convention falls with the following broad areas:
- objects/purpose of Convention
  - definitions and new terminology
  - jurisdiction of officials and courts exercising jurisdiction, including special rules and limitations on jurisdiction
  - law to be applied by officials and courts exercising jurisdiction
  - recognition and enforcement of New Zealand measures of protection overseas and of overseas measures in New Zealand
  - arrangements for co-operation between New Zealand and overseas courts and administrative authorities.
78. Some, or part of some of the administrative obligations can be dealt with by regulation (eg, in the Family Courts Rules 2002) rather than primary legislation, for example:
- the process for recognition and enforcement of orders
  - technical and procedural matters relating to the transfer of jurisdiction
  - requests for the recognition of a measure of protection in another Contracting State
  - judicial communication.

79. Including the more procedural aspects of the Convention in regulations will mean that primary legislation will not be overly prescriptive. The advantages of including procedural aspects of the Convention in the Family Courts Rules 2002 also include:
- the comparative ease with which regulations can be amended
  - the relatively technical nature of some provisions that are likely to be necessary
  - the difficulties of predicting in advance the mechanisms necessary to implement the Convention that is comprehensive in any situation.
80. Not all the Convention's provisions need to be included in either legislation or regulation (eg, those provisions relating to countries with a federal jurisdiction and purely operational issues).
81. The Children (Child Protection Convention) Bill, which will encompass one of these options, has a priority 4 on the Government's legislative programme. Subject to the availability of parliamentary time the Bill will be introduced in November 2010 and referred to select committee in December 2010. The Convention will enter into force for New Zealand during 2012. An Order-in-Council will be necessary to bring the legislation into force.
82. Interested parties will be advised of the requirements under the Convention through information on the Ministry of Justice website, and general media and legal publications.

#### *Impact on existing legislation*

83. New Zealand has existing reciprocal arrangements with Australia concerning the recognition and transfer of New Zealand parenting orders in Australia and vice versa under Subpart 3 of the Care of Children Act. Part 5 of the Domestic Violence Act 1995 also contains similar provisions in respect of Australia for the recognition and enforcement of protection orders. Under Part 3A of the Children, Young Persons and Their Families Act proceedings and orders may be transferred in a reciprocal arrangement with Australia. It is proposed that these provisions remain and operate in parallel with those of the Convention. The more beneficial regime may be used in a particular circumstance.

#### **Economic, social, cultural and environmental costs and effects of treaty action**

84. Implementing the Child Protection Convention will deliver immediate benefits to New Zealand children and their parents. The Convention will provide a substantial degree of certainty concerning the enforcement of New Zealand court orders in other Contracting States while significantly reducing jurisdictional disputes. The result will be a significant reduction in the time and cost involved in resolving cross-border cases.
85. Implementing the Convention will further reinforce New Zealand's international reputation as a family-friendly and child protective society. Failure to implement the Convention will result in less protection for children and continuing uncertainty and unnecessary costs for parents and the courts. In the long term, failure to implement the Convention could lead to difficulties in relations with States that have ratified the Convention. There could also be economic consequences if

families with children see New Zealand's failure to implement the Convention as a barrier to living and working in New Zealand.

86. Conversely, implementing the Convention may have a positive economic impact (in addition to the direct benefits for New Zealand children and their parents) if families with children choose New Zealand (in preference to a non-Contracting State) as a place in which to live, do business, or holiday.
87. The Convention provides a means of communication and co-operation between countries with diverse legal systems and cultures. Countries that are already parties to the Convention include civil law jurisdictions (eg, Switzerland), common law jurisdictions (eg, Australia) and those in the Islamic tradition (eg, Morocco). In providing a framework which aims to avoid conflicts between differing legal systems, the Convention recognises the importance to children in maintaining connections to their families and ethnic, cultural or community ties and values.
88. Most movement of New Zealanders internationally is between New Zealand and Australia, and vice versa. The free movement of people between our two countries highlights the importance of the Convention in providing internationally agreed rules when making decisions on behalf of children whose family are separated across international borders.
89. Currently, Trans-Tasman disputes generate over 70 per cent of New Zealand's international cases before the Family Court. It is estimated that at least half those cases could be dealt with under the more streamlined process available under the Convention.
90. Australia ratified the Child Protection Convention in 2003. New Zealand's accession to the Convention would deliver considerable benefits to all concerned including the children involved, parents, and the authorities in both countries.
91. Implementing the Convention will not result in any environmental costs or effects.

### ***The costs to New Zealand of compliance with the treaty***

#### *Ministry of Justice*

92. The Convention requires each Contracting State to designate a Central Authority to carry out the obligations and functions of the Convention. It has been proposed that the Secretary for Justice would undertake the functions of the Central Authority under the Convention. There would be no set up costs in the Secretary for Justice assuming the role of the Central Authority as the Ministry has the necessary infrastructure to undertake the role. The Secretary for Justice undertakes the functions of the Central Authority under the Child Abduction Convention.
93. Much of the work of the Central Authority under the Child Protection Convention will involve liaising with the Family Court. This work is closely aligned to existing Central Authority functions under the Child Abduction Convention. Implementing the Convention is not expected to result in a significant increase in the number of international cases being dealt with by the existing Central Authority. Consequently, the role of the Central Authority under the Convention is not expected to result in a significant increase in costs.

94. There are no anticipated cost increases in acceding to the Convention. Conversely, there is the potential for some reduction in Crown costs as the Convention will simplify the process of resolving international cases involving children thus reducing delays and using fewer resources (including judge and court staff time, and lawyer for the child).
95. Savings in legal costs to individuals and the legal aid budget are also likely.

*Ministry of Social Development (Child Youth and Family)*

96. Costs to the Ministry of Social Development (MSD) will relate primarily to casework management and, to a lesser extent, the provision of information about New Zealand law and procedures. International casework is already carried out in the national office as well as local offices. The Convention will simplify case management resulting in savings in time and resources.
97. Accession to the Convention is not expected to result in any additional costs for Child Youth and Family in relation to the management of international care and protection cases.
98. The Convention provides for a parent seeking access to a child who is living in another Contracting State to request the Central Authority to provide a report on that parent's suitability. MSD's social workers are already required to complete reports to assist the Family Court in relation to proceedings under the Care of Children Act 2004. However, some additional costs may be incurred if social workers are required to complete reports for the purposes of private family law matters covered by the Convention. The Convention provides for a parent seeking access to a child who is living in another Contracting State to request the Central Authority to provide a report on that parent's suitability.
99. The cost for MSD will relate primarily to casework management and to a lesser extent the provision of information about New Zealand law and procedures. International casework is already carried out both in local offices and in the national office. It is not expected that accession to the Convention would result in any additional costs for Child Youth and Family with respect to the management of international care and protection cases. It is anticipated that the Convention will make case management easier thus saving time and resource.

**Completed or proposed consultation with the community and parties interested in treaty action**

100. The following agencies have been consulted and their views considered: the Ministries of Social Development, Foreign Affairs and Trade, Education, Health, Pacific Island Affairs and Women's Affairs; the Department of Internal Affairs, including the Office of Ethnic Affairs, the Department of Labour; Te Puni Kōkiri; Treasury; and NZ Police. The Department of the Prime Minister and Cabinet have been advised.
101. The Principal Family Court Judge, the Families Commission, the Office of the Children's Commissioner, the Public Trust, the Family Law Section of the New Zealand Law Society and some family law academics have also been consulted.
102. Overall feedback was very supportive of New Zealand's accession to the Convention. No significant issues were raised. However, as accession to the

Convention will see New Zealander's personal information being disclosed to overseas child protection authorities, consultation has identified the need to ensure that such disclosures are specifically enabled by legislation, and accompanied by an adequate level of privacy protection. These issues will be addressed during the process for implementing the Convention in New Zealand law.

### **Subsequent protocols and/or amendments to the treaty and their likely effects**

103. The Convention does not specify how it may be amended or how any protocols may be established under it. However, under Article 39 and 40 of the Vienna Convention on the Law of Treaties the Convention may be amended by agreement between its parties.
104. Article 52 of the Convention provides that Contracting States are not precluded from concluding agreements which contain, in respect of children habitually resident in those States, provisions on matters governed by the Convention.

### **Withdrawal or denunciation provisions in the treaty**

105. A party to the Convention may denounce it by a notification in writing addressed to the depository (the Ministry of Foreign Affairs of the Kingdom of the Netherlands) and such denunciation takes effect 12 months later.

### **Ministry of Justice Disclosure Statement**

106. The Ministry's analysis of the anticipated impact of the Convention is based on comparing the resources utilised by the Family Court and the Central Authority in resolving international cases with the situation if New Zealand becomes a party to the Convention.
107. The analysis uses historical data to estimate the number of international cases the Family Court and the Central Authority will deal with annually. There is a risk that the volumes of overseas orders transmitted to New Zealand will be higher than anticipated. However, greater numbers of orders requiring registration should be offset by a decrease in Court time required to hear proceedings initiated by an overseas party.
108. There was no information or data from other Contracting States to draw on as there is not yet a sufficient body of international experience.
109. Accession to the Convention will not impose any additional regulatory burden on New Zealand authorities, or New Zealand parents and their children. Conversely, the Convention's clear rules on jurisdiction and conflict of laws, and automatic recognition and enforcement of court orders will:
  - provide greater certainty for New Zealand parents that their rights will be protected when their children travel overseas, and vice versa
  - simplify the process of resolving cross-border disputes involving children
  - substantially reduce or eliminate the need for duplicate proceedings in overseas jurisdictions

- reduce delays and resources expended (including judge time), and that of court staff) in the court process.

110. Primary legislation is necessary to implement the Convention. Non-regulatory solutions are not feasible because accession to the Convention involves:

- international binding treaty obligations
- mutual recognition of court orders by Contracting States
- enforcement of overseas orders in New Zealand in accordance with New Zealand law.

Signed by Benesia Smith, Acting General Manager, Public Law on behalf of the Ministry of Justice

Date