

# MEMORANDUM

**DATE:** 9 February 2007

**RE:** Inter-country Adoption

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The information provided below is correct as at 9 February 2007.

## 1. Introduction

With 'local' adoption becoming increasingly rare in Western Australia, more couples have begun looking to adopt a child from overseas. This practice is known as inter-country adoption. While the arranging of any adoption is a lengthy process with no guarantee of success, there are many additional factors to consider when adopting from overseas. The process by which an inter-country adoption is arranged, the requirements for prospective parents and even the ability to adopt a child in the first place depend largely on the child's country of origin. The options available to those seeking to adopt from overseas are discussed below.

## 2. Adoption arranged through Australian authorities

All inter-country adoptions arranged in WA are dealt with by the Department for Community Development's Adoption Service (the 'DCD'). The DCD requires all prospective parents to meet the eligibility and assessment criteria laid down in the *Adoption Act 1994* (WA) (the 'Adoption Act'). Should prospective parents meet the *Adoption Act* criteria, they should be aware that the DCD only arrange inter-country adoptions with either:

- countries which have ratified the *Hague Convention on the Protection of Children and Cooperation in regard to Intercountry Adoption* ('Convention countries'); or
- countries with which Australia or Western Australia has a bilateral agreement in place.

### (a) The DCD's eligibility and assessment requirements

#### (i) Eligibility

All prospective parents must meet the eligibility criteria set down in s.39 of the *Adoption Act* before the DCD will consider their application to adopt a child. Eligibility requirements relate to age; citizenship; country of residence/domicile; and relationship status.

In addition to the standard eligibility criteria, some overseas countries prescribe their own additional criteria which must be met by prospective parents. These additional criteria vary depending on the country concerned. For instance, China requires each prospective parent to have completed at least secondary education.

On a practical level, prospective parents should also be aware that potential applicants are also required to attend 2-3 information sessions before their application will be considered.

(ii) **Assessment**

Should prospective parents meet the eligibility criteria their application will be assessed in accordance with s.40 of the *Adoption Act*. Section 40(2) sets out the factors to be considered in assessing an application.

Amongst other things, prospective parents will be assessed on their: ability to care for the child until it reaches 18 years of age; reputation; stability of relationship; desire and ability to provide a suitable family environment and criminal record.

On a practical level, prospective parents should also be aware that all applicants are required to participate in up to six interviews during the assessment process.

Further it is worth keeping in mind that currently demand for children from overseas far exceeds supply and it may take some years before an adoption is successfully arranged through the DCD (if it is arranged at all).

(b) **Types of inter-country adoption arranged by the DCD**

(i) **Convention country adoptions**

Presently the majority of inter-country adoptions arranged by the DCD concern children from Convention countries. These are generally the simplest adoptions to arrange as the full adoption order can be made in the child's country of origin and is automatically recognized by Australia.

A list of Convention countries can be found in Schedule 2 to the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* (Cth). A copy of Schedule 2 may be found in **Appendix A** to this memorandum.

(ii) **Non-Convention country adoptions**

Section 111C(3) of the *Family Law Act 1975* (Cth) gives the Commonwealth the power to make regulations to give effect to a bilateral agreement on inter-country adoption.

At present the only non-Convention country with which Australia has made such an agreement is China.<sup>1</sup> Several Australian states also have their own bilateral agreements in place with overseas countries. WA currently has individual bilateral agreements with China, Ethiopia, Hong Kong, Thailand, India, the Philippines, Sri Lanka and Taiwan.<sup>2</sup>

(c) **Summary – adoption arranged through Australian authorities**

Unfortunately should prospective parents be seeking to adopt a child from a country that is neither a Convention country nor a party to a relevant bilateral agreement with Australia (or Western Australia) they will be unable to arrange a legal adoption with the DCD's assistance.

Prospective parents should be aware that in most cases it is impossible to arrange a *legal* adoption privately, and there are heavy penalties for doing so. For this reason it is highly recommended that prospective

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<sup>1</sup> See *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998* (Cth), Schedule 1

<sup>2</sup> Advice of DCD Adoption Information Officer of current Western Australian bilateral agreements provided 01/02/2007. State bilateral agreements are made under s.137 of the *Adoption Act 1994* (WA)

parents apply through the DCD to adopt a child from a country with which they have an existing arrangement in place.

### 3. **Adoption arranged by prospective parents in an overseas country**

The adoption of overseas children by Australian citizens in their countries of origin does not of itself change the nationality of those children. They remain citizens of their country of origin, and therefore require an Adoption visa to lawfully enter Australia.<sup>3</sup>

The only circumstance where an Adoption visa may be granted to a child adopted privately overseas is where the adoptive parents have been living overseas for more than 12 months at the time of the migration application.

As such, an adoption arranged privately overseas will only be a viable option for a very small percentage of prospective parents and is generally not recommended.

#### (a) **Adoption visa requirements**

Should prospective parents be successful in adopting overseas, there are several requirements (in addition to the standard migration requirements such as health checks) to be satisfied before a visa may be granted to a child adopted in this manner. Prospective parents will need to show that:

- their residence in the overseas country was not contrived to deliberately bypass any requirements concerning entry of adopted children into Australia;
- they have lawfully acquired full and permanent parental rights by the child's adoption (meaning that the adoption order obtained in the overseas country must sever the legal relationship between the child and its natural parents); and

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<sup>3</sup> Adoption visas are granted pursuant to the *Migration Regulations 1994* (Cth), Schedule 2, Clause 102

- the relevant authorities in the overseas country have approved the child's departure to Australia.<sup>4</sup>

(b) **Adoption orders**

Unless completed under the Hague Convention, Australian citizens who adopt overseas are not automatically recognized as parents of the child under Australian law. In order to be recognized as the child's legal parents, the prospective parents will require an adoption order.

Until an Australian adoption order is granted, the Minister for Immigration and Multicultural and Indigenous Affairs will remain the child's legal guardian.

Section 138 of the *Adoption Act* provides for certain overseas adoption orders to be treated as adoption orders made under the *Adoption Act* if the following requirements are met:

- the order is in accordance with and has not been rescinded under the law of the overseas country;
- when the order was made the adoptive parent was domiciled; or had been resident in the overseas country for at least 12 months;
- the proceedings in which the order was made involved no denial of natural justice or failure to observe the requirements of substantial justice; and
- as a consequence of the adoption, the adoptive parent, according to the law of the overseas country has a right superior to that of the adoptee's birth parents in relation to all the duties, powers, responsibilities and authority which, by law, parents have in relation to children; and is placed in a relationship with the adoptee that is treated as a parent and child relationship.

(c) **Citizenship**

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<sup>4</sup> See *Migration Regulations 1994* (Cth) Schedule 2, Clause 102.211(2)

Once legal parenthood is granted in Australia, prospective parents may also wish to apply for a grant of Australian citizenship for their child. There is no automatic right of citizenship granted to children adopted in this manner; rather, prospective parents will need to apply for citizenship for the child under s13(9)(a) of the *Australian Citizenship Act 1948* (Cth), which gives the relevant Minister a general discretion in deciding whether to grant citizenship to an applicant who is under 18.

#### 4. **Conclusion**

All prospective parents interested in adopting from overseas should first attempt to arrange an inter-country adoption with the assistance of the DCD. As discussed above, the DCD only arranges adoptions with Convention countries and those with which it has entered into bilateral agreements. Prospective parents should be aware that a limited number of children are made available for inter-country adoption every year (around 35 in total). The DCD permits prospective parents to apply for three categories of adoption, either: local adoption, overseas adoption, or both. No provision is made for prospective parents to specify a preferred country of origin at the application stage. It is recommended that prospective parents be open to receiving a child from any country (including local children) to maximise their chances of success.

Generally it is not possible for prospective parents to legally adopt a child from a country that is not a party to either the Convention or a bilateral agreement. As discussed above, the only circumstance in which this may be done legally is where prospective parents have been genuinely resident in the overseas country for at least 12 months. Ultimately, this route will only be available to a very small percentage of prospective parents, who should be aware that a considerable degree of complexity is often involved. It is highly recommended that those considering adopting in this manner first seek legal advice in the overseas country concerned.

#### 5. **Further reading**

##### (a) **Legislation**

- *Adoption Act 1994* (WA)
- *Australian Citizenship Act 1948* (Cth)

- *Family Law Act 1975* (Cth)
- *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998* (Cth)
- *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* (Cth)
- *Migration Regulations 1994* (Cth)

(b) **Other**

- Adopting Children from Overseas fact sheet, Australian Government: Department of Immigration and Citizenship  
<http://www.immi.gov.au/media/fact-sheets/36adopting.htm>
- Child Migration fact sheet, Australian Government: Department of Immigration and Multicultural Affairs  
<http://www.immi.gov.au/allforms/booklets/1128.pdf>
- DCD Adoption Service website  
<http://www.community.wa.gov.au/Resources/Adoption/>
- Inquiry into Adoption of Children from Overseas, Commonwealth Parliament: House of Representatives Standing Committee on Family and Human Services, Nov. 2005  
<http://www.aph.gov.au/house/committee/fhs/adoption/report.htm>

## APPENDIX A – LIST OF CONVENTION COUNTRIES AS AT 6<sup>th</sup> FEBRUARY 2007

Country	Date
Albania	1 January 2001
Andorra	1 December 1998
Austria	1 September 1999
Azerbaijan	1 October 2004
Belarus	1 November 2003
Belgium	1 September 2005
Bolivia	1 July 2002
Brazil	1 July 1999
Bulgaria	1 September 2002
Burkina Faso	1 December 1998
Burundi	1 February 1999
Canada — in relation only to the following Provinces and Territories:	
(a) Alberta, British Columbia, Manitoba, New Brunswick, Prince Edward Island, Saskatchewan and the Yukon Territory	1 December 1998
(b) Northwest Territories	1 April 2000
(c) Nova Scotia	1 October 1999
(d) Nunavut	1 September 2001
(e) Ontario	1 December 1999
Chile	1 November 1999
China	1 January 2006
Colombia	1 December 1998
Costa Rica	1 December 1998
Cyprus	1 December 1998
Czech Republic	1 June 2000
Denmark (other than Faroe Islands and Greenland)	1 December 1998

<b>Country</b>	<b>Date</b>
Ecuador	1 December 1998
El Salvador	1 March 1999
Estonia	1 June 2002
Finland	1 December 1998
France (other than the overseas territories)	1 December 1998
Georgia	1 August 1999
Germany	1 March 2002
Guatemala	1 March 2003
Guinea	1 February 2004
Hungary	1 August 2005
Iceland	15 August 2000
India	1 October 2003
Israel	1 June 1999
Italy	1 May 2000
Latvia	1 December 2002
Lithuania	1 December 1998
Luxembourg	1 November 2002
Malta	1 February 2005
Mauritius	1 January 1999
Mexico	1 December 1998
Moldova	1 December 1998
Monaco	1 October 1999
Mongolia	30 November 2000
Netherlands	1 December 1998
New Zealand	1 January 1999
Norway	1 December 1998
Panama	1 January 2000

<b>Country</b>	<b>Date</b>
Paraguay	1 December 1998
Peru	1 December 1998
Philippines	1 December 1998
Poland	1 December 1998
Portugal	1 July 2004
Romania	1 December 1998
San Marino	1 February 2005
Slovakia	1 October 2001
Slovenia	1 May 2002
South Africa	1 December 2003
Spain	1 December 1998
Sri Lanka	1 December 1998
Sweden	1 December 1998
Switzerland	1 January 2003
Thailand	1 August 2004
United Kingdom of Great Britain and Northern Ireland — extended to the following territory:	1 June 2003
(a) the Isle of Man	1 November 2003
Uruguay	1 April 2004
Venezuela	1 December 1998