A submission to the Law Commission on Preliminary Paper 38 *Adoption Options for Reform: A Discussion Paper*

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The *Auckland Medical Aid Trust (AMAT)* was incorporated under the *New Zealand Charitable Trusts Act* in 1974. Its objects are:

> to establish and maintain a comprehensive health and welfare service related to the human reproductive process and its control (whether by means of contraception, sterilization, abortion or otherwise) and to that end to establish, provide and maintain hospitals and clinics and surgical, medical, pharmaceutical, counselling and welfare services; and to
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> arrange and conduct lectures meetings and classes and to publish and disseminate literature and to do all other things to educate the public in the facts of human reproduction and the human reproductive process and of all matters concerning reproductive health and well-being physical and social (AMAT Trust Deed).

So AMAT's objects can be summarised as empowering it to address issues concerning: the support of human reproduction; and the provision of education -- including the research, publication and dissemination of literature. We regard adoption as one of these interests.

Because AMAT is charitable, it is public rather than private, and is located in the 'not-for-profit' discourse[1]. As a public institution it must make itself accountable. This report is one of its means of accountability.

AMAT operates an *Adoption Resource Centre*

It is also of interest to note that one of us, Ann Weaver, was cited in the Law Commission's *Discussion Paper #38*.

Background

The New Zealand Minister of Justice recently requested that the Law Commission review the legal framework for adoption in New Zealand as set out in the Adoption Act 1955 and the Adult Adoption Information Act 1985. From this process the Law Commission is to recommend whether and how the framework should be modified to address contemporary social needs.

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[1] See e.g., Hansmann (1980: 59). Le Grand & Robinson (1984: 6). Smith & Lipsky (1993: 37).

The Law Commission considers that the Adoption Act 1955 was enacted in a very different social climate from that which pertains today. Social conditions then included very different attitudes to children born outside marriage, secretive adoption procedures which produced what is known as 'closed' adoption. The extent of the secrecy and closure is indicated around the issue of birth certificates. After an adoption order has been made, a new birth certificate is issued with the adoptive parents entered in the place of the birth parents.[2] There is no indication on the certificate of the birth parents. Under this culture of secrecy, once a child is adopted the record is sealed and a new certificate is issued.

Since the early 1980s research has been conducted to show the benefits of open adoption. As a result the practice has grown considerably. For example, Iwanek (See *Discussion Paper #38*) reports that open adoption can be a positive experience for the birth parents and the adoptive parents. She also argues that New Zealand leads the Western world in open adoption practices. Although open adoption is being widely promoted in practice, the Adoption Act that promotes secrecy and the severance of ties between birth parents and children does not support it.

In summary, since 1955, there have been changes in social conditions and public attitudes including the removal of the legal concept of legitimacy, the facilitation of open information exchange and increased practice of open adoption.

The New Zealand position

The New Zealand Government introduced the Intercountry Adoption Act in 1997 and this was implemented on January 1st 1999. This is an Act to:

(a) implement in the law of New Zealand the Convention in Respect of Intercountry Adoption; and

(b) provide for the approval of organisations as accredited bodies to whom functions may be delegated under the Convention; and

(c) make other provision for intercountry adoption and other matters related to adoption.

The law change potentially allows Non-Government Organisations to:

(a) provide services of assessment of adoptive applicants and the associated reporting; or

(b) provide placement and post placement services to approved prospective adoptive parents.

It is important to note that an organisation may undertake only one of the two tasks.

These changes in New Zealand law as of 1/1/99 mean that AMAT, under the auspices of its *Adoption Resource Centre* has the potential to offer a significant resource.

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[2] Section 63, Births, Deaths and Marriages Registration Act 1995.

Our concerns

AMAT want to convey their views that were formulated at their recent meeting.

Among the commonly accepted goals in social policy is the caring for children, establishing their identity, and assuring their legal status. The practice of adoption is one way of addressing such goals. The question of what adoption means, however, is problematic as the Law Commission *Discussion Paper #38* acknowledges in that the purpose and effect of adoption varies according to the context, society, and era in which it is discussed.

The Law Commission then proceeds to analyse adoption from a modernist legal perspective, which is their interpretation of its terms of reference. There are, however, many other discourses that have not been referenced[3], and, to this extent, the *Discussion Paper #38* lacks substance. Some of these discourses are:

economic	ethical
social control	techno-science
family formation	religious
nation building	professionalism
legal parental replacement	historical
ownership/succession	the politics of difference
psychoanalytic	historical
cultural	ethnic
colonisation	institutional racism

We do not propose to do the research ourselves, but think it does need to be carried out in addition to the *Discussion Paper #38*.

We would now like to introduce you to a poststructuralist mode of criticism of a few issues mentioned in the *Discussion Paper #38* and why we think further research is required.

A politics of difference

Pragmatic legal theory conceives law as an instrumental process moulded by extra-legal factors such as history, economy, culture, etc.. Contextualization is a characteristic that legal pragmatism shares with the postmodern explanations of law (cf. Douzinas, 1991). But pragmatism contextualizes law according to a homogeneous culture and Western society, while the postmodern point of view accepts and vindicates a world of irreducible cultural heterogeneity in which each one of us possesses very different bases for the knowledge of and the experience of life. The *Discussion Paper #38* does not address societal issues from this perspective.

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[3] For a discussion on this topic from a legal perspective see e.g., Ward (1998), Brown (1995).

A postmodern perspective

The New Zealand philosopher Michael Peters argues in favour of a postmodern perspective when he says, "the politics of difference emerges as the new desideratum for understanding the complex nature of oppression in education and the way in which multiple and contradictory subjectivities and identities are socially constructed at the intersections of race, gender, and class, among their configurations" (1995: 55). If we substitute the word 'adoption' for oppression in education' in this quote, adoption can be seen also as 'the way in which multiple and contradictory subjectivities and identities are socially constructed at the intersections of race, gender, and class'. We therefore contend that adoption needs to be understood in the light of the politics of difference (among other things).

Peters (1995: 48) further makes the point that the new politics of difference as developed by Young, Yeatman, Mouffe, and Dalimayr, draws its inspiration for a notion of politics based on the meaning of difference from Derrida, Deleuze, Foucault, Lyotard, and Kristeva. Accordingly, we can explore the idea of conceptions of difference through the employment of Derrida's notion of *différance*, Lyotard's (1988) notion of the *Différend*, Young's (1995) differentiation between conceptions of difference, and Peter's (1995) analysis of the politics of difference under the discourse of critical multiculturalism.

Liberalism and pluralism

In a liberal and pluralistic society, dealing with adoption using adoptees as an homogenous group with special needs is a problematic idea.

Many people believe that their group they identify with (or their culture) is the core of the one life worthy of human beings, or that those who belong to supposedly inferior groups or cultures count for little or nothing. Such beliefs and the practices they motivate can be termed chauvinistic.

There are many who think that the New Zealand public policy environment is chauvinistic. In a society like New Zealand, which could be loosely termed liberal, there are two important issues to be addressed from recent theory written under a liberal frame.[4] The first issue is whether free and equal citizenship can be adequately addressed by a system of political rights that ignores differences especially when those differences yield divergent interests, some of which will be systematically marginalized under that system. The second issue is whether a society that ignores the fragile conditions of its minority groups and cultures can treat all with the dignity appropriate to citizens, given the intimate connection of group and cultural affiliations to self-respect.

These two issues imply that there is a relationship between politics, culture, and subjectivity. Politics and culture must impact on subjectivity because, under liberalism, the good of the group does not supersede that of the individual. So any rights or recognitions will be granted not because the group or culture deserves it based on its marginal status, but because of their importance for individuals. In other words, the claim that adopted people are a group that have needs cannot overtake what any

[4] See e.g., Kymlika (1995).

individual in that group might want. So unless we can show that everybody is identical, we have a problem. This is because, under liberalism, the rights of individuals are central.

The critique of subject-centred reason allows for plural subject positions. However, there are, as Peters (1995: 50) points out, limits to pluralism, which means that not all differences can be accepted". All differences cannot be valorised. Stuart Hall wants to know how, when discovering lost histories of Black experiences, he can, at the same time, recognised the end of the essential Black subject. As he puts it:

> It is the politics of recognising that all of us are composed of multiple social identities. . . . That we are all complexly constructed through different categories, of different antagonisms, and these may have the effect of locating us socially in multiple positions of marginality and subordination, but which do not yet operate . . . in exactly the same way . . . has to be a struggle which is conducted positionally (Hall, 1991: 57).

Critical multiculturalism

As is their right under the Treaty of Waitangi, Maori receive special mention in the *Discussion Paper #38*. That means Maori are seen as identifiably different from other groups in this context.

One of the binary oppositions that have demarcated Maori from others, has been their emphasis on 'community', which could be theorised under communitarianism. Communitarianism (cf. Rasmussen, 1990), is a current of thought opposed to liberalism and individualism. It is not homogenous, but spans from recognition of strong social ties that denies classical assumption of rational individual and claims shared values, to community as constitutive of capacity of judgement and of identity of self. Communitarianism poses a major challenge to the traditional left-right divide in politics and the competing principles of individualism and collectivism. But, as Peters and Marshall see it, communitarianism "is guilty of substituting one universalistic notion, that of the social self, for another, the individual self (and) falsely romanticise the notion of community, privileging unity over difference" (cited in Peters, 1995: 47). Young also argues that this ideal of community based on the idea of a social self "totalises and temporalizes the conception of social life by setting up an opposition between authentic and unauthentic social relations" (Quoted in Peters, 1995: 47). Conceived in this way, community "still faces the poststructuralist critique of subject-centred reason, out of which the demand for a politics of difference emerges" (Peters, 1995: 47).

If notions such as 'difference', 'culture', and 'identity' each have no unity, there is no point in looking essential meanings in them – there is no unity, no ultimate essence.

Identity

The *Discussion Paper #38* wants to know about the status of openness vs closed adoption, which is a matter of individual identity.

One of the fundamental beliefs in the Western world is in the existence of an identity where identity means that 'A' can, and always will be, 'A' -- the unique, essential thing. In order to distinguish ourselves from others we adopt this idea of an essential identity,

a sovereign self. Since Descartes, philosophy has articulated a form of individualism where the individual is thrown back on his or her own responsibility, requiring him or her to build an order of thought for themselves, in the first person singular. This process produces a dichotomy in the form of binary oppositions such as 'us/them', 'public/private', friends/enemies', 'individual/community', and so on. These binary oppositions are based on the supposed unity of each essential group of, for example, 'us', or 'friends', which require, for their definition and maintenance, a sense of otherness and exclusion.

Defining a group as 'other' identifies them as different from 'us'. It also denies the difference among those who understand themselves as belonging to the same group as well as reducing the members to a common set of attributes (cf. Young, 1995: 159). In other words, the logic of identity essentialises a group, and to the extent they identify with it, it essentialises its members. But no groups in modern liberal society are, in reality, fully excluded or assimilated. If, then, groups are not mutually exclusive across time and space, there is a need to describe them – and their identity -- in relation to one another -- a relational, or contingent, identity. For this contingent identity to develop, there is a need for a "politics that treats difference as variation and specificity rather than as exclusive opposition, aims for a society and polity where there is a social equality among explicitly differentiated groups who conceive of themselves as dwelling together without exclusions" (Young, 1995: 165).

Diverse cultures compete for control of the system of norms and it is not clear if law can be defined as an order that is impersonal, universal or legitimate in this context of cultural division or diversity. Lyotard (1988) even argues that the word culture is a distraction because it circulates redundant information instead of doing "the work that needs to be done to arrive at presenting what is not presentable under the circumstances" (p, 181). Much of this information is in the form of resistance and which "fosters hegemony as much as it counters it . . . Proud struggles for independence end in young, reactionary States" (p, 181). Rather than struggle within binary oppositions defined by the logic of identity with difference as essential identity, we need to place language in dispute. The rationale is that the issue for minority groups is lack of justice, which, under a liberal rule of law, requires litigation -- an issue of language. But, in Western societies, when litigation does take place, the plaintiff is unable to be heard because the regulation of the conflict takes place in the idiom of one party -- the economically dominant group. In order to critique this situation, Lyotard employs what he calls a 'differend' in which "the plaintiff is divested of the means to argue and becomes, for that reason, the victim" (1988: 9). This critique reverses popular understandings of justice; for Lyotard, the accuser becomes the victim and the accused becomes the oppressor. To try to achieve justice through resistance under these circumstances has no value. Justice, rather, "requires new rules for the formation and linking of phrases. No one doubts that language is capable of admitting these new phrase families or new genres of discourses. Every wrong ought to be able to put into phrases. A new competence (or 'prudence') must be found" (Lyotard, 1988: 13). If justice was the evaluative criteria for all groups (rather than arguments about essential identities), according to the politics of difference, the processes as well as the problem contents could be placed in dispute. That new competence requires enough heterogeneity in society to de-emphasise the essentialism that constructs the 'other', but which still acknowledges different interests.

Citizenship under globalisation

The *Discussion Paper #38* talks about questions of citizenship.

Citizenship is a problematic idea under globalisation. Jamieson (1991: 412), for example, notes that "the nation state itself has ceased to play a central functional and formal role in a process that has in a new quantum leap of capital prodigiously expanded beyond them, leaving them behind as ruins and archaic remains in the development of this mode of production". This makes the definition of the nation-state and the global economy as mutually exclusive operations, problematic. In previous times, states could keep and wield real power in as far as they rested on their economic, military, and cultural sovereignty. Such sovereignty gave them the ability to balance the accounts, to control their borders, and to legislate the norms and the patterns by which all their subjects were to compose their customary conduct. These days, however, the economic, military, and cultural aspects of states are increasingly shaky, and so the power of governments to rule and control the territories and the populations under their administration is deteriorating. The politics are territorial, while economy, military force, and culture, become ever more global and thus extraterritorial. The things that affect the well-being of its citizens are largely beyond the government's control: they are in the hands of the so called 'market forces' rather than local political decision making. Governments can do less and less to influence the course of events which affect directly the livelihood of their subjects. The order of things protected by the state has lost much of its aura of reality; order no longer appears preordained, self-evident, or secure. Citizens can no longer rely on state protection; the national identity, or any other identity for that matter.

Under what Sassons (1996: 1) calls 'a new geography of power', the economic globalisation that re-configures the territorial exclusivity of sovereign states, does not *necessarily* mean that sovereignty or territoriality are less important features in the international system. Economic globalisation is concerned with global and financial markets, the ascendancy of Anglo-American law firms in international business transactions, the emergence of organisations such as the General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO) and international credit rating agencies, and a geographic dispersal of factories, offices, service outlets, and markets. At the same time there is a growth in the importance, complexity, and numbers, of transactions requiring a corresponding growth in the central control functions and all their associated support systems (e.g., legal, financial, managerial, planning). These control functions are disproportionately concentrated in global cities (such as New York, Amsterdam and Paris). Here, there is a negotiated relationship between global cities and the nation states they reside in, which makes possible the circulation of publicly listed shares around the world in seconds. It seems that adoption will not avoid the pressures set up by these changes.

The privatisation of the law

One major source of cultural and political issues arises from the philosophical hegemony of western legal concepts of authorship and property that define the legal arena in the West. The dominant global philosophy of neoliberalism has contributed to the formation of trans-national legal regimes that are centred in Western economic concepts. New legal regimes for governing cross-border transactions are being developed to cope with the inability of nation states to arbitrate between different systems, which lead

Sassons (1996: 52) to suggest, "international law will be predominantly international private law". And, although these legal innovations are often characterised as 'deregulation', they contain specific reconfigurations of space that may signal a more fundamental transformation in matters of sovereignty such as new institutional arrangements that fulfil credit-rating, arbitration requirements, and advisory functions. These arrangements are private gate-keeping systems and as the demand for credibility ratings grows, so too does their authority. The processes intrinsic to ratings are tied to dominant neoliberal interests. Under those interests there now appears to be a philosophical hegemony with the spread of western legal concepts of authorship and property that define the legal arena in the West. An example would be when two transnational organisations make legally binding agreements to govern their future relations outside the jurisdiction of any particular nation state. Since there is no global law that is universally binding, this represents the privatisation of law. And privatisation means that justice will vary according to how much can be purchased. Adoption will thus be at lest partially outside the law of any one nation state. The Hague discourse is but one example.

Human sciences

The *Discussion Paper 38* takes adoption's adaptation of psychological research (e.g., Bowlby and other recent variants) as a given.

But adoption depends on an uncritical acceptance of the human (read 'social') sciences, which is highly contestable. It is not the place in this submission to develop a genealogy of criticisms of the human sciences. But the Law Commission's particular framing of the question of adoption overall precludes these issues being raised.

Michel Foucault (1972) has provided such an investigation. In a very well known publication he examined the historical possibilities for the formation of the human sciences. His conclusion was that it is not simply a question of time and development or that the human (read 'social') sciences will become more scientific as they discover new methods or devise ways of successfully emulating the natural sciences. Nor does their uncertainty as sciences spring from their ineradicable metaphysical or transcendental core assumptions about the nature of 'man'. Rather their uncertainty and instability as sciences is a result of "the complexity of the epistemological configuration in which they find themselves" (Foucault, 1972: 348).

The human sciences, while retaining a positivity as forms of knowledge, which they draw from the particular epistemological configuration, do not possess the required objectivity and systematicity to be defined as sciences. As he suggests:

> [the human sciences] are not sciences at all, the configuration that defines their positivity and gives them their roots in the modern episteme at the same time makes it impossible for them to be sciences ... Western culture has constituted, under the name of man, a being who, by one and the same interplay of reasons must be a positive domain of knowledge and cannot be an object of science (Foucault, 1973: 366-7).

Unity

The *Discussion Paper #38* talks about competing interests among participants.

That question assumes differences between what are called competing interests, in that each group has an homogenous identity or unity of position. The nature of those differences is not queried.

Jacques Derrida developed the idea of *différance* to put into question the very idea of unity. He says *différance* signifies "something like the production of what metaphysics calls the sign (signified/signifier) (and[5]) implies an irreducible reference to the mute intervention of a written sign" (Derrida, 1981: 8). He models *différance* on the French word *différer* to tie together a configuration of concepts that he holds to be systematic and irreducible. *Différance* refers to deferring, to the oppositional concepts in language, to the production of these differences, of Saussurian linguistics (and the structural sciences modeled upon it), and the provisional naming of the unfolding of difference (cf. Derrida, 1981: 8-10). Derrida employs *différance* to signify the association of two ideas, *difference* and *deferral*. *Difference* derives from *differ* and *deferral* derives from *defer.* To *differ* is to advance a different explanation or action. With *differ*, we take the meaning of something from that which it is not. Meaning comes from the place a word occupies in the system of relationships. Here the meaning is never present in itself but is always suspended between *difference* and *deferral*, and, therefore, is ambiguous. Meaning is always dancing around leaving only traces of traces; there is never anything present only traces of traces of where it has been. We only have traces because whenever we try to pin down the meaning of a concept or word, it has already moved on. There is no final word, there can be no final version, no last thought, no fixed position.

Historically, in the discourse of adoption, difference is conceived as such otherness and exclusion (e.g., those who have been adopted and 'really know' what it is like, versus those who have not). Groups that identify one another as different typically see that difference as otherness, which conceives social groups as mutually exclusive and categorically opposed. Borders are sought and policed, and attempts are made to identify the characteristics that mark the purity of one group off from another. With this logic of identity, Western epistemology has operated with a rational totalising of thought, and a reduction of heterogeneity to unity by bringing the particulars under comprehensive categories, which pose as real substances. These substances then define group membership. Often, these categories involve moral distinctions based on binary oppositions. The categories are depicted as mutually exclusive but if we examine the logic of identity, we find they actually depend on each other. The categories certainly do not depend for their formation on present reality.

By contrast, when there is talk about 'difference', 'culture', 'identity', and so on, the tendency is to try to pin down a unity that is supposedly signified by these terms. That unity is then used as a justification for one group resisting another to achieve their ends. But, according to *différance*, meaning can never be present in its totality at any one point. In *différance* meaning always differs even from itself as well as being deferred from reaching any sense of completeness.

[5] Authors' insertion

Summary

As questions of adoption are currently posed (the *Discussion Paper #38* itself is but one example), they 'adopt' almost unproblematicaly particular notions of identity, unity, rationality, difference, community, culture, and so on. The adoption discourse then accepts such notions as the underpinning foundations for its debates about attachment theory, essential pain, secrecy vs openness, and so on. Although adoption still requires a legal framework, the basic problem is that its foundational status has not been questioned. And if those foundational ideas that the legal framework rests on are unexamined, to that extent, the legal framework will remain questionable.

While we accept the *Discussion Paper #38* as a valuable document in its own terms, we contend it does not go far enough. For example, it accepts the foundational notions that the adoption discourse is based on and all the problems associated with that. What is required in postmodern times is a different type of inquiry that will critique the foundations of the disciplines that the adoption discourse is founded on.

We conceive of the need for research that deconstructs and re-theorises the underpinning concepts. This involves dismantling the logic and structures in order to reassemble them in new and more appropriate ways. It does not involve destruction of the structures *per se*. Thus we support the development of a legal framework but it must be theorised properly.

We also know that our requests are probably outside your brief but, as a public body we wish to make them anyway. As well as a general acknowledgement for our submission, we would like some specific response from you about whether you intend to act on our ideas and what form that action might take.

Recommendations

We accept that changes must be made and want to make a few practical suggestions. We suggest that:

- research of the type indicated above be commissioned to investigate its impact on a legal framework for adoption;
- more time be given for pubic debate
- in the meantime the legislation be reformed to reduce the contradictions and tensions to allow New Zealand conform with the Hague Convention.

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