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Should the rules of evidence apply to adoption proceedings?

Terms of Reference

Pursuant to section 10 of the Law Reform Commission Act 1967 (NSW), the Attorney General, the Honourable J P Hannaford MLC, referred, by letter received on 1 December 1992, the following matter to the Law Reform Commission.

> The Commission is to review the current scope and operation of the *Adoption of Children Act* 1965 and in particular to consider:
>
> (i) the criteria for the selection of adoptive parents, regulation of standards of practice and recognition of adoption agencies and support groups;
>
> (ii) the relationship between adoption and other forms of permanent care;
>
> (iii) intra-family adoption;
>
> (iv) the relevance of reproduction technology and surrogacy to adoption law;
>
> (v) the relevance of Aboriginal customary law, and ethnic and racial heritage;
>
> (vi) inter-country adoption and overseas orders of adoption having special regard to any international treaties or conventions to which Australia is a party; and
>
> (vii) any related matter.

Participants

The Law Reform Commission is constituted by the *Law Reform Commission Act* 1967. For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

The Hon G J Samuels AC QC (from 3 April 1993)

Justice Richard Chisholm

Mr Hal Sperling

Professor David Weisbrot

Officers of the Commission

Executive Director

Mr Peter Hennessy

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Ms Stephanie East

Honorary Consultants

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Submissions

The Commission invites submissions on the issues relevant to this review, including but not limited to the issues raised in this *Discussion Paper.* Submissions and comments must reach the Commission by 29 July 1994. All submissions and inquiries should be directed to:

Mr Peter Hennessy

Executive Director

NSW Law Reform Commission

GPO Box 5199

SYDNEY NSW 2001

[DX 1227 SYDNEY]

Phone: (02) 252 3855

Fax: (02) 247 1054

There is no special form required for submissions. If it is inconvenient or impractical to make a written submission you may telephone the Commission and either direct your comments to a Legal Officer over the telephone, or arrange to make your submission in person.

If you would like your submission to be treated as confidential, please indicate this in your submission.

Who can make a submission?

Anyone can make a submission or comment. If you have been affected by the Act in any way or have a particular interest in the area of adoption, the Commission would like to hear from you. It is not necessary to have legal or any other special qualifications. The Commission is keen to hear from all those who have something to say about adoption, whatever their experiences and whatever their particular points of view.

What should a submission contain?

The Commission is interested in any comments on how the law is operating or how it might be improved. You may wish to address some or all of the issues raised in this Discussion Paper. You may also wish to discuss

other related issues that have not been raised, but which you consider relevant. The Commission is aware that approaches to adoption law differ between Australian states and between countries. The Commission is interested to hear comments, favourable or unfavourable, about experiences under alternative systems.

The Commission emphasises that comments on any aspect of the legislation and its impact will be welcome and will be given careful consideration.

What form can a submission take?

There is no special form required for submissions. You may:

Send or fax a letter to the Commission stating your views. The fax number is (02) 247 1054.

Telephone the Commission on (02) 252 3855 and ask to speak to a legal officer about your views.

Telephone or write to the Commission and arrange to make a submission in person.

Is there a deadline for submissions?

The Commission will do its best to benefit from any submissions received prior to the completion of the Report. However, submissions will be most useful if they are received before 29 July 1994.

Use of submissions and confidentiality

Submissions made to the Commission may be used in two ways:

Since the Commission's process of law reform is essentially public, copies of submissions made to the Commission will normally be made available on request to any person or organisation. However, if you would like all, or part of your submission to be treated as confidential, please indicate this in your submission. Any request for a copy of a submission marked "confidential" will be determined in accordance with the Freedom of Information Act 1989 (NSW).

In preparing the final Report, the Commission may also find it useful to refer to and make mention of comments submitted in response to the Discussion Paper. However, if a request for confidentiality is made, it will be respected by the Commission in relation to the publication of such submissions in a Report.

1. Introduction

THE REVIEW

1.1 The New South Wales Law Reform Commission is currently conducting a review of the *Adoption of Children Act* 1965 (NSW). The terms of reference are set out above at page **iv** and the Commission is required to report to the Attorney in 1994. This Discussion Paper follows on from the Issues Paper, released in May 1993, which explained the nature of the law and the Commission's inquiry.[1] The Issues Paper discussed alternative legal approaches, and listed some of the issues on which we wanted to receive submissions and comments. This Discussion Paper draws on further research done by the Commission and uses material from the submissions made to the Commission following the release of the Issues Paper in order to reach some tentative conclusions for reform of adoption law.

Background

1.2 In 1992, the Commission reviewed the operation of the *Adoption Information Act* 1990 (NSW), and published its report: *Review of the Adoption Information Act 1990*.[2] The 1990 Act was the subject of intense debate and lobbying, and involved sensitive issues of information and privacy concerning many thousands of adults and children involved with adoption. The Commission undertook extensive research and consultation in order to understand how the Act operated and its impact on the various people affected. The present review will complete the Commission's examination of adoption law in New South Wales. Both reviews were initiated by the then Minister for Community Services, the Honourable John Hannaford MLC, and have been funded by the Department of Community Services.

1.3 Much has changed since the mid-1960s, when the Act was drafted. There has been a great decline in the number of healthy newborn Australian children available for adoption. Consequently, there has been a continuing or increased interest in other kinds of adoption, for example, the adoption of children from overseas countries, children who are older or have specific health problems or other difficulties, former foster children, and children related to the adopters.

1.4 Considerable evidence has become available since the 1960s relating to people's experience with adoption. Community attitudes and laws have changed in relation to unmarried parenthood, the roles of men and women, ex-nuptial birth, de facto relationships, and many other features of family and community life. Attitudes and laws relating to access and information have changed markedly, and a considerable part of the review is concerned with the implications of the new openness in adoption law and practice. Ideas relating to children's rights and interests have been modified, for example, by Australia's ratification in 1990 of the United Nations' *Convention on the Rights of the Child*.[3] The continued development of national family laws since the introduction of the *Family Law Act* 1975 (Cth) requires a reconsideration of the scope of New South Wales adoption legislation. Changes in adoption law in most other Australian States have greatly eroded the considerable uniformity achieved in the mid-1960s. Adoption practice has also changed. In other jurisdictions, both in Australia and overseas, adoption legislation has been reviewed and changed, and information regarding these developments has been of great value to the Commission.

Scope of issues to be considered

1.5 Although there have been valuable comments on aspects of the legislation, and amendments made from time to time in relation to particular matters, the *Adoption of Children Act* 1965 (NSW), and the regulations made under it, have never been thoroughly reviewed. The important changes referred to above make it appropriate that the present review should involve a thorough reconsideration of adoption law. This paper indicates tentative conclusions reached by the Commission following the consultation and research process. **Any views expressed in this Paper are presented for the purpose of discussion and do not represent the final views of the Commission.** The Commission will continue to respond to new information as the review proceeds, and will be influenced by responses to this Discussion Paper. Such submissions will be of great assistance to the Commission in finalising its Report to the Attorney General. It is important that all submissions reach the Commission by the specified deadline.

The purpose of this Discussion Paper

1.6 This Discussion Paper is designed to promote discussion of the issues that the Commission has identified and the conceptual framework that the Commission has developed, in order to review the *Adoption of Children Act* 1965 (NSW). Its purpose is to provide sufficient background and structure to the issues in order to promote informed debate about adoption in New South Wales. It does not make final recommendations for reform. It invites comments on provisional recommendations that have been made for the purpose of encouraging comments and suggestions from interested persons and groups.

Outline of the Discussion Paper

1.7 This paper consists of fourteen chapters.

Chapter 1 - Introduction. This chapter outlines the context in which the reference arose and the Commission's approach to conducting this review.

Chapter 2 - A brief overview of existing adoption law and practice. This chapter explores the background of the current legislation and gives a brief history of its amendments. The remaining part of the chapter focuses on:

the purpose of adoption;

the different forms of adoption; and

developments in the adoption legislation of other Australian States.

Chapter 3 - The purpose and validity of adoption. This chapter examines the arguments for and against the abolition of adoption.

Chapter 4 - General principles. This chapter sets out the general principles that should guide the development of adoption law. These are:

the best interests of the child to be the paramount consideration;

the making of adoption arrangements to be controlled by a government department or approved agency;

responsibility for the making of adoption orders and related orders to rest with a court; and

adoption arrangements to be characterised by openness and honesty.

This chapter also reviews the possible consequences of adoption and the way in which adoption legislation should respond to the different forms of adoption.

Chapter 5 - Regulation of adoption placements. This chapter begins with a discussion of the issue of legal responsibility for children prior to the making of the adoption order. It then goes on to examine the legal regulation of adoption and considers the following:

a preliminary hearing;

an adoption hearing;

independent representation at court hearings;

the merits of courts and tribunals; and

appeals and review.

The chapter ends with a discussion of the roles and responsibilities of the Department of Community Services and the authorised agencies.

Chapter 6 - Eligibility to adopt. The chapter begins by examining existing law and practice and then considers particular issues. These include:

discrimination;

infertility;

marital status and family structure;

sexual orientation;

religion;

wishes of birth parents;

age; and

racial issues.

The chapter ends with draft guidelines for the selection of adoptive parents.

Chapter 7 - Consent to adoption. This chapter considers parental consent requirements and the child's participation in the process of adoption. The chapter examines the issues of:

current practice for the taking of consents;

consent and the unmarried father;

ensuring that birth parents' consents are fully informed and voluntary;

types of consent; and

dispensing with consent.

Chapter 8 - Aboriginal law and racial and ethnic heritage. This chapter examines the impact of adoption legislation on Aboriginal and Torres Strait Islander children. In particular, it considers:

the historical impact of white welfare laws on Aboriginal communities;

the Aboriginal Child Placement Principle; and

traditional adoption among Torres Strait Islanders.

Chapter 9 - Racial and ethnic heritage. This chapter examines racial and ethnic heritage generally, focusing on the current perceptions of inter-racial and inter-ethnic adoption placements.

Chapter 10 - Donor reproduction technology, surrogacy and adoption. This chapter begins by drawing analogies between donor reproduction technology, surrogacy and adoption. It then considers the applicability of adoption legislation to:

children born as a result of surrogacy agreements;

children born with the aid of donor reproduction technology; and

embryo donation.

Chapter 11 - Current practices in inter-country adoption. This chapter describes current practices in inter-country adoption. In particular, it examines the role of parent support groups.

Chapter 12 - Inter-country adoption in an international perspective. This chapter examines the international community's concerns in relation to inter-country adoption and discusses the international conventions that have been drafted to combat these concerns.

Chapter 13 - Problems in current inter-country adoption practice. This chapter rounds off the discussion of inter-country adoption by assessing:

how far current practice in New South Wales complies with international standards; and

specific problems the Commission has been made aware of in the course of the Review.

Chapter 14 - Technical and miscellaneous issues. This chapter examines the issues of:

State and Federal legislation;

adoptees' birth certificates;

discharge of adoption orders; and

offences.

1.8 Some passages in this Discussion Paper repeat material from the earlier Issues Paper so that it is not necessary for the reader to refer to the Issues Paper in order to understand the Discussion Paper.

1.9 The New South Wales Department of Community Services did not make a formal submission to the Commission, although some of its officers made individual submissions. Senior departmental officers provided a great deal of valuable information about departmental practice and attitudes in the course of conversations with Commission staff. In this Discussion Paper there are many statements that draw on what has been said by these senior officers. It is not practicable to identify the specific source of each comment, and the Discussion Paper contains many statements that rely generally on these conversations in stating what the Commission believes to be departmental practice, or the prevailing view of the Department. In the absence of a formal departmental submission, this appeared to the Commission to be the only practical way to cover this material.

THE COMMISSION'S APPROACH

The conduct of the reference to date

1.10 The early phase of this project was of a preliminary nature: collecting materials, making contacts, collecting literature, preparing mailing lists, studying reviews and reform of adoption laws in other jurisdictions, and engaging in limited consultation in order to prepare the Issues Paper. The publication of the Issues Paper represented a general request for assistance and suggestions from anyone who wanted to comment on the legislation or any related aspect of adoption law or practice.

1.11 In July 1993, the Commission held three public hearings. One hearing was devoted to the topic of inter-country adoptions, while the other two hearings invited interested members of the public to discuss any other issues relating to adoption in New South Wales. The hearings allowed individuals to express their views in an open forum and provided a valuable source of information to the Commission.

1.12 Not everyone feels comfortable discussing their ideas at a public forum, so the Commission has continued to extend an open invitation to members of the public to discuss their adoption experiences. The Commission has

also made a special effort to speak to different groups, members of which may not necessarily have come forward on their own. It was felt to be necessary to contact people who had had a positive or neutral adoption experience as well as those who may have suffered because of it. The fact that the Commission is a government body made us aware of our obligations, under International Law[4], to consult with children about reforms that affect them. This has led to some very interesting and informative discussions with young people who have made an important input to the Commission's work.

1.13 The Discussion Paper provides an in-depth analysis of reform issues in adoption and discusses the arguments for and against various aspects of the current law and potential solutions to problems raised by individuals and organisations in their submissions. The Discussion Paper format allows the Commission to set out draft proposals for reform and subject them to extensive community consultation prior to preparing its final Report to the Attorney General.

The next steps

1.14 The Commission plans to report to the Attorney General in the latter half of 1994. Over the next three months the Commission will continue to meet with interested organisations and individuals, and invite written and oral submissions. This consultation will enable the Commission to assess the reaction to the proposals put forward in this Discussion Paper and to refine its recommendations to the Attorney General.

FOOTNOTES

1. New South Wales. Law Reform Commission *Review of the Adoption of Children Act 1965 (NSW)* (Issues Paper 9, May 1993).

2. New South Wales. Law Reform Commission *Review of the Adoption Information Act 1900* (Report 69, July 1992).

3. United Nations *Convention on the Rights of the Child.* The Convention was adopted by the General Assembly of the United Nations in November 1989. Australia first signed and then ratified the Convention in 1990.

4. *Convention of the Rights of the Child*, Article 12.

2. A Brief Overview of Existing Adoption Law and Practice

WHAT IS ADOPTION?

2.1 Currently, adoption is a legal process by which a person becomes, legally, a child of the adopting parents and ceases to be a child of the birth parents. All the legal consequences of parenthood are transferred from the birth parents to the adoptive parents. The adopted child obtains a new birth certificate showing the adopters as the parents, and acquires rights of support and rights of inheritance from the adopting parents. The adopting parents acquire rights to guardianship and custody of the child. Normally the child takes the adopters' surname. The birth parents cease to have any legal obligations towards the child and lose their rights to custody and guardianship. Inheritance rights between the child and the birth parents also disappear. Adoption is governed by New South Wales law, specifically the *Adoption of Children Act* 1965. Adoption applications are determined by the Supreme Court of New South Wales.

2.2 The statements in the above paragraph are intended to summarise the main characteristics of adoption[1] and to help readers to assess the proposals for reform that appear in the later sections of this Paper. Some aspects of adoption law will be explained more fully in connection with particular issues as they arise.

BACKGROUND TO THE LEGISLATION

2.3 The *Adoption of Children Act* 1965 (NSW), which came into force in 1967, is based on a model adoption Act which was followed by all Australian jurisdictions and led to relatively uniform adoption laws in Australia. Since the 1960s, the differences between the Australian jurisdictions have become much greater as there have been numerous amendments, and in some cases completely new Acts. It is necessary to say something about the earlier developments of adoption law in New South Wales before considering the 1965 Act.

Early developments

2.4 The period up to 1967 saw the gradual development of adoption law. Initially, adoption was regulated by provisions in child welfare legislation.[2] Early legislation provided that adoption orders could be made by the Supreme Court, and dealt with the consequences of adoption. Adoptions could be arranged by the parties themselves, with the assistance of intermediaries such as medical practitioners or clerics, or by adoption agencies. The adoption of a child normally required the consent of both birth parents (only the mother where the child was ex-nuptial). The Court could make orders without the consent of the birth parents in certain circumstances, such as where they could not be found or had abandoned the child. However, the Court was concerned to protect the rights of the birth parents, and so was generally reluctant to make orders against their wishes.[3]

The *Adoption of Children Act* 1965

2.5 The 1965 Act was the first comprehensive treatment of adoption law in New South Wales, and many of its features remain in the law today. It introduced three major changes in the law.

2.6 First, the Act included a provision that, in making orders relating to the child, the Court should regard the child's welfare as "the paramount consideration".[4] This principle had previously been developed by the Courts, and then expressed in the legislation, in the context of custody and guardianship matters. Its inclusion in the adoption legislation is a matter of considerable importance.

2.7 A second characteristic of the 1965 Act was that it banned privately-arranged adoptions, except within the extended family. In giving consent to adoption, the birth parents could not consent to the adoption of the child by a particular person or class of persons; they could only give consent to the child's adoption by any person.[5] In practice this meant any couple selected by an adoption agency and approved by the Court. Other rules reinforced the monopoly given to adoption

agencies. For example, it was an offence to place children privately for the purpose of adoption,[6] or advertise for adoptive parents,[7] and applications to the Court had to be made by the agency, not by the intending adopters.[8] This regulatory framework was relaxed in the case of adoptions by relatives and step-parents. In these cases, the parents of the child and the step-parent or relative could arrange the placement. The parents could consent to the child being adopted by the selected step-parent or relative, and the intending adoptive parents could themselves apply to the Court for an adoption order. However, there was still a degree of regulation. A report from the New South Wales Department of Community Services or an authorised agency on the merits of the proposed adoption was normally required,[9] and the order would only be made if the Court found that the requirements of the Act were satisfied and that the adoption would promote the child's welfare.[10]

2.8 A third characteristic of the 1965 Act was a tightening of provisions relating to secrecy in adoption. New provisions attempted to ensure that members of the birth family and the adoptive family would not discover each other's identity, and that the records of the adoption would be kept confidential. Indeed, the new birth certificate issued for the adopted child was intended to disguise the fact that the child had been adopted. This aspect of the legislation has been considered in detail in the Commission's Report on the *Adoption Information Act* 1990.[11]

Social changes since 1967

2.9 There have been many changes, both in society and in the law of adoption, since the Act commenced operation in 1967. The 1970s saw the beginning of a dramatic decline in the numbers of babies relinquished for adoption, and this had important implications for adoption law and practice. While at the commencement of the 1970s adoption agencies were concerned to find enough couples willing to adopt the available children, by the late 1970s the situation had reversed; there were many couples anxious to adopt, and a much smaller number of Australian babies available for adoption. In 1971-72, the then Department of Child Welfare and Social Welfare arranged 3,882 adoptions.[12] This can be contrasted with 154 placements by the Department of Community Services in 1991.[13]

2.10 It is generally thought that the reasons for the sharp reduction in available children included increased financial support for single mothers (the Supporting Mother's Benefit was introduced in 1973), increased availability of contraception and abortion, and a changing social climate which reduced the stigma and difficulty associated with single parenting.

2.11 There was no corresponding decline in the demand to adopt children. On the contrary, it appears to have increased. The previous availability of adoptable babies, the successful efforts to persuade people to adopt, the relative wealth and stability of Australia, the social emphasis on nuclear families as the accepted norm and the limitations of effective services for infertile couples may all have contributed to the continuing demand for adoptive children. The increased desire of many infertile couples to adopt children led to a new interest in the adoption of children other than newborn healthy "white" Australians, and there was a rise in the numbers of adoptions of foster children, older children, children with disadvantages and, especially, children from other countries. The former practice of allocating babies among approved adopters became unworkable because it came to involve applicants being on waiting lists for unreasonably lengthy periods.

2.12 Other changes in social patterns and values had an impact on adoption law and practice. A growing appreciation of the impact of adoption on the multicultural Australian society led to a questioning of the merits of the "clean break" that was traditionally associated with adoption, in cases where the adopters were of a different race or cultural group from the birth family. Emerging respect for diversity and the importance of cultural inheritance suggested that the task of adoption law was somehow to give these children the benefits of a secure family life while preserving their links with the culture or race of their parents. More specifically, publications and films led to a new awareness of the tragic story of the removal of many Aboriginal children from their families and communities through the operation of child welfare and adoption laws. By the end of the 1980s there was a widespread consensus that adoption should not be used in a way that separated

Aboriginal children from their Aboriginal culture and heritage.[14] A growing concern with the rights of individuals to have access to personal information held by governments, and the right to privacy, also led to a questioning of the secrecy associated with adoption.[15] The publication of the personal experiences of adopted people, and of criticisms of some of the practices and assumptions underlying adoption, also exposed adoption to re-evaluation.

2.13 The stigma associated with birth outside marriage also appeared to be lessening. In the mid-1970s most states and territories introduced legislation intended to remove the legal disabilities of illegitimacy.[16] Such laws and policies raised questions about aspects of adoption law, such as the position of fathers of ex-nuptial children, whose rights had found little recognition. Finally, rising divorce rates and the consequent increase of "blended families" meant that the model of the separate nuclear family which appeared to underlie adoption was ceasing to be regarded as essential to the upbringing of children. Despite such changes, adoption remained for many people a symbol of total commitment to a child, and was still valued as providing a unique degree of security for children who, for whatever reason, were not going to be cared for by their birth families.

Amendments to the 1965 Act

2.14 It will be convenient here to summarise the main features of the amendments made to the 1965 Act. The Act has been amended on seven occasions.[17] The more significant amendments may be summarised as follows. In 1966, the grounds on which the Court could dispense with the consent of the birth parents to the adoption of the child were expanded to include the ground that, by dispensing with consent, the child's welfare would be promoted.[18] The 1971 Act eased the restrictions on adoptions by single parents, and adoptions of persons over twenty-one years of age.[19] It also provided that in the case of step-parent adoptions, the applicants, as well as the Director-General of the Department of Community Services or an authorised agency, could apply for dispensation from the requirement for parental consent.[20]

2.15 The 1980 Act provided for an Adoption Tribunal to exercise jurisdiction under the Act, but these provisions have never been brought into force.[21] The Act also dealt with a number of other issues. The adopting parents' lack of religious conviction was not to be taken into account as a separate matter relevant to their suitability.[22] There were new provisions relating to fathers of ex-nuptial children.[23] These provisions, in brief, stated that the consent of such fathers was not required but, where their paternity was established, they were entitled to notice of the proceedings, so that they could, if they wished, oppose them. Failure to respond to such notice, however, precluded them from further involvement with the proceedings or with the child,[24] and the Court could dispense with notice in limited circumstances. The 1980 Act also added new grounds on which the Court could dispense with parental consent.[25] Two of these grounds were intended to facilitate the adoption of children who had been placed in foster homes or residential care, and the third enabled consent to be dispensed with where the person whose consent was required failed to respond to a notice within fourteen days. The 1980 Acts also provided for subsidised adoptions.[26]

2.16 The 1984 Act incorporated limited changes associated with legislation granting increased recognition to de facto relationships.[27] In certain circumstances it allowed de facto partners to adopt the children of one or both of the partners.[28] The 1987 Act expanded the capacity of de facto partners to adopt children; they could now adopt children who had been in their care for at least two years,[29] and children with special needs.[30] It also included a provision for the adoption of Aboriginal children by Aboriginal people who were married according to the traditions of an Aboriginal community. It provided that in the case of children between 15 and 18 years who had been brought up by the applicants for adoption, the child's consent alone is required.[31] It also provided that overseas adoptions would not be recognised unless the adopters had been resident in the overseas country for at least 12 months.[32]

PURPOSES OF ADOPTION

2.17 In Australia today, adoption is often associated with the objective of providing a new family to take care of a baby or young child. The process of adoption was developed in order to encourage married couples to undertake the permanent care of children born to unmarried mothers. Although this may have been appropriate in the past, when infants accounted for the vast majority of adoptees, it has since been applied to other types of children.[33] As noted above, the objective of adoption was to permanently sever the child from the birth family and to transfer him or her to complete membership of the adoptive family.

2.18 It is necessary to look at the original purpose of adoption, with which the legislation was drafted, and test its validity against current developments in society. Consider the following changes that have taken place since the drafting of the *Adoption of Children Act* 1965:

> the introduction of financial support for single mothers;
>
> a reduction in the stigma associated with single parenthood and the recognition of the value of many different kinds of family structures;
>
> recognition of the rights and needs of children to have access to information about their genetic heritage, and the subsequent development of the practice of "open adoption" as an attempt to address these needs;
>
> an increasingly widely-held view that children are separate beings with individual rights;34
>
> growing appreciation of cultural links and the value of an individual's ethnic heritage;
>
> recognition of the rights and responsibilities of birth parents;
>
> the current divorce rates and the subsequent numbers of blended families leading to an increase in requests to facilitate step-parent adoption;
>
> dramatic changes in the type of children being adopted. Approximately half of the adoptions taking place in New South Wales each year are inter-country adoptions. There are also significant numbers of special needs adoptions and intra-family adoptions.

2.19 Adoption now faces the criticism that it is a system which promotes the separation of children and birth parents in order to satisfy the need of infertile people to become parents. For a child that has been abused or abandoned, with no hope of contact or reconciliation with his or her birth family, adoption may be an entirely beneficial and positive experience where the child has lost very little. However, many adoptions are not of this kind. Some adoptions may involve a loss for the child in terms of contact with birth family, extended birth family and ethnic and racial heritage. Adoptions by former foster parents and adoptions by step-parents do not usually involve reconsideration of the child's placement, but alter the child's legal relationship with his or her carers and sever the child's relationships with his or her extended birth family.

2.20 Occasionally, adoption may be used for a specific and limited purpose, for example, to bring a person within the terms of a family trust.[35] It is well known that in different societies, and at different times in history, adoption has served a variety of purposes. Until quite recently, for example, one of the main functions of adoption in Australia was to remove "the stigma of illegitimacy", but this factor probably plays a very small part in adoptions today.[36] An adopted person may become entitled to inherit property or titles, may be treated differently for taxation purposes or may acquire or lose citizenship rights. Adoption has often been chosen for such reasons and, in these cases, it may have nothing to do with caring for young children. The specific purposes of adoption may vary from case to case and from time to time.

2.21 It should be the purpose of adoption not only to secure a permanent home for a child, but to do so in a way that is flexible enough to take account of the broad spectrum of children who require care. It is widely accepted that whatever its specific purpose may be, modern adoption should be intended essentially to benefit the adopted child. This is reflected in the provision of the Act that the child's welfare is to be regarded as "the paramount consideration".[37] Therefore, adoption must be able to reflect current attitudes regarding the importance of cultural and family ties that exist at birth and the rights and needs of children as individuals. Chapter 3 of this Paper discusses the ability of the adoption process to absorb these necessary changes and examines its capacity to reflect the child's best interests.

FORMS OF ADOPTION

2.22 There are different ways of describing the various forms of adoption. The descriptions below are the ones most commonly used and are convenient for discussion of the issues.

Local infant adoptions

Introduction

2.23 In the 1960s the most important form of adoption involved the adoption of healthy Australian-born infants by unrelated adopters who had been selected by the Department of Community Services or by an authorised adoption agency. The structure of the existing Act still reflects the dominance of this form of adoption. Today, the number of these adoptions is rather small. The table opposite indicates the number of adoptions of this kind and the agencies involved.

Agencies providing local infant adoption services

2.24 There are four providers of adoption services for the adoption of infants born in NSW.

2.25 *The Department of Community Services.* The Department has a central local adoption section for the co-ordination of local adoption services. The Department offers a State wide service through its networkspecific needs of the children.

2.26 *Centacare Adoption Services*. Centacare is conducted under the auspice of the Catholic church. This agency is based in Sydney. In the case of non-metropolitan clients, the agency utilises hospital social workers (private counsellors known to the agency), and Centacare officers in larger regional areas for the supervised provision of services to birth parents. The agency has also utilised members of the St Vincent de Paul Society to report on the suitability of housing of country applicants. of Community Welfare Service offices.

Consents and Revocations / Agency in New South Wales38

1991, 1992 and 1.1.93 to 30.6.93

AGENCY	ACTION	1991	1992	1.1.93 to 30.06.93
Department of Community Services	Consents given	53	58	27
	Revocations	13	12	3
	Infant Wards	4	5	1
	Placements*	44	51**	25
Careforce (Anglican Adoption Agency)	Consents given	18	10	10
	Revocations	2	0	10
	Placements*	16	10	10
Centacare (Catholic Adoption Agency)	Consents given	25	35	8
	Revocations	6	8	4
	Placements*	19	27	4
Total Placements		**79**	**88**	**39**

Notes:

* The placement numbers are the placements resulting from the consents taken in this period.

** Of the 51 placements resulting from the consents taken in this period only 41 were placed with applicants from the pool. The other children were placed with siblings previously relinquished or with special attribute families who were recruited from outside the pool of approved applicants to meet.

2.27 *Careforce*. This is the Anglican adoption agency. This agency limits its services to persons within a 200 kilometre radius of Sydney.

2.28 *Barnardos Australia.* Barnardos is the fourth licensed adoption agency. They offer adoption services primarily for children aged older than two years. The service provision is limited to clients within a 50 kilometre radius of Sydney. Centacare, Barnardos and Careforce are private adoption agencies by virtue of Part 3 of the *Adoption of Children Act* 1965. They have been approved by the Director-General in accordance with s10 of that Act and are authorised to conduct negotiations and make arrangements with a view to the adoption of children.

2.29 The authorised adoption agencies also deal with special case and special needs adoptions (see below), but only the Department of Community Services is involved in the process of inter-country adoption.

Intra-family adoptions

2.30 Some adoptions involve only members of a family. The most common examples are adoptions by grandparents and by step-parents. There are approximately 150 step-parent adoptions each year.

"Special needs" adoptions

2.31 "Special needs" adoptions refer to the adoption of children whose needs require special qualities in the adopting parents. Such needs may arise from the fact that a child is older or disadvantaged by some physical or intellectual disability. In the past many of these children would have been regarded as "unadoptable", but in recent times adoption agencies have been keen to use adoption to provide homes for these children, some of whom might otherwise have lived indefinitely in institutions. In practice, these adoptions are sometimes subsidised and the selection of adoptive parents reflects the special needs of the child.

"Special case" adoptions

2.32 Adoptions are referred to as "special case adoptions" when the Department of Community Services or an authorised adoption agency supports an adoption application by adoptive parents who have not been assessed in the usual way. In these cases there has been a prior placement of a child which was made outside the regulatory scheme that applies to non-family adoptions. For example, the child may have previously been placed with the adoptive parents as a foster child. Alternatively, the child may have been previously placed with them informally, as can occur in surrogate parent arrangements. In these cases the child, whether born locally or overseas, has been placed in the care of non-relatives by way of a private arrangement.

2.33 Usually, the adoption application is made because the child is well settled in the care of the proposed adopters, and it is thought that adoption is in the child's best interests. Special case applications raise difficult policy issues because they involve by-passing the normal procedures which are designed to protect children, birth parents and intending adopters against ill-considered or even exploitative arrangements.

Ward adoptions

2.34 Ward adoptions refer to adoptions of children who have been declared wards of the State and are therefore under the guardianship of the Minister for Community Services. However, there is some overlap with special case adoptions as ward adoptions may take place after a child has been placed into a family as a foster child while being a ward of the State. In other cases, the Department may approve adoption as the case plan for a particular ward. This may be done after a conference to consider whether or not adoption would be in the best interests of the particular child.

Inter-country adoptions

2.35 Of the 154 placements made by the Department of Community Services in 1991, approximately 93 of those placements were inter-country adoptions. Inter-country adoptions usually involve an Australian couple making arrangements to adopt a child from an overseas country. Normally, the adoptive parents are approved as suitable in Australia, then visit the overseas country and obtain a child by arrangement with the overseas adoption authorities. They adopt the child under New South Wales law after their return. It is also possible, though uncommon, for an Australian child to be adopted in another country. Inter-country adoptions involve questions of immigration law and practice, and questions about the circumstances in the overseas country which led to the child becoming available for adoption. They also involve issues of identity, cultural continuity, and all the issues that arise when a person moves to a new country and to a different culture and lifestyle.

Mature age adoption

2.36 While most children must be under 18 years of age on the date the adoption application is filed in the Supreme Court, the *Adoption of Children Act* 1965 makes provision for the adoption of people 18 years old and over. Section 18(b) of the Act states that mature age adoptions may occur where the adoptee is not or has not been married and:

(i) had been brought up, maintained and educated by the applicant or applicants, or by the applicant and a deceased spouse of the applicant as his [or her] or their child; or

(ii) had, as a ward within the meaning of the *Child Welfare Act* 1939 or the *Children (Care and Protection) Act* 1987, been in the care or custody of the applicant or applicants or of the applicant and a deceased spouse of the applicant.

DEVELOPMENTS IN OTHER AUSTRALIAN JURISDICTIONS

2.37 Since the "uniform" legislation of the mid-1960s, and especially in recent years, there has been considerable modification of the adoption legislation in various Australian jurisdictions. In **Victoria,** a major and influential review published in 1983[39] led to the *Adoption Act* 1984 (Vic).

2.38 This Act made many changes, including creating rights to information for adult adoptees, discouraging step-parent adoption, requiring the wishes and feelings of children to be taken into account, requiring consent from fathers of ex-nuptial children in certain circumstances, and making special provision for Aboriginal adoptions. Many of these topics have been the subject of recent proposals or amendments in other jurisdictions, although they have been treated in different ways. The *Adoption Amendment Act* 1991 (Vic) has been proclaimed but is not yet implemented. **Queensland's** *Adoption of Children Act* 1964 (Qld) has been substantially amended, and now includes provisions for information rights (subject to veto) for adult adoptees and birth parents. This Act has been amended most recently by the *Adoption Legislation Amendment Act* 1991 (Qld) No 2. **South Australia** replaced its former legislation with a shorter Act, the *Adoption of Children Act* 1988 (SA).[40] **Western Australia** has just completed a major review of its legislation, the *Adoption of Children Act* 1896 (**WA)**. Following the review, the *Adoption Bill* 1992 (WA) was produced and proceeded to the committee stage in the Legislative Assembly before the end of the Parliamentary session in 1992. This Bill continues to be reviewed, with implementation anticipated in mid-1994. **Tasmania** has recently passed new legislation, the *Adoption Act* 1988 (Tas). The **Australian Capital Territory** has recently reviewed its legislation and, on 2 April 1993, enacted the *Adoption Act* 1993 (ACT). The **Northern Territory** undertook a review of its adoption legislation in 1987[41] and the *Adoption of Children Amendment Act* was passed in 1991.

FOOTNOTES

1. For detailed treatments, see A Dickey *Family Law* (2nd ed, Law Book Company, Sydney, 1990) and H Finlay and R Bailey-Harris *Family Law in Australia* (4th ed, Butterworths, Sydney, 1989).

2. *Child Welfare Act* 1923 (NSW) s 123-129; *Child Welfare Act* 1939 (NSW) s162-173.

3. *Mace v Murray* (1955) 92 CLR 370.

4. *Adoption of Children Act* 1965 (NSW) s 17.

5. Section 27(1).

6. Section 51.

7. Section 52.

8. Section 18(2).

9. The Court can dispense with the report: s 21 (1A)(a) and (c).

10. Section 21.

11. New South Wales. Law Reform Commission *Review of the Adoption Information Act 1990* (Report 69, July 1992), Chapter 2**.**

12. New South Wales. Department of Child Welfare and Social Welfare *Annual Report 1972.*

13. New South Wales. Department of Family and Community Services *Adoption Newsletter: October 1992* at 1. It is the opinion of the NSW Committee on Adoption that these placements included special needs and inter-country placements as well as the placements of non-relative children born in NSW. The number of NSW born non-relative placements would have accounted for less than 100 of the 154 placements, *Submission* (9 September, 1993) at 13.

14. See, for example, P Read, *The Stolen Generations: The Removal of Aboriginal Children in New South Wales, 1883-1969*, (New South Wales Ministry of Aboriginal Affairs, Sydney, c.1983), C Edwards and P Read, *The Lost Children*, (Doubleday, Moorebank NSW, 1989) and *Lousy Little Sixpence* (Ronin Films, Campbell ACT, 1983).

15. See generally New South Wales. Law Reform Commission *Review of the Adoption Information Act 1990* (Report 69, July 1992).

16. See, for example, *Children (Equality of Status) Act* 1977 (NSW).

17. *Adoption of Children (Amendment) Act* 1966 (NSW); *Adoption of Children (Amendment) Act* 1971 (NSW); *Adoption of Children (Domicile) Amendment Act* 1979 (NSW); *Adoption of Children (Amendment) Act* 1980 (NSW); *Adoption of Children (Community Welfare) Amendment Act* 1982 (NSW); *Adoption of Children (De Facto Relationships) Amendment Act* 1984 (NSW); *Adoption of Children (Amendment) Act* 1987 (NSW).

18. *Adoption of Children (Amendment) Act* 1966 (NSW) s 2, adding para (e) to s 32.

19. *Adoption of Children (Amendment) Act* 1971 (NSW) s 2, amending s 19(2) and 21(1)(c)(ii)(b), in each case changing the requirement of “exceptional circumstances” to “particular circumstances”.

20. *Adoption of Children (Amendment) Act* 1971 (NSW) s 2(h), inserting sub-s (1A) into s 32. It also enabled the Court, in certain circumstances, to dispense with giving notice to the persons whose consent was required: s 2(h)(iv).

21. *Adoption of Children (Amendment) Act* 1980 (NSW), Schedule 1. Most of the other amendments were not brought into force until 1984 and later.

22. This amendment effectively overruled statements made in *Re an Infant E and the Adoption of Children Act* [1974] 1 NSWLR 739.

23. Schedule 3, amending s 21, 22, 23, 26 and inserting s 31A-31E.

24. Schedule 3, inserting s 49A.

25. Schedule 3, amending s 32.

26. Schedule 3, inserting s 68A and 68B.

27. See especially *De Facto Relationships Act* 1984 (NSW), based on New South Wales Law Reform Commission, *De Facto Relationships* (Report 36, June 1983).

28. *Adoption of Children (De Facto Relationships) Amendment Act* 1984 (NSW), Schedule 1, amending s 19 and s 26.

29. This requirement could be dispensed with by the Court: see s 19(1B), amended by the 1987 Act.

30. *Adoption of Children (Amendment) Act* 1987 (NSW), Schedule 1, amending s 19 and s 21.

31. Schedule 1, inserting s 26(4A) and s 33(2).

32. Schedule 1, inserting s 46(2)(b) and (7).

33. United Kingdom. Department of Health and Welsh Office, *Inter-Departmental Review of Adoption Law Discussion Paper no 1: The Nature and Effect of Adoption* September 1990 at 56.

34. R Ludbrook *Submission* (10 September 1993).

35. *Re K and the Adoption of Children Act 1965* (1988) 12 Fam LR 263.

36. See, for example, *Re CM and MG* (1976) 9 ALR 666.

37. *Adoption of Children Act* 1965 (NSW), s 17.

38. *Table prepared by A Roughley,* Identifying Adoption Practice and Problems in Relation to Local Adoption of Infants, *Project 2 prepared at the request of the Commission, 23 September 1993 at 3.*

39. Victoria. The Adoption Legislation Review Committee *Report of the Adoption Legislation Review Committee* (Melbourne, 1983).

40. The Act was enacted after an extensive review of adoption in the mid-1980s and introduced some innovative concepts. In February 1994, the Minister for Family and Community Services requested a review of selected parts of the Act to take place over a six month period.

41. Northern Territory. Department of Health and Community Services *Northern Territory Adoption of Children Act Review* (Discussion Paper, 1987).

3. The Purpose and Value of Adoption

PROVISIONAL PROPOSALS FOR REFORM

1. The concept of adoption should be maintained but adoption law needs to be modified to remove its negative aspects and to ensure that it promotes the welfare of children.

2. Prior to the consideration of any kind of alternative parental care for children, there must be no infringement of the human rights of birth parents.

3. Adoption must be considered critically against all other possible arrangements for each particular child.

4. Adoption must be recognised as the most extreme form of order for children in need of permanent care to be used only where the circumstances of the particular child dictate that it is necessary.

5. The focus of adoption should be on the needs of children who require permanent care. This refers not only to the needs in existence at the time that the adoption order is made but also to those that may arise later in the child's life.

6. Children should be recognised as individuals who have ties with people, by virtue of their birth, that cannot be eradicated. The assessment of the best interests of a child should be made in relation to each child and not in relation to children in general.

SUPPORT FOR ADOPTION

3.1 In the Issues Paper we posed the question of whether there remains a need for adoption in New South Wales today. The responses to this question varied across a spectrum, from those who strongly supported adoption to those who recommended that it should be abolished.

3.2 It is clear from submissions made to the Commission that there is a great deal of community support for the continuance of adoption, although many of the submissions supporting adoption also recommended particular reforms. In the following paragraphs we summarise the main themes of these submissions.

Research evidence on generally positive outcomes for adopted children

3.3 A number of submissions pointed to information gathered from research on adoption as support for the continuation of adoption. It is not necessary to engage here in the large task of assessing this formidable body of research.[1] Overall, the research does seem to support the benefits of adoption for adopted children. According to various measures of development, adopted children appear in general to do as well as other children in the community, and better than children in the underprivileged circumstances which at least some adopted children might have experienced had they not been adopted. The studies vary in their measures for evaluating success. They also vary in the extent to which the adoptees themselves are involved in assessing the outcome of their adoption. No doubt the success of adoption has been of great satisfaction to the adoptive parents, and has been a testimony to their parenting abilities and their commitment to the children. However, the research also indicates that adoptive children face difficulties arising from their adoption, and that relinquishment entails great distress for many birth parents. The generally positive results of most adoption research does not allow us to say what the outcomes for those children would have been if they had experienced “open” rather than “closed” adoption. Nor do the general findings allow us to make confident predictions about whether adoption will promote the welfare of particular children, or particular categories of children.

Continuing acceptance of adoption in Australia and similar countries

3.4 Most States and Territories of Australia have conducted reviews of their adoption law in recent years.[2] Legislative amendments continue to be implemented to accommodate changing aims and values.[3] While suggestions to modify the law have been commonplace, there has been little support for the removal of adoption altogether. Similarly, reviews conducted in the United Kingdom, New Zealand and Scotland in the last decade, while recommending major changes to adoption law, have all supported the continued existence of adoption.[4] For instance, in the Scottish Review it was stated clearly that there was overwhelming support for retaining

adoption in its current form. Adoption was seen to be a fundamental legal concept that had proved to be successful as a way of caring for children.[5]

3.5 Not surprisingly, a number of submissions stated that adoption is a familiar, well-understood and uniquely valued concept. It is accepted both nationally and internationally.[6] Long experience has shown that adoption is a successful way of caring for a child away from his or her birth parents. It appears to have worked well for many adopted people and their adoptive parents. No other form of permanent placement has demonstrated that it can be more beneficial than the established system of adoption.[7] According to these submissions, to abolish adoption would remove the legal expression of a valued family commitment and would destroy a legal concept that exists in all countries similar to our own.[8]

Security for children

3.6 An argument strongly advanced in favour of adoption was that, for the child, a sense of security and belonging is founded in the adoptive parent's sense of entitlement and commitment.[9] A child's need for security is provided for within a nurturing, protective and permanent family who feel free to treat the child as their own. "Family" has usually been defined very narrowly in the context of this argument. It is the perceived legality, finality and exclusivity of adoption that is said to encourage adoptive parents to treat the child as if he or she were their own. Of course, the development of open adoption challenges the way in which adoption has been traditionally perceived and diminishes the strength of this argument. The argument continues that unlike, for example, the insecurity of foster care, adoption provides a level of security and commitment which is said to be fundamental to a child's upbringing. This argument was made very strongly even in submissions that acknowledged and supported the concept of open adoption, which ultimately challenges the finality and exclusivity of traditional adoption. It was argued or assumed in such submissions that the *perception* of adoption as irrevocable, and the resulting sense of commitment and security continue even though the child may be encouraged to acknowledge that it is a member of two families.

3.7 A closely related argument is the claim that adoption provides a psychological boost to a child's sense of personal identity. The sense of belonging which is enhanced by a solid family environment is invaluable to the child's self-esteem. It was argued that the disruption rate for children who are adopted is dramatically less than for children in other forms of care.[10] Disruption and lack of continuity in children's lives causes emotional problems, whereas secure family membership enhances self worth.

Capacity of adoption to change

3.8 While most people do not want to see adoption abolished, many expressed the view that appropriate modifications could be made to meet changes in social patterns and values. Many submissions referred to the current practice of "open adoption" and felt that it should be incorporated, to a greater or lesser degree, in the Act.

> Any new system established should, we believe, have information access and openness from the beginning. Anyone embarking upon adoption would know that there is to be no secrecy.[11]

3.9 The thrust of many of these comments was that, in the past, problems had been caused by the 'conspiracy of silence', and that adoption does not have to involve deception if all parties acknowledge the reality of the adoption.[12] Nor does adoption necessarily involve the complete severing of a child's existing family relationships; it is flexible enough to accommodate continued involvement of the birth parents and adoptive parents in the child's life.[13]

CRITICISM OF ADOPTION

3.10 Some submissions to the review contained criticisms of adoption as it is now practised and called for radical changes in adoption law. One view is that adoption should simply be abolished. Those who supported the abolitionist argument stated that the concept of adoption is so fundamentally flawed that no statutory amendments to the Act could overcome this essential fault.[14]

3.11 Adoption has been criticised as being fundamentally flawed for the following reasons:[15]

> adoption differs from all other legal orders for care in that it purports to change the personal identity of the child by altering historical, genealogical and biological facts about the child. It thus creates a legal fiction about the child's parentage. This legal fiction is gradually being eroded by developments in social work policy, particularly those regarding openness in adoption;
>
> birth parents not only cease to be parents to the child but also render themselves liable to criminal sanctions under New South Wales law if they attempt to communicate with their child;
>
> in order to support the legal fiction that the adoptive parents are the child's only parents, children have been denied access to information about family origins and the circumstances of their birth. The social work objective, to encourage openness and honesty in adoption, runs contrary to the aim of the adoption legislation which is to deny birth parents any relationship with their child;
>
> adoption treats children as the property of their parents. The legal rights of birth parents and adoptive parents prevail over biological reality and the process has more in common with laws relating to the transfer of property than family law;
>
> the process of adoption treats children as a homogenous group rather than as separate beings with individual rights;
>
> critics of adoption also argue that the traditional concept of adoption has already been greatly compromised by developments such as "open adoption", increased access to information and the declining numbers of adoptions. They conclude that abolishing adoption would represent a culmination of these trends rather than a radical change in direction;16 and
>
> medium or long-term carers of children can be given the powers and responsibilities necessary to carry out their task (ie the rights and responsibilities of biological parents) without any need to pretend that they are the biological parents of the child and that the child's birth family have ceased to exist.

3.12 The role of non-parental carers could be recognised by amendments to the *Family Law Act* 1975 (Cth) giving the Family Court ample powers to make orders about some or all the matters now associated with adoption, including the issuing of a new birth certificate and changes in support obligations and inheritance rights. The argument is that, instead of making a single inflexible order for adoption, the Court would be able to assemble a package of legal orders which would be designed to suit the particular circumstances of each case. This method of making orders for the care of children would ensure that the process was driven by the needs of the particular child in question and not by the type of order. Legislative guidelines could be drafted to aid the Court in making an assessment of the child's situation and orders for care could be issued in terms of parental responsibilities as opposed to parental rights.

3.13 Guardianship and custody arrangements were also seen as preferable options to adoption because they could allow for the provision of access rights for the non-custodial parent and did not create a second birth certificate.[17] One submission appealed for the removal of proprietorial terms such as 'guardianship, custody and access'. The implementation of a 'residence order', a current United Kingdom invention, was considered a good alternative because it involves not an award of custodial rights but instead a direction as to where the child should reside. The focus of these suggested reforms is on the rights of the child rather than the adult, and this represents an important shift in attitude.[18]

3.14 Adoption was described as a social experiment which has failed.[19] Critics have argued that the concept of adoption is outdated because it was created in the past to punish, protect or conceal those women who bore illegitimate children. Now that it is possible for single women to support their children and less stigma is associated with single parent families, it is arguable that adoption is no longer necessary. It may also be inappropriate because the concept of adoption still has a strong attachment to the idea of punishment and concealment. These deeply entrenched, adult-focussed beliefs may not be eradicated simply by changing the legislation.

3.15 Adoption is also based on the view that the nuclear family is a vastly superior unit in which to raise children. This view is rigid and simplistic as it fails to recognise the number of children being successfully raised in many different types of family structures and it also fails to recognise the importance of members of the child's extended family. The law should acknowledge the importance of extended family members, and the fact that many Australian children experience a variety of other family forms. This would include recognition of modern families in a multicultural society.

THE VALIDITY OF ADOPTION

3.16 It is clear from the preceding paragraphs that arguments both for and against adoption provide a valuable source of ideas for change and improvement in the way adoption is practised. The Commission is not persuaded at this stage, however, that it would be desirable to abolish adoption.

3.17 There are two reasons for taking this position. First, although adoption can be seen as having some or even all of the negative connotations described by its critics, it also has some positive features. These include the idea that adoption involves a complete commitment to the welfare of the child, and a complete acceptance of the child into one's family. It should be remembered, in this context, that adoption was originally resisted in part on the ground that children born to "undesirable" parents were destined to failure, because of their circumstances of birth. It might be argued that the abolition of adoption could discourage people from providing unqualified love and care for children, and might lead us to forget the positive lessons that adoption appears to have taught. It is possible that if adoption is reformed, the connotations which are seen as negative, such as ownership of the child, deception, and an excessive preoccupation with the traditional nuclear family structure would be greatly weakened, and the positive connotations retained or strengthened.

3.18 Second, there seem no prospects at this stage that a recommendation to abolish adoption would have any chance of success in the present climate of opinion. As noted earlier, it is well established in many countries, and its abolition does not appear to have been seriously considered by any legislature. The *Convention on the Rights of the Child* contemplates the continued existence of adoption, although it is fair to say that the main concern of the Convention is to guard against abuses of adoption.[20] It is clear from submissions to the Commission that there is a great deal of community support for the continuation of adoption. It is difficult to imagine that a recommendation to abolish adoption would have any chance of gaining political acceptance unless there was a very significant shift in community opinion. This is not of course decisive, but it does suggest that the Commission should recommend abolition of adoption only if it were convinced that this was really necessary.

3.19 It is the Commission's provisional recommendation that the concept of adoption be maintained but that the criticisms underlying the abolitionist position need to be kept carefully in mind when approaching particular aspects of the law and practice. Adoption law can be modified to remove negative aspects and retain the positive features in order to promote the welfare of children. It is important that:

> there be no infringement of the human rights of birth parents either prior to the consideration of any kind of alternative parental care for children or at any stage of the adoption process;
>
> adoption be recognised as the most extreme form of order for children in need of permanent care and that it is only used where the circumstances of the particular child dictate that it is necessary;
>
> adoption be considered critically against all other possible arrangements for each particular child;
>
> the focus of adoption be on the needs of children who require permanent care. This refers not only to needs in existence at the time that the adoption order is made but also to those that may arise later in the child's life;
>
> children be recognised as individuals who have valuable ties with people, by virtue of their birth, that cannot be eradicated. The assessment of the best interests of a child should be made in relation to each child and not in relation to children in general.

FOOTNOTES

1. See , for example, L Raynor, *The Adopted Child Comes of Age* (Allen & Unwin, London 1980) referred to in J Thoburn, *Success and Failure in Permanent Family Placement*, (Aldershot, Hants, England, c1990); J Triseliotis and J Russell, *Hard to Place - The Outcome of Adoption and Residential Care*, (Heinemann, London, 1984); M Shaw, "Growing Up Adopted" in *Adoption. Essays In Social Policy, Law and Sociology*, (ed) P Bean, (Tavistock Publications, London, 1984). A valuable overview of the research was conducted in connection with the recent *Inter-Departmental Review of Adoption Law* undertaken in the United Kingdom by the Department of Health and Welsh Office.

2. See **Australian Capital Territory:** *Adoption Legislation and Practice* Report of the Review Committee, December 1987, *Report of the Standing Committee on Social Policy on the Adoption Bill* 1992; **South Australia:** *Adoption Policy and Practice in South Australia* Report of the Review Committee, November 1986 and the recently announced review of selected parts of the *Adoption Act* 1988 (SA); **Tasmania**: *Report of the Interdepartmental Committee on Adoption Legislation Review*, October 1986; **Victoria**: *Report of the Adoption Legislation Review Committee*, May 1983 and **Western Australia**: *A New Approach to Adoption* Final Report, Legislative Review Committee, February 1991.

3. See for example the *Adoption Act* 1993 (ACT) which represents a compromise of the 1987 Review recommendations. The major thrust of the Act is concerned with allowing the granting of 'open' or conditional adoption orders. See also *Adoption Act* 1988 (SA) incorporating substantial changes following the Committee's Report; *Adoption Act* 1984 (Vic) incorporated recommendations of the 1983 Report. The *Adoption (Amendment) Act* 1991 (Vic) dealt with changes in inter-country adoption; *Adoption Bill* 1993 (WA) is to be introduced into Parliament in February 1994. The initial Bill was based largely on the 1991 Report and the *Adoption of Children Act* 1993 (NT) implemented substantial changes to adoption law in the Territory.

4. See United Kingdom. Department of Health and Welsh Office *Review of Adoption Law: Report to Ministers of an Interdepartmental Working Group* (October 1992); New Zealand. Department of Justice *Adoption Act 1955. A Review By An Interdepartmental Party: Proposals for Discussion*(January 1987), and Scotland. The Scottish Office *The Future of Adoption Law in Scotland. A Consultation Paper* (1989).

5. Scotland. The Scottish Office *The Future of Adoption Law in Scotland. A Consultation Paper* (1989) at paragraphs 1.4 and 1.6.

6. Centacare Adoption Services *Submission* (31 August, 1993) at 4.

7. Post Adoption Resource Centre *Submission* (1 September, 1993) at 2.

8. Barnardos Australia *Submission* (6 September, 1993) at 2 and New South Wales Committee on Adoption *Submission* (9 September, 1993) at 17.

9. Post Adoption Resource Centre *Submission* (1 September, 1993) at 4.

10. Barnardos Australia *Submission* (6 September, 1993).

11. Presbyterian Women's Association *Submission* (27 August, 1993) at 3.

12. New South Wales Committee on Adoption *Submission* (9 September, 1993) at 16.

13. A recent United Kingdom review, for example, emphasised that the Court should be able to make access orders ("contact" orders) in conjunction with adoption, and was sympathetic to the view that adoption orders should not be made when other orders, such as guardianship or a change of name, would suffice. However, it considered that in other respects adoption should be retained more or less in its present form. See United Kingdom. Department of Health and Welsh Office *Review of Adoption Law: Report to Ministers of an Interdepartmental Working Group* (October 1992) at 8-9.

14. R Ludbrook *Submission* (10 September, 1993).

15. This list of reasons is developed from R Ludbrook, *Submission* (10 September, 1993).

16. Adoption Jigsaw WA *Submission* (26 August, 1993) at 1.

17. M Coblenz *Submission* (29 August, 1993).

18. R Ludbrook *Submission* (10 September, 1993).

19. Adoption Jigsaw WA *Submission* (26 August, 1993).

20. See especially articles 20 and 21.

4. General Principles

PROVISIONAL PROPOSAL FOR REFORM

General principles for the practice of adoption

1. The principle that the child's best interests should be treated as the paramount consideration should be retained and applied to all aspects of the adoption process.

2. The making of arrangements under which children are placed for adoption, except in the case of intra-family adoptions, should continue to be controlled by a government department or approved agencies. The law should not permit individuals to make their own adoption arrangements, either personally or though intermediaries.

3. The Court should retain responsibility for making adoption orders and other related orders.

4. The legislation should ensure, specifically:

   that the individuals closely involved in the child's life have an adequate opportunity to express their views to the court;

   that the child's own perceptions, feelings and wishes are discovered and taken into account; and

   that the available alternatives for the child are carefully considered.

5. The *Adoption of Children Act* 1965 should support the policy of open adoption.

6. The legislation should create a system of adoption in which a package of orders and arrangements can be tailored to meet the needs of each child.

7. The law and practice of adoption should ensure that adoption and its alternatives are carefully considered.

8. **Infant adoptions**

   Adoption law in these cases should have the following objectives:

   to present birth mothers with adequate and correct information about alternatives to adoption and the consequences of open adoption;

   to ensure that the birth mother's consent is fully informed and freely given and that she has a reasonable amount of time in which to make her decision and to revoke it if desired;

   to involve the birth parent(s) in the placement plan as far as possible in order to facilitate openness;

   to establish a situation where the child will have the benefits of a secure home with the adopters; and

   to ensure as far as possible that the adoption will promote the child's life-long welfare.

9. **Children in care**

   In relation to children in care, adoption law should, in particular, have the following characteristics:

   it should provide for the child to be consulted and actively involved in the planning process as far as the child's understanding and maturity allows;

   it should ensure as far as possible that members of the child's birth family are involved in the planning process and encouraged to maintain an involvement in the child's life;

it should ensure that before an adoption order is made a careful and thorough assessment is made of the range of possible placements;

where it is decided that the child should be adopted, careful consideration should be given to the choices available within adoption, for example, whether the child should continue to have the same first name, and even surname; and

where it is proposed that the child be adopted by foster parents, that the application may be brought either by the foster parents themselves or by an adoption agency, and that the birth parents may give consent either to the adoption of the child by the foster parents, or to the adoption of the child by any persons.

10. **Intra-family adoptions**

The law should ensure that the decision whether to adopt reflects an informed and careful assessment of whether the child's interests will be promoted by the various legal consequences of adoption and, in particular, whether the desired objectives might be equally achieved without court orders, or by orders for custody or guardianship.

11. **Special needs adoptions**

In the case of these adoptions, adoption law should ensure that every reasonable effort is made to find, assess and support suitable adoptive parents. The needs of the particular child may well justify measures which would be unacceptable in other forms of adoption, such as circulating advertisements seeking to recruit adoptive parents, and dispensing with normal criteria relating to such matters as age or domestic circumstances.

POINTS FOR FURTHER DISCUSSION

To what extent should the adoption legislation actively implement or encourage openness, as distinct from creating a framework which relies heavily on the professional judgment of adoption workers and the other adults involved?

The Commission invites comments on whether s 35 of the Adoption of Children Act 1965 should be amended to read as follows:

(1) For the purposes of the laws of New South Wales, but subject to this Act and to the provisions of any law of New South Wales that expressly distinguishes in any way between adopted children and children other than adopted children, upon the making of an order-

(i) the adopter or adopters shall become the legal parent(s) of the child;

(ii) the birth parent or birth parents of the child shall no longer be the legal parent(s) of the child;

(iii) the legal relationships between the child and all other persons shall be determined on the basis of the foregoing provisions so far as they are relevant;

(iv) any existing guardianship of the adopted child (including the Minister's guardianship under the Children (Care and Protection) Act 1987 ceases to have effect; and

(v) any previous adoption of the child (whether effected under the law of New South Wales or otherwise) ceases to have effect.

4.1 In this section we discuss some general policies, or principles which are relevant to adoption law. In the Issues Paper, the Commission raised the issue of whether there were general principles that should guide the development of adoption law. Chapter 3 of this Paper concluded with five general principles for the reform of adoption that are intended to apply to all forms of adoption and to bring adoption into line with other areas of legal thought and development. This chapter examines some of these general principles and highlights some of the aims and objectives of the different forms of adoption.

THE BEST INTERESTS OF THE CHILD

4.2 Article 21 of the Convention on the Rights of the Child requires ratifying countries to permit their systems of adoption to ensure that "the best interests of the child shall be paramount". A similar statement can be found in the Adoption of Children Act 1965 (NSW) in s 17. This principle is well established and applies in many areas of children's law, including guardianship and custody under the Family Law Act 1975 (Cth).1 This principle should be retained and applied to all aspects of the adoption process. Adoption has life-long consequences for the children involved and it is necessary to consider what is best for a particular child in the long-term as well as the short-term. Although the principle should apply to each stage of the adoption process, it may be of limited application at some points. For example, where the Court must decide whether or not parental consent should be dispensed with, the guiding principle should be that adoption requires parental consent.

4.3 Many of the submissions considered this principle, that the interests of the child are paramount, to be fundamental to any changes made to the legislation. The principle has become closely linked to the concept of children's rights, such as the right of the adopted child to know about his or her birth origins and to participate in the adoption process to the extent that his or her maturity will allow. Many of the Commission's tentative proposals acknowledge this new way of perceiving children and their rights and try to ensure that an assessment of the 'best interests of the child' is made from the point of view of the particular child rather than children in general.

LEGAL REGULATION

4.4 There are a number of characteristics common to adoption legislation throughout Australia since the introduction of the uniform legislation of the 1960s. Some of these may be seen as constituting the essential features of the existing legal regulation of adoption. In the Commission's provisional view, these essential features, namely the way in which adoption arrangements are controlled and the role of the Court, should remain the features of New South Wales law. In the following paragraphs they are identified and briefly discussed.

Control of adoption arrangements

4.5 The making of arrangements under which children are placed for adoption, except in the case of intra-family adoptions, should continue to be controlled by a government department or approved agencies. The law should not permit individuals to make their own adoption arrangements, either personally or though intermediaries.

4.6 This level of control over adoption arrangements is similar to that of the United Kingdom and several other countries, though it is different from others, such as the United States, where in general there is limited legal regulation of adoption practice. None of the subsequent reviews of adoption have involved any significant modification of this basic approach. The approach is also endorsed by the National Minimum Principles in Adoption.[2] Submissions to the Commission were overwhelmingly in favour of this approach.

4.7 There are good reasons for retaining such control. There appears to be a real danger that uncontrolled adoption arrangements would endanger the welfare of children in many cases. At the present time, there is an increasing demand for adoption and a decreasing supply of local newborn children. This creates a situation in which there is a significant risk that the needs of intending adopters would, in an unregulated system, prevail over the interests and rights of the children and the birth parents. Evidence to the Commission makes it very clear, for example, that many mothers are extremely vulnerable around the time of childbirth, and it is important to protect

them from undue pressure or misinformation. It is now known that the interests of adopted children require that they know of their adoptive status, and have certain rights to information about their birth families. If adoptive parents are not carefully selected and prepared, they may not appreciate the importance of this, and their own needs and assumptions about children may lead them to deny the child the opportunity to have knowledge of his or her birth family. In an unregulated system the birth parents may be subjected to undue pressure and deprived of the opportunity to participate in the arrangements leading to adoption.[3] Children, too, may not have an opportunity to be heard.[4] For these and similar reasons, the Commission takes the view that continued legal regulation of adoption placements is appropriate.

4.8 It must be acknowledged that legal regulation is neither a necessary nor a sufficient condition for good adoption placements. It is quite possible for unsatisfactory arrangements to be made within a regulatory system, and it is clear from evidence to the Commission that this has occurred at times. Conversely, private arrangements can be entirely satisfactory for some children. The Commission's view, however, is that legal regulation of placements is capable of promoting children's welfare better than an unregulated system. Much of this Review is devoted to the task of designing a system that will be effective and appropriate to present-day views on adoption, and will avoid both the dangers associated with lack of regulation and the mistakes that have been shown to occur even in a regulated system.

4.9 The above paragraphs speak of the regulation of adoption "placements" and "arrangements". The law may differ in its regulation of the different forms of adoption. Broadly speaking, regulation seems most important where adoption involves the selection of suitable adopters, and the placement of children with them for adoption. A more limited form of legal regulation may be appropriate in other cases, for example adoptions by step-parents, where the child is already established in a home and the main question is the legal relationship between the child and the persons who will be raising the child. Such issues are discussed in appropriate parts of this Discussion Paper.

4.10 The legal regulation of adoption has another aspect. The law could "regulate" adoption by providing that adoption arrangement may be made only by authorised agencies, but it could also leave those agencies virtually unrestricted in the way they carry out their work. At the other extreme, the law could attempt a high level of control over the work of the agencies. The original regulations under the *Adoption of Children Act* 1965 might be regarded as seeking to impose a high level of control in relation to some aspects of adoption. They came close to providing that the Department had to allocate babies to approved adopters on a strict principle of priority in time: "first come, first served".[5] By contrast, under the present legislation the agencies appear to have a great deal of freedom. It is clear that very important changes in adoption practice have occurred in recent years with little or no change in the legislation. Adoption agencies and their professional staff would no doubt see much merit in flexibility of this kind, and argue that the law should encourage the development of professional practice. On the other hand, the very notion of *legal* regulation of adoption means that the law provides some checks on the exercise of professional discretion of adoption staff. The extent of authority that should be given to agencies and their staff is a basic issue in adoption law. The Commission's general view is that the law should be sufficiently flexible to allow professional judgment to be exercised, and for standards to develop, while also providing a measure of protection against errors of judgment or professional practices that violate the rights of people involved in adoption. Achieving a sound balance between these two objectives is one of the challenges of the present review.

The role of the Court

4.11 A second basic feature that should be retained is the role of the Court,[6] which has the responsibility for making adoption orders and related orders, such as an order to dispense with obtaining the consent of a birth parent who cannot be located. This is a characteristic of all Australian jurisdictions except Queensland, and even there the legislation makes provision for contested issues to be dealt with by a court. This characteristic would appear to be based on the view that such important changes in a person's legal status should only occur as a result of a court order. The advantage of a court process is, no doubt, that the court is independent in that it has no interest in the outcome of the proceedings. Not only is it independent of the parties, but it is also independent of the government department and adoption agencies. Further, the processes of the court should be such that all those concerned will have, and be seen to have, a fair hearing before the order is made. In order for full

advantage to be taken of its potential, it is important that the system should give the court a real rather than a token role.[7]

4.12 The court process is primarily designed for the resolution of contested matters, in which the parties involved present their evidence and argument to the court, and the court makes a judgment resolving the issues between them. In most types of jurisdiction, as is well known, the majority of cases are in fact resolved between the parties, and the court will often be asked to make a consent order. In commercial matters and many other matters, this presents few difficulties as both parties are adult, reasonably presumed to be able to judge their own interests, and are often legally represented. Accordingly, in the vast majority of settled cases, the court makes orders in the terms requested by the parties, and is not concerned with the question whether the agreed result corresponds with what the court might have ordered had the matter gone to trial. The court would hesitate to make the consent orders sought by the parties only where it had some special reason to question the apparent agreed resolution, for example where it had reason to believe that a party was labouring under some misapprehension or duress.

4.13 Should this model be followed in adoption? This is an important question, since in practice there are very few fully contested adoption matters; perhaps one or two a year. In principle, it is clear that the court should not make an order simply on the basis that there is no opposition to a proposed adoption. It has the task of satisfying itself that the proposed adoption will promote the child's welfare.[8] The Commission's provisional view is that the practice and procedure of adoption should ensure that it is in a position to do so. It should ensure, specifically:

> that the individuals closely involved in the child's life have an adequate opportunity to express their views to the court;
>
> that the child's own perceptions, feelings and wishes are discovered and taken into account; and
>
> that the available alternatives for the child are carefully considered.

4.14 It is appropriate, therefore, that the adequacy of the existing law be tested according to whether it meets these criteria. This question is considered below, in Chapter 5.

Openness and honesty

4.15 There are also aspects of recent thinking about children and their needs and developments in adoption practice that have never been a feature of the adoption legislation, but are now recognised as crucial parts of good adoption practice. Perhaps the most distinctive feature of recent thinking and practice in adoption is the view that the law should not facilitate deception or secrecy but should promote openness and honesty. Thus the National Minimum Principles in Adoption state:

> Openness and honesty in family relationships should be encouraged in all adoptions.[9]

4.16 Unfortunately, as numerous submissions pointed out, echoing much of the public comment on the *Adoption Information Act* 1990 (NSW), adoption law and practice has been frequently associated both with deceptive practices and the selective withholding of the truth. This occurred when adopted children were misled about their adoptive status, or when they were told, falsely, that their birth parents were dead. It also occurred when relinquishing mothers were not told of their rights, for example, the right to revoke a consent, or were given misleading information about the child. Of course these practices were not universal but they occurred with worrying frequency.

4.17 Although there may be room for argument about the extent to which adoption involved *deception*, it unquestionably involved the deliberate concealment of the truth. The birth parents were to have no knowledge of the identity of the adopters, nor the adopters of the birth parents, although the latter proposition appears to have been taken less seriously than the former.[10] The adoptees in some cases were not told that they had been adopted, and were generally not told, and often unable to learn, the identity of their birth family. Those who discovered the information did so in spite of the legislation, not because of it: the *Adoption of Children Act* 1965

sought to ensure secrecy. However, one aspect which is now widely seen as deceptive is still universally practised, namely the issuing of birth certificates which misleadingly indicate, except to those with special knowledge, that the adoptive parents had given birth to the adoptee.

4.18 The strong community reaction against the secrecy that had surrounded adoption was manifested in the *Adoption Information Act* 1990, which removed a great deal of it. Following the implementation of this Act, the debate turned to a large extent on the difficulties the 1990 Act caused for people who had conducted themselves in accordance with the climate of secrecy. A common theme of those who opposed the Act was that they would have no objection to the Act's information rights being available to people who were involved in *future* adoptions. For the future, people relinquishing children for adoption, and people intending to adopt, would know in advance that access to information would be possible when the child turned 18. However, the vast majority of adopted persons and birth parents welcome the rights to information and exercise them responsibly.[11]

4.19 In the Issues Paper the Commission asked whether legislation should reinforce, extend or ignore the increasing openness in adoption. This section will examine what is meant by open adoption, how it is currently practised and the arguments for and against its establishment as normal adoption practice. The *Adoption Information Act* 1990 will also be considered as it has obvious implications for increasing openness in adoption.

What is open adoption?

4.20 There is no universally accepted definition of open adoption. Definitions range from "an adoption in which the birth parent meets the adoptive parents; relinquishes all legal, moral, and nurturing rights to the child; but retains the right to continuing contact and knowledge of the child's whereabouts and welfare"[12] to "shar[ing] with the child why a mother would place the child for adoption".[13] In the Issues Paper the Commission suggested that open adoption may include the provision of non-identifying information to adoptive and birth families, the making of access or other orders after the adoption order in favour of the birth family, or the provision of identifying information to adult adoptees and their birth parents.[14]

4.21 Despite the diversity of definitions, it seems clear that open adoption indicates a move away from the traditional practice of secrecy in adoption where children were not told of their adoptive status or, if they were told, were not provided with any information about their birth family. Open adoption is also a move away from the "clean break" theory which promoted the belief that women who relinquished children would simply forget and get on with their lives without ever needing information about or contact with their relinquished children.

4.22 *Current practice of open adoption.* The Department of Community Services and the private adoption agencies currently practise a form of open adoption. Birth parents and adoptive parents are provided with non-identifying information about each other. Children are given a booklet called "My Story" which provides non-identifying information about their birth family. Birth parents are often given the opportunity to choose adoptive parents for their child from a number of 'profiles' selected and then shown to them by adoption workers. In special needs and ward adoption, birth families and adoptive families may meet, and if they wish, provide each other with identifying information and remain in contact with one another. Some adoptive families and birth parents provide the Department or agencies with on-going information about the child or themselves which will be passed on to the other party to the adoption when that party makes contact with the Department or agency.[15]

4.23 In the period up to the granting of an adoption order (the "post placement period"), agencies contact birth parents and adoptive parents and implement exchange of information and organise meetings between the parties. During this period adoptive parents are generally anxious to please the adoption agency so that the agency will support the making of an adoption order.

4.24 Careforce has both applicant adoptive parents and birth parents sign affidavits acknowledging the agreement for exchange of news and information and lodges these with the Supreme Court with the application for an adoption order. On the basis of these affidavits some judges have been making orders for the continuance of news and photograph exchange at the frequency specified in the affidavit. In seeking an affidavit from the birth parents Centacare reinforces the importance of information exchange between all parties. They believe it is important for the adoptee and adoptive parents to see and recognise the way in which birth parents also change over time. They believe this process will facilitate greater openness.

4.25 Barnardos have both adoptive parents and relinquishing parents sign agreements for the ongoing contact and information exchange between adoptive parents and relinquishing parents.

4.26 Current practice of open adoption is based on the parties' own wishes. The provision of information or the arrangement of a meeting between the parties is voluntary, so that no one is pressured to act against his or her own convictions. Adoptive parents and birth parents can provide as little or as much information as they feel comfortable providing.

4.27 This means that, in practice, the degree of "openness" varies from case to case. Adoptive parents may want more information for their child than a birth parent is willing to give. For example, this may be because the parents have two adopted children and one is receiving on-going information and photos from his or her birth parents while the other is not. Understandably, adoptive parents may be concerned that the child whose birth parents are not providing information is feeling left out. Alternatively, adoptive parents may provide an early photo of the child to a birth parent but refuse to provide any more information once the child reaches the age of two. The birth mother may have specifically selected the adoptive parents because they indicated that they were prepared to provide on-going information and she may become angry and upset that they are not keeping to their informal undertaking.

4.28 If the adoptive parents will not co-operate, the agencies are not able to provide news and information about relinquished children to the birth parents during the post adoption period after an Adoption Order has been granted. Exchange of news and information in the post adoption period up until the child is 18 years of age depends upon the goodwill of adoptive parents, irrespective of what was agreed at the time of placement. Most adoptive parents honour the unenforceable agreements given at the time of placement but a significant number do not, and it is these situations which are of considerable concern to all adoption agencies. In these cases, the agencies are unable to force adoptive parents to allow communication with the birth parent(s) and respond by keeping letters and presents from the birth parent(s) until the child turns 18 years of age when they will be made available to him or her. In this way the child will hopefully understand that his or her birth mother did in fact do all she was able to do to demonstrate a caring interest in the life of the child.

4.29 As increasing numbers of birth parents and adoptive parents agree to information exchange, via the adoption agency which placed the child, the cost to agencies for the provision of services associated with openness in adoption is increasing exponentially. Until recently once an order of adoption was granted the involvement of the adoption agency ceased. Awareness of the needs of birth parents, adoptees and adoptive parents has resulted in post adoption services being implemented to facilitate openness in adoption. At present the considerable cost for these services is being borne by the agencies but it is doubtful if they can continue to do this without funding increases.

Adoption Information Act 1990

4.30 The *Adoption Information Act* 1990 has implications for open adoption, allowing parties access to information that previously has been withheld. The Act, however, is limited in its significance to children because, as a general rule, it permits access to identifying information only after an adoptee has reached 18. It allows adoptees and birth parents access to original or amended birth certificates in order to ascertain the identity of a person separated from them by adoption. Although, in general, the present Review does not reconsider the 1990 Act, the connection with the *Adoption of Children Act* 1965 is so close in relation to this issue that it is necessary to give it some consideration at this point.

4.31 There are two exceptions to the general rule that information will only be granted if the adoptee is 18 or over. Adoptees under 18 can receive their original birth certificate with their adoptive parents' and birth parents' consent.[16] Also, adoptees can receive their original birth certificate with the consent of the Director-General if the adoptive and birth parents are dead, cannot be found or there is sufficient reason to dispense with their consent.[17] Birth parents are not entitled to any information about adoptees who are under 18.

4.32 Adoptees under the age of 18 are not entitled to be registered on the Reunion Information Register unless they are over 12 and have their adoptive parents' consent, over 16 and living separately from their adoptive parents or over 12 and the Director-General believes that there are special circumstances making it desirable that their names be entered on the register.[18]

4.33 Adoptive parents are entitled to receive extensive non-identifying information about their adopted child under the Act.[19] They can only receive identifying information, that is the original birth certificate, once their child is 18 and only with his or her consent.[20] Access to non-identifying information during the adoptee's childhood constitutes a significant move towards open adoption. It acknowledges that adoptive parents should have this information as of right, not simply when a Department or agency social worker deems it appropriate.

Adoptees under 18

4.34 The *Adoption Information Act* 1990 (NSW) provides little assistance to adoptees under the age of 18 who are seeking information about their birth families. As has been shown above, information rights for adoptees under 18 are very limited. The denial of rights to those under 18 raises some serious questions about children's rights.

4.35 The *Convention on the Rights of the Child* states that children have the right to "seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print...".[21] This right can only be restricted by laws that are necessary

> (a) For respect of the rights or reputations of others; or
>
> (b) For the protection of national security or of public order or of the public health or morals.[22]

4.36 It is difficult to see how the *Adoption Information Act* 1990 complies with this article. Restriction of adoption information for those under 18 cannot be for the protection of national security, public order, public health or morals. Can it then be necessary for respect of rights or reputation of others, in particular birth and adoptive parents? This seems difficult to justify in light of the rights given to adult adoptees. If adoptees under 18 were given information rights birth parents could place contact vetoes, should they so wish, protecting their rights, just as they can to prevent contact by adult adoptees. Birth parents' rights would be no more interfered with by adoptees under 18 than they are by adult adoptees. Further, it cannot be successfully argued that giving adoptees information rights fails to respect the rights of adoptive parents. While parents have certain rights in relation to their children they do not have the right to control all information their children seek and receive. Children are people with rights of their own; their parents are entitled to guide them but they do not have absolute power over their lives. The *Convention on the Rights of the Child* makes this clear. Children's rights to seek and receive information are to be restricted by law alone, not by their parents' wishes.

4.37 The restriction on children's access to adoption information is further undermined by articles 7 and 8 of the *Convention on the Rights of the Child* which state that children have the right "as far as possible...to know and be cared for by [their] parents" and the right to "preserve [their] identit[ies]...name[s] and family relations". All adopted children have two sets of parents, one by virtue of birth and one by virtue of adoption. If children ask to know who their birth parents are, they have a right to be told. The only qualification on this right is the phrase "as far as possible". If it is possible to give adult adoptees identifying information it should be equally possible to give adoptees under the age of 18 information.

4.38 The question of access to information for adoptees under 18 is important for open adoption. Discussions of open adoption most frequently focus on the concerns of adoptive and birth parents, not adoptees. This may be inevitable when adoptees are babies or young children, but it is not necessarily appropriate when children are old enough to express their own views. Children at this age should have the right to have a persuasive voice in relation to their own adoption. If they express the desire to have a more open adoption, with contact with birth parents, then this wish should be respected. Adoptive parents and social workers should not have the absolute right to veto another person's wishes simply because they are under 18. Such a system is fundamentally at odds with the *Convention on the Rights of the Child* and the underlying principle of adoption legislation which stipulates that the interests of the child must be paramount.

Open adoption in other jurisdictions

4.39 The evidence reviewed by the Commission indicates that open adoption is a positive and progressive concept that has been developed in various forms throughout Australia.

4.40 *Northern Territory.* The Northern Territory has drafted a new *Adoption of Children Bill* 1993 which essentially only provides for open adoption. The Bill gives birth parents, adoptive parents and adoptees over 16 the right to identifying information about another party to the adoption at *any time after the adoptee is placed*.[23] Information cannot be released before the applicant has received counselling from a person approved under the Act.[24] The Bill works on the assumption that people who are not prepared to accept contact will choose not to participate in the adoption process.

4.41 *Western Australia.* The Western Australian Adoption Legislative Review Committee recommended that "Negotiated Adoption Agreements" be entered into between the adoptive parents, birth parents and where possible the child, prior to placement. These agreements would make provision for the exchange of information and/or contact for the adoptive and birth families. The Committee emphasised that it was "not recommending compulsory open adoption but rather a mechanism to allow parties in an adoption to select from a wide range of options, and negotiate an arrangement which best suits all concerned"[25]. In all agreements the interests of the child would be paramount.

4.42 Agreements would be registered with the Family Court of Western Australia but not form part of the Order of Adoption.[26] In the event of a disagreement over the conditions or interpretation of the Agreement, the proposed Adoption Information Exchange could provide mediation or the Court could make a determination. In situations where an Agreement is not possible, a judge would have the power to waive the requirement of an Agreement under prescribed circumstances.

4.43 *Victoria*. In Victoria adoption orders can be made subject to certain conditions agreed upon by the adoptive and birth parents. These conditions include access rights to the child for the birth parents and/or relatives under circumstances specified in the order[27] and the provision of regular information for the birth parents by the adoptive parents via the adoption agency.[28] Conditions attached to an adoption order can be varied or revoked on the application of adoptive parents, birth parents or on behalf of the child.[29] Greater access to the child by the birth parent cannot be granted by the court without the agreement of the adoptive parents and the wishes of the child being considered.[30] All variations or revocations of conditions must be made in the best interests of the child.

4.44 *England and Wales*. The Interdepartmental Working Group reviewing adoption legislation noted that the court already had the power to grant a contact order in conjunction with an adoption order under the *Children Act* 1989. The Working Group recommended that this power be re-affirmed but that legislation should not prescribe the circumstances under which contact should or should not take place.[31] The Working Group decided that the form of contact should be determined by the adoptive parents, birth parents, relatives, children and agency and then confirmed by the court. Like the Western Australian model, the emphasis is on consensus between the parties, the assumption being that any arrangements imposed without consultation are unlikely to be successful or in the best interests of the child.

Arguments for reinforcing and increasing openness in adoption

4.45 Proponents of open adoption argue that the secrecy promoted in the past in adoption proved unnatural and damaging in adoptive relationships. They argue that it is fallacious to believe that a child placed with a biologically unrelated couple will never want to know about or meet his or her biological family. Further, denying the reality of adoption and the existence of two sets of parents, adoptive and biological, places unnecessary stress on an adoptive family; family members will always be working to minimise the factors that point to the existence of another family. For example, adoptive parents may play down their child's differences from themselves, whether physical, emotional or intellectual, in an effort to deny the fact that these traits may be inherited from the biological family. As children are often immensely perceptive to unspoken messages, the child may collude with the parents in their efforts and also attempt to minimise his or her differences from them, thus creating a crisis in identity in teenage or adult years.

4.46 Open adoption, advocates argue, prevents the parties to an adoption 'fantasising' about each other and creating false images of each other's personalities. For example, birth parents may create a whole picture of their child and his or her family in their minds which is in fact entirely false. Adoptive parents, particularly in the past but even sometimes today, may stereotype birth mothers as irresponsible and amoral young women from whom

their child is lucky to have been separated. They may pass this perception on to their child which may have a negative effect on their child's self-identity and jeopardise any future relationship with the birth parent when the adoptee is an adult. Adoptees often fantasise about their birth parents, wondering what they look like and why they placed them for adoption. Adoptees often experience feelings of rejection, believing that the reason they were relinquished was because they were 'not wanted' or loved.

4.47 Proponents argue that open adoption can provide the means to avoid all of these problems. Birth parents can explain why they placed the child thus minimising the adoptee's feeling of rejection. Adoptive parents and birth parents can gain an accurate perception of each other instead of assuming that the other party fits a particular stereotype.

4.48 Open adoption, it is argued, allows adoptees to develop a proper sense of identity. The plethora of material written by and about adoptees in search of their birth parents documents the problems some adoptees encounter in developing a coherent sense of self.[32] 'Genealogical bewilderment' is a noted phenomenon amongst adoptees, stemming from lack of knowledge of immediate biological family and family history. Proponents of open adoption argue that adoptees would not need to go through this painful experience if they had access to information and the opportunity to meet their birth family when they were growing up.[33]

4.49 Another factor contributing to the development of "open adoption" is the growing realisation that the introduction of "closed" adoption may involve the imposition of an alien cultural standard on people whose child-rearing practices are based on extended family networks, in which placement with other relatives is quite consistent with knowledge of actual parentage and continued membership of the kin groups associated with the birth parents.[34] This problem has been discussed in connection with Maori people in New Zealand but has application to a number of groups in Australia, notably Aboriginal and Torres Strait Islander people.

4.50 Finally, open adoption can be supported by the argument that confidential adoption treats children like property, where the birth parents transfer all rights of enjoyment to the adoptive parents and the adoptive parents then have the exclusive power to determine who shall have access to their new possession. Open adoption, in contrast, recognises that children are people with their own relationships and ties that exists by virtue of who they are, not simply by virtue of what their parents determine. In other words, adopted children have a relationship with their biological parents because they were born to them - this is a relationship in fact, that neither the birth parents nor the adoptive parents can eradicate. Children come to adoptive parents with this relationship, in the same way that they come to their adoptive parents with brown eyes or a particular personality and it is not the adoptive parents', birth parents' or adoption agency's right to deny or destroy this relationship.

Arguments against open adoption

4.51 There is considerable resistance to the practice of open adoption, often from adoptive parents. One submission to the Commission stated that:

> [Open adoption] is experimental and may result in psychological damage being inflicted on the child - such practice that experiments with the lives of children should be banned![35]

4.52 Criticisms have been made of open adoption on the basis that there is no reliable research evidence to support it. Some commentators argue that there is no evidence that the practice is positive and that the number of healthy, well-adjusted adoptees in the world is testament to the fact that closed adoption is successful. One commentator claims that open adoption is "unsupported by anything other than the sparsest anecdotal data - data with virtually no sound theoretical rationale or scientific research to back it up".[36]

4.53 Opponents of open adoption also argue that contact with birth parents during childhood will jeopardise the adoptive parent-child relationship and prevent the child bonding or attaching to the adoptive parents.[37] They argue that the child will become confused about who his or her 'real' parents are and feel insecure about his or her position in the adoptive family. Studies have documented that some children worry that their biological parents will take them away.[38]

4.54 Some people argue that adoptive parents will be inhibited by birth parents and not feel able to care for their children exactly as they wish. They may feel that they are not 'entitled' to the child and that they are continually being reminded that they are not the child's biological parents. This may "not only re-emphasize biological infertility, but lead to feelings of psychological infertility as well. They are not allowed to really psychologically parent the child."[39]

4.55 Finally, opponents of open adoption argue that continued contact with or knowledge of a relinquished child will only prolong birth parents' grief. By not making a complete break with the child, birth parents are continually reminded of their loss and prevented from mourning properly, healing and then getting on with their lives.

Conclusions

4.56 The Commission's provisional view is that the case for openness in adoption is very strong, and that the arguments against it are not convincing. While it is true that there has been little lengthy and detailed research on open adoption, it does not necessarily follow that the practice should not be pursued. As one commentator has pointed out:

> in the area of children's services, it is not always possible to await the definitive statement before we proceed with a new initiative which we know has a more just and equitable value base and will better serve the needs of our clients. In the face of demand...it is appropriate to proceed, carefully and confidently.[40]

4.57 Further, it seems to the Commission that while there has been little long-term research on open adoption, there has been research on closed adoption that has resoundingly stated that closed adoption is not in the best interests of adoptees and birth parents. In a number of studies, adult adoptees and birth parents have stated that they would have liked information about each other during the adoptee's childhood and even the opportunity to meet. Further, the Commission found in its review of the *Adoption Information Act* 1990 that many adoptive parents regretted not having access to information about their children's birth families when they were growing up.[41] Many felt that it would have made their task of parenting easier if they had had access to medical information and information about the birth family so that they could answer their children's questions more accurately and honestly.

4.58 It seems to the Commission that the trend in open adoption is the result of an accumulation of adoption knowledge from workers and members of the adoption community over the past thirty years or more. Adoption workers have applied certain theories to their practice and they have monitored the results. Adoptees, birth parents and adoptive parents have lived with the results of these theories and have spoken out about the positive and negative effects they have had on their relationships and their personal identities. The consensus of this experience seems to be that adoption needs to be more open and honest about the reality of adopted children's dual parentage. It seems to the Commission that this consensus of experience constitutes a considerable body of reliable research on which to justify the trend in favour of openness.

4.59 From the point of view of adoptive parents, there is strong evidence to suggest that the more open an adoption, the less threatened adoptive parents and consequently children feel by birth parents. Studies have found that "the more frequent and direct the contact [with biological parents] the less the adoptive parents worried about being the child's real parents or feeling entitled to the child. Parents who had letter-only contact were those who worried the most about biological parents wanting or taking the child back".[42] This illustrates the familiar pattern in adoption that parties are threatened by what they do not know. Limiting access to real knowledge can lead people to unnecessarily believe the worst of others.

4.60 The argument that birth parents are forced into a continual process of grieving by open adoption is easily dismissed on two grounds. First, it seems clear that it is in fact closed adoption that precipitates a continual grieving process. Birth parents claim that relinquishment without contact or information feels like the child has died, but without any of the finality of death. Birth parents have spent years worrying and wondering about their children, desperate to know if they are healthy and happy in their adoptive families. They say that if they had been allowed some information about their children their feelings of loss would have been easier to bear.[43] Second, birth parents should be able to make the decision about whether open adoption is damaging to them for

themselves. For too long birth mothers have been treated as irresponsible and incapable women who need social workers and adoptive parents to order their lives for them. If a woman can make the monumental decision to relinquish a child for adoption then she is surely capable of deciding whether contact is beneficial to her well-being and that of her child.

4.61 The Commission is therefore strongly inclined to recommend that adoption legislation should support the policy of open adoption. The promotion of openness and honesty is relevant to numerous issues in all forms of local and inter-country adoptions. They include:

access to information while the child is under 18;

access to information when the child is over 18;

contact with birth family during childhood;

involvement of birth family in selection of adopters; and

birth certificates.

4.62 In order to provide a focus for discussion about the reform of adoption legislation in New South Wales, the Commission has drafted a provisional set of general principles for the practice of adoption. These principles appear at the beginning of this chapter and they seek to incorporate the benefits of open adoption in a similar manner to that proposed by the Western Australian Adoption Legislative Review Committee (see above).

4.63 New South Wales could legislate for any of the forms of open adoption which exist or have been mooted in other jurisdictions. A model like that of the Northern Territory would mean that parties to all future adoptions would have complete access to information about one another and would be able to arrange contact without the involvement of a court or an adoption agency. In contrast, the Western Australian, Victorian and English models involve court approval to a greater or lesser degree. The Court's sanction for open adoption arrangements may be desirable for all the reasons raised earlier in the discussion of legal regulation of adoption - legal regulation ensures that all parties' interests, in particular the child's, are protected. The Court could be given power to make a variety of orders relating to contact depending on the circumstances of each child. All parties would be given the opportunity to be heard and provision could be made for the variation of an original order should the child, birth parents or adoptive parents so wish.

4.64 It is correct to approach the *Adoption of Children Act* 1965 on the basis that as far as possible deception and secrecy should be avoided.[44] This is not to say that all information should be open to universal scrutiny. It means that the relevant provisions of the Act should be approached on the basis that unless there is some clear justification for them, any rules involving deception or the withholding of information should be removed. The Commission would be very interested to receive submissions on the issue of the extent to which the law should actively implement or encourage openness, as distinct from creating a framework which relies heavily on the professional judgment of adoption workers and the other adults involved.

CONSEQUENCES OF ADOPTION

4.65 It is appropriate to consider what consequences should flow from an adoption order, considering the profound changes that have already occurred in adoption law and practice, and those that are likely to be recommended in this review. Two major questions arise. The first is whether or not there should be more than one type of adoption? It is important not to confuse "types" of adoption with "forms" of adoption. "Forms" of adoption has been used in this Paper to describe the different reasons how and why people come to be adopted. Inter-country adoption and step-parent adoption are two *forms* of adoption. Some jurisdictions have different *types* of adoption in the sense that they have simple adoption orders based on openness and more complex adoption orders that seek to completely sever the child from his or her birth family. The general guidelines drafted by the Commission and presented in this Paper are designed to provide the basic requirements that must be fulfilled in relation to the adoption of *any* child. The Commission has also drafted specialised guidelines in relation to the particular forms of adoption, such as inter-country adoption. There is enough flexibility within the guidelines to deal with the unique needs of each child placed for adoption. The preliminary court hearing, detailed below in

Chapter 5, requires all other alternatives to adoption to be considered in relation to the child who is the subject of the adoption application. For these reasons it is not relevant to consider different *types* of adoption, as a package of orders and arrangements will be tailored to meet the needs of each child.

4.66 The second question is whether the consequences of adoption should continue to be expressed in the terms of s 35, which reads as follows:-

> (1) For the purposes of the laws of New South Wales, but subject to this Act and to the provisions of any law of New South Wales that expressly distinguishes in any way between adopted children and children other than adopted children, upon the making of an adoption order -
>
> (a) the adopted child becomes a child of the adopter or adopters, and the adopter or adopters become the parents of the child, as if the child had been born to the adopter or adopters in lawful wedlock;
>
> (b) the adopted child ceases to be a child of any person who was a parent (whether natural or adoptive) of the child before the making of the adoption order, and any such person ceases to be a parent of the child;
>
> (c) the relationship to one another of all persons (including the adopted child and an adoptive parent or former parent of the adopted child) shall be determined on the basis of the foregoing provisions of this section so far as they are relevant;
>
> (d) any existing guardianship of the adopted child (including the Minister's guardianship of the child under section 90 of the *Children (Care and Protection) Act* 1987 ceases to have effect; and
>
> (e) any previous adoption of the child (whether effected under the law of New South Wales or otherwise) ceases to have effect.

4.67 In the Commission's provisional view, this phrasing pays insufficient attention to the continuing relevance of the child's birth family, especially, as a result of the *Adoption Information Act* 1990, once the child has reached 18. A general definition of the consequences of adoption should retain the important idea that adoption involves a transfer of the child from one family to another without going so far as to suggest that the birth family is to be disregarded completely. The Commission invites comment on the following formulation:

> Subject to the provisions of this Act, etc
>
> (i) the adopter or adopters shall become the legal parent(s) of the child;
>
> (ii) the birth parent or birth parents of the child shall no longer be the legal parent(s) of the child;
>
> (iii) the legal relationships between the child and all other persons shall be determined on the basis of the foregoing provisions so far as they are relevant;
>
> (iv) any existing guardianship of the adopted child (including the Minister's guardianship under the *Children (Care and Protection) Act* 1987 ceases to have effect; and
>
> (v) any previous adoption of the child (whether effected under the law of New South Wales or otherwise) ceases to have effect.

Assessing the alternatives to adoption

4.68 An important theme of much recent writing on adoption, and of many submissions to the Commission, is that the law and practice of adoption should ensure that adoption and its alternatives are carefully considered in relation to each child. This principle does not involve a denigration of adoption, or the view that adoption is necessarily the "second best", or the "last resort". It means only that in each case the system should ensure, as

far as possible, that thoughtful and informed decisions are made relating to each child. It has been suggested, for example, that in the case of step-parent adoptions other alternatives are sometimes not fully explored; conversely, in the case of children in alternative care it is sometimes suggested that the possibility of adoption is not always given adequate consideration. The principle simply means that the law and practice should seek to avoid hasty or incomplete analysis of what is best for each child. The principle suggests that we should, for example, consider the adequacy of information and counselling available to the people involved in adoptions, and, whether the formal procedures are effective in ensuring that the court (or other decision-maker) hears all points of view and explores all possibilities before coming to a decision.

4.69 The principle obviously has application at the time the adoption is being arranged. But since adoption has lifelong consequences it extends further. It is arguable, for example, that in the event that the adoptive placement breaks down, the possibility of the birth parents helping should be explored. Anecdotal evidence to the Commission indicates that in the past, once a birth parent had relinquished a child for adoption, there was no further reference to the birth parent if the adoptive placement broke down. In such an event a new placement was sought. Yet it may be the case that, at the time of a breakdown in the adoptive placement the birth parent will have both the capacity and the willingness to take care of the child. Whether this is so will depend on the circumstances of each case. In the Commission's view the law should not exclude the possibility that in such circumstances it will be in the child's interest to return to the birth parent(s).

ACCOMMODATING DIFFERENT KINDS OF ADOPTEES

4.70 In the Commission's view, a review of adoption legislation must take into account the very different forms of adoption that are in current use. It is necessary to consider the adequacy of the law in relation to each of these forms. Although all the principles discussed so far in this Chapter apply to adoption generally, each form of adoption raises an additional set of unique issues. For this reason, we proceed to consider each form of adoption in turn, seeking to identify its particular characteristics and determining its objectives.

Adoption of infants

4.71 In the 1960s the most important form of adoption involved the adoption of healthy new-born Australian infants by unrelated adopters in New South Wales, where the adopters had been selected by the Department of Community Services or by an authorised adoption agency. The structure of the existing Act still reflects the dominance of this form of adoption. As is well known, in recent times very few healthy newborn babies have been relinquished for adoption. Although the numbers are now small, this form of adoption still exists, and appears likely to continue.

4.72 This form of adoption has a number of distinguishing features:

> the newborn baby will have no capacity to participate in the decision-making and will have existing ties that are different from those that older children are likely to have;
>
> the mother is likely to be affected by the physical and emotional consequences of the birth, presenting a difficult problem in obtaining her free and informed consent; and
>
> there is no difficulty in finding applicants for adoptions of this kind.

4.73 As mentioned earlier, this form of adoption was the norm at the time the existing Act was drafted, and its provisions represent an attempt to deal with the features mentioned above. It is necessary to reconsider the existing rules in the context of the new openness in adoption practice, and also in the light of evidence about the experiences of birth mothers at the time of adoption and later.

4.74 Adoption law in these cases should have the following objectives:

> To present birth mothers with adequate and correct information about alternatives to adoption and the consequences of open adoption.

To ensure that the mother's consent is fully informed and freely given and that she has a reasonable45 amount of time in which to make her decision and is free to revoke it if desired.

To involve the birth parent(s) in the placement plan as far as possible in order to facilitate openness.

To establish a situation where the child will have the benefits of a secure home with the adopters.

To ensure as far as possible that the adoption will promote the child's life-long welfare.

Adoption of children in care

4.75 In this category we include not only children who are wards of state, or otherwise under the guardianship of the welfare authorities, but also children who are in foster care or institutional care, either arranged privately or through a non-government agency such as Barnardos Australia.

4.76 Adoption represents one of a number of options for children in alternative care. Generally speaking, these children have come into care as a result of the inability or unwillingness of their parents to look after them. Their case histories often involve neglect or abuse. Most have had some contact with their parents or other members of their birth families, and some remain in communication with them. Some have been abandoned by the parents, some voluntarily given to the welfare agencies, and some have come into care as a result of court proceedings.

4.77 The legal guardianship of these children may have been placed with the Department of Community Services, or with foster parents, or with a non-government agency. In some cases it may remain with the parents. In practice, decision-making will normally have been a complex and extended process, involving numerous meetings with those concerned, in order to achieve an agreed plan of action. The general policy of the agencies is to allow the children to remain in the care of their parents if possible. It is not uncommon for children to be returned to their parents' care, perhaps for a trial period, if this seems feasible. The desire to keep open the possibility of a return to the birth parent(s) is one of the factors which tends to lead the agencies to defer any irrevocable decision.

4.78 On the other hand, there is a formidable body of professional social work opinion supporting a policy of "permanency planning". This refers to policies which are designed to prevent the situation where a child "drifts" from one temporary placement to another. Permanency planning seeks to achieve a permanent placement, ideally in a family, within a reasonably short time. It is generally based on the view, frequently articulated by child development experts, that children need a secure and stable family life in order to develop well. Advocates of permanency planning tend to argue that agencies should be very slow to remove children from their homes; appropriate support should be given to allow the parents to retain the children if at all possible. However, if the child has to be removed, then permanency planning suggests that unless the child can be restored home in a relatively short time, another permanent placement should be sought, rather than the child being placed on a trial or indefinite basis with foster parents or in residential care. Permanency planning, while having many adherents, is open to different interpretations, and is in any case only one approach to the difficult and controversial topic of placement of children in care.

4.79 Adoption, then, represents one option for these children. From the point of view of permanency planning, it is often seen as the best outcome for those children who cannot return home as it represents the most complete and permanent transfer of a child known to the law.

4.80 The law should take account of the fact that these children are different in at least two important ways from new-born babies. First, these children will normally know their biological families, and may well have had contact with them; some may continue to do so. However inadequate their parenting may have been, they still have "history, memories and attachments which cannot be erased."[46] For these children, there is no question of adoption concealing their birth circumstances or obliterating the memory of their birth family.

4.81 Second, the age of the child is relevant to the approach to placement. While attachment theories might suggest that it is highly desirable for newborn babies to be placed as soon as possible with the proposed adopters, there is not the same urgency with older children. Again, where older children are to be adopted it will

normally be important to explain the situation to them, and perhaps have a period during which they get to know the adopters before moving in to live with them. These processes may not be appropriate with newborn babies.

4.82 Third, in these cases adoption represents one of a range of choices. The law should ensure so far as possible that those responsible have examined all options carefully. This task entails an assessment of the children and their existing relationships, and an assessment of the possible placements available for the children, immediately and in the future.

4.83 Fourth, it may be desirable to relax the existing rules relating to adoption applications in at least some of these cases. As we have seen, the model developed for the adoption of newborn babies involved an agency selecting adopters with whom the child was to be placed. In the case of a child who has been in foster care, and it is proposed that the child be adopted by the foster parents, there will be no question of *selecting* adoptive parents. Instead, the question will be whether the child's existing placement should be confirmed by adoption. In this respect, the situation is somewhat similar to that of a step-parent or other relative who seeks to adopt. Yet, under the present law, step-parents and relatives may themselves apply to adopt, and the parent may consent to the child's adoption by those individuals. It may well be that in some foster care cases, like step-parent cases, the birth parents will know the foster parents and be willing for the child to be adopted by them, though not for the child to be available for placement with other unknown people. In these cases there may be merit, therefore, in allowing the foster parents to make the adoption application. This reasoning is consistent with the United Kingdom Review, which recommends that it should be possible for persons with whom the child has been living to make applications for adoption.[47] In order to protect the child, it seems right to retain the rule that the Court should receive a report on the proposed adoption, or that there be some equivalent to a "placement hearing" prior to the placement being made. The concept of a pre-placement hearing is discussed below.

4.84 It may be argued that anything that would encourage foster parents to make adoption applications should be avoided. It is important that, at least in most cases, foster parents should work towards the restoration of the child with the birth family. The prospect of being able to apply for the adoption of the child may lead people to become foster parents as a "back door" to adoption. This issue is of less concern in an era of "open adoption", since adoption is not likely to reduce any existing contact between the child and the birth family. Further, adoption will mean the end of the foster care allowance, which will be a significant disincentive for some foster parents. It should be remembered, too, that the children in this category are likely to be older, and to have serious difficulties arising from their pre-placement experience. The care of these children, whether or not they are adopted, presents many challenges as well as rewards, and the demand for them as adoptive children is much lower than the demand for healthy babies. Finally, because the children will often be at an age where their views will be highly relevant, there may be less danger that adoption will proceed in cases where it does not advance the child's interests. For these reasons, it is the Commission's provisional view that foster parents should be allowed to adopt where such an adoption will be in the best interests of the child.

4.85 In relation to children in care, adoption law should, in particular, have the following characteristics:

it should provide for the child to be consulted and actively involved in the planning process as far as the child's understanding and maturity allows;

it should ensure as far as possible that members of the child's birth family are involved in the planning process and encouraged as far as practicable to maintain an involvement in the child's life;

it should ensure that before an adoption order is made a careful and thorough assessment is made of the range of possible placements;

where it is decided that the child should be adopted, careful consideration should be given to the choices available within adoption, for example, whether the child should continue to have the same first name, and even surname; and

where it is proposed that the child be adopted by foster parents, the law should provide that the application may be brought either by the foster parents themselves or by an adoption agency, and that the birth parents may give consent either to the adoption of the child by the foster parents, or to the adoption of the child by any persons.

Intra-family adoptions

4.86 Some adoptions involve only members of a family (understood in a wide sense). The main example is adoption by a parent and step-parent, but occasionally intra-family adoptions are by other relatives, mainly grandparents. The existing law distinguishes between these adoptions and those involving non-relatives. In short, the parties themselves can arrange the adoption, and apply to the Court for the order, although a report is required from the Department of Community Services or an agency.

4.87 The use of adoption to change legal relationships within families takes a number of forms. It includes the following cases:

i after the death of her husband, the father of their child, a mother remarries and adopts the child with her new husband;

ii after separation from her husband, the mother remarries and, with her new husband, adopts the child;

iii after separation from the husband, with whom she lived in a de facto relationship, the mother marries and adopts the child with her new husband; and

iv the parents of a woman adopt her child; that is, adoption of the child by his or her grandparents.

4.88 Adoptions of this kind have some common characteristics. The placement of the child is not normally in doubt; the issue is the legal status of the relationship between the care givers and the child. There may be an assumption that there are fewer risks to the child where the adoption is within the extended family. However, some intra-family adoptions superimpose the new legal relationship onto an existing one, producing a sometimes bizarre mix of adoptive and birth relationships. Thus in example (iv), above, adoption means that the child becomes, in a legal sense, her own mother's sister (since they are both now legally the children of the grandmother - the mother by birth and the child by adoption). In step-parent adoptions, this problem does not arise, since the mother's new husband in examples (i) - (iii) did not previously have a legally recognised relationship with the children.[48]

4.89 The literature indicates that in some cases intra-family adoptions are used inappropriately. Step-parent adoption, in particular, seems too strong a measure where the only purpose is to change a child's name or secure guardianship. It is often argued that the law should ensure that adoption is only used in step-parent cases where it is clear that other measures, such as guardianship or other orders, are insufficient. Thus the National Minimum Principles in Adoption state that:

> Adoption should not be considered for children in step-families or living with relatives, unless it can be demonstrated that a guardianship order would not serve their needs.[49]

4.90 The literature suggests that step-parent adoption can be used inappropriately as a device for shutting a parent out of the child's life. In fact, since the Family Court retains a power to make orders relating to custody, guardianship and access, adoption today does not necessarily have this effect.[50] The generally accepted view is that in the adjustments following family breakdown and reorganisation, it is normally in the child's interests for questions of access and guardianship, as well as other questions such as name, to be handled by the Family Court according to the usual assumptions about what is best for children. With something like a third of marriages ending in divorce, it seems unnecessary and generally undesirable to resort to a legal mechanism that seeks to disguise the child's actual history. On the other hand, few would argue that intra-family adoption can *never* be in the interests of children.

4.91 The most common response of commentators and legislators is that the power to make intra-family adoption orders should be retained, but that the legislation should include guidelines to reduce the likelihood that it will be used inappropriately. The most common formula is rather minimal, namely that the court should not make an order for adoption unless it is satisfied that doing so will promote the child's welfare better than making no order, or making some other orders.

4.92 In the Commission's provisional view, the law should ensure that the decision to allow adoption reflects an informed and careful assessment of whether the child's interests will be promoted by the various legal consequences of adoption, and in particular, whether the desired objectives might be equally achieved without court orders, or by other court orders such as orders for custody, or change of name.

4.93 Submissions to the Commission have also drawn attention to a technical difficulty in step-parent adoptions. Due to the way the Act is currently drafted, if a woman remarries and wants her new husband to adopt the children from her first marriage, she herself must go through the process of adopting her own children as part of a couple with her new husband. The Commission received several calls from women who thought that this was anachronistic and inappropriate, the most poignant being from a woman who was told incorrectly by her solicitor that she would have to abandon her children for a period of time before she could apply to adopt them. It is difficult to see any merit in the existing requirement. The Commission can see no reason why a woman who is the child's natural mother should be forced to relinquish and then adopt her child in these circumstances. If, in such cases, adoption is found to be the best possible alternative for a child in this situation, the child's step-father should be able to adopt the child in his capacity as a single person without any change in the status of the birth mother.

"Special needs" adoptions

4.94 "Special needs" adoptions refer to the adoption of children whose needs require special qualities in the adopting parents. Such needs may arise from the fact that a child is older or disadvantaged by some physical or intellectual disability. In the past many of these children would have been regarded as "unadoptable", but in recent times adoption agencies have been keen to use adoption to provide homes for these children, some of whom might otherwise have lived indefinitely in institutions. In practice, these adoptions are sometimes subsidised and the selection of adoptive parents reflects the special needs of the child. There is some overlap between this category and the adoption of children in care.

4.95 The most obvious feature of these adoptions is that it is often difficult to find suitable and willing adoptive parents. It may be that in some cases the benefits these children would obtain from being cared for in a secure family environment would outweigh factors that in other situations would be more important. For example, a physically and intellectually handicapped child may have a very urgent need for intensive caring, requiring special skills from the adoptive parents. It may be that a child's unique needs do not relate so much to the general requirements of adoptive parents, as discussed in Chapter 6 of this Paper, as much as they require these very specialised parenting skills. In these circumstances, the law should facilitate a placement of a child with such parents, rather than rigidly apply the general guidelines for the selection of adoptive parents. The Department or the authorised adoption agency should seek to use the selection criteria that are relevant to the particular child, however, these needs may be so great as to take them outside the realm of the general guidelines.

4.96 In the case of these adoptions, adoption law should ensure that every reasonable effort is made to find, assess and support suitable adoptive parents. The needs of the particular child may well justify measures which would be unacceptable in other forms of adoption, such as circulating advertisements seeking to recruit adoptive parents, and dispensing with normal criteria relating to such matters as age or domestic circumstances.

"Special case" adoptions

4.97 Special case adoptions have been discussed at length in Chapter 10 of this Paper.

Inter-country adoptions

4.98 Inter-country adoptions are discussed at length in Chapters 11, 12 and 13 of this Paper.

Adoption of adults

4.99 Adoption of adults is very rare, and it has been suggested that it might be better abolished. It seems, however, that in some circumstances adoption of adults may be advantageous, and no case has yet been made for its abolition. This issue is discussed further in Chapter 14 of this Paper.

FOOTNOTES

1. *Family Law Act* 1975 (Cth) s 64(1)(a).

2. The Council of Social Welfare Ministers *National Minimum Principles in Adoption* (June 1993). The National Minimum Principles were prepared by State and Territory representatives on the Inter-country Adoption Standing Sub-Committee. See paras 1(17) - (19) at 5 and para 8(1) at 8.

3. *National Minimum Principles in Adoption,* para 1 (21) and (22) at 5, para 5(6), (9) and (10) at 7.

4. See the *National Minimum Principles in Adoption,* para 8(2) at 9.

5. See, for example, the discussion in *Re TLR and the Adoption of Children Act* (1967) 87 WN (Pt 1) (NSW) 40 (Myers J).

6. We consider in Chapter 5 the question whether adoption jurisdiction should be exercised by a tribunal rather than a court; the present discussion assumes that it will be continue to be exercised by the Supreme Court.

7. Carolyn Bridge has argued that recent New Zealand developments involve a “retreat from formalism”, leaving excessive control to those who have power within the extended family: “Changing the Nature of Adoption: Law Reform in England and New Zealand” (1993) 13 (1) *J Soc Public Teachers of Law* at 81-102 and 93-4.

8. *Adoption of Children Act* 1965 (NSW) s 17, 21.

9. Paragraph 4(1) at 6.

10. There was a period when the adoption certificate received by the adopters contained the surname of the birth mother. See New South Wales. Law Reform Commission *Review of the Adoption Information Act 1990* (Report 69, July 1992) at para 2.6.

11. New South Wales. Law Reform Commission *Review of the Adoption Information Act 1990* (Report 69, July 1992) at viii.

12. A Sorosky, A Baran and R Pannor *The Adoption Triangle* (Anchor Press, Doubleday, New York, 1978) at 207.

13. Ruby Lee Piester, Director of Development, Edna Gladney Maternity Home, Fort Worth, Texas cited in R McRoy, H Grotevant and K White *Openness in Adoption* (Praeger, New York, 1988) at 20.

14. New South Wales. Law Reform Commission *Review of the Adoption of Children Act 1965 (NSW)* (Issues Paper 9, May 1993) at para 3.12.

15. In accordance with the Department’s ‘Agreement and Undertaking’ that adoptive parents are required to sign, adoptive parents agree to provide an early photograph and news of the child for the natural parents and further information as may be requested by the Department from time to time. This agreement is not legally enforceable.

16. *Adoption Information Act* 1990 (NSW), s 6(2)(a).

17. Section 6(2)(b).

18. Section 32(3). The adoptive parents’ consents are not needed if they are dead, cannot be found or are incapable of giving consent: s 32(5).

19. Section 7(1)(b).

20. Section 7(2).

21. The *Convention on the Rights of the Child* Article 13(1).

22. Article 13(2).

23. *Adoption of Children Bill* 1993 (NT), cl 61 and 64.

24. Clause 63.

25. Western Australia. Adoption Legislative Review Committee Final Report: A New Approach to Adoption (February 1991) at 81.

26. The Committee's reason for not including Agreements in the Order of Adoption was that federal authorities would then require the adoptive parents to obtain the birth parents' consent for the issue of a passport for the child. This would amount to an unacceptable infringement on the adoptive parents' rights as parents.

27. *Adoption Act* 1984 (Vic), s 59a(c).

28. Section 59a(d).

29. Section 60(1).

30. Section 60(3).

31. England. Review of Adoption Law: Report to Ministers of an Interdepartmental Working Group (Department of Health and Welsh Office, October 1992) at 13.

32. F Fisher The Search for Anna Fisher (A Fields Books, New York, 1973); J Triseliotis In Search of Origins (Routledge and Kegan Paul, London 1973); P Toynbee Lost Children: The Story of Adopted Children Searching for their Mothers (Hutchinson, London 1985); S Tabak Self Search: A Program for Adult Adopted Persons (Community Services, Victoria 1990).

33. R Pannor and A Baran "Open Adoption as Standard Practice" in Child Welfare (1984) 63(3) 245 at 247.

34. See, for example, C Bridge "Changing the Nature of Adoption: Law Reform in England and New Zealand" (1993) 13 (1) J Soc Public Teachers of Law 81-102, at 91 and "Changing the Nature and Effect of Adoption" (1991) 3 JCL at 37.

35. Australian Families for Children Submission (17 September 1993) at 2.

36. A Byrd "The Case for Confidential Adoption" (1988) 46 (Fall) Public Welfare at 20.

37. Some commentators argue that adopted children never bond with their adoptive parents because bonding is a result of the psychological and physiological closeness between mother and child during pregnancy and birth which can never be duplicated or broken. They argue that adoptees "attach" to their adoptive parents. Attachment is the psychological connection between people that permits them to have significance to each other. People learn how to make attachments from their primary caretakers in the first few years of their lives. See K Watson "The Case for Open Adoption" (1988) 46 (Fall) Public Welfare 24 at 26-7. Others argue that adoptees do bond with adoptive parents and that bonding is not restricted to biological relations. See A Byrd "The Case for Confidential Adoption" (1988) 46 (Fall) Public Welfare at 20.

38. D Brodzinsky, L Singer and A Braff "Children's Understanding of Adoption" (1984) 55 Child Development at 869.

39. A Bryd, at 22.

40. M Van Keppel “Openness in adoption: birth parents and negotiated adoption agreements” Adoption and Fostering (1991) 15(4) 81 at 85.

41. New South Wales. Law Reform Commission Review of the Adoption Information Act 1990 (Report 69, July 1992) at para 5.123 - 5.126.

42. M Berry “The effects of open adoption on biological and adoptive parents and the children: the arguments and the evidence” Child Welfare (1991) LXX (6) 637 at 645 referring to N Belbas “Staying in touch: Empathy in Open Adoptions” (Smith College School for Social Work, 1986): R McRoy, H Grotevant and K White Openness in Adoption (Praeger, New York 1988). Also see C Dominick Early Contact in Adoption: Contact between Birth Mothers and Adoptive Parents at the time of and after the Adoption (Research section, Head office of the Department of Social Welfare, Wellington 1988) at 189-90.

43. New South Wales. Law Reform Commission Review of the Adoption Information Act 1990 (Report 69, July 1992) at para 5.38-5.51; L Gross “How Are You, Baby Green?” A Study of how receiving Information Helps Mothers who have Placed Their Children for Adoption (School of Social Studies, South Australian Institute of Technology, 1984).

43. New South Wales. Law Reform Commission *Review of the Adoption Information Act 1990* (Report 69, July 1992) at para 5.38-5.51; L Gross *“How Are You, Baby Green?” A Study of how receiving Information Helps Mothers who have Placed Their Children for Adoption* (School of Social Studies, South Australian Institute of Technology, 1984).

44. Similarly, the Western Australian *A New Approach to Adoption: Final Report* (February 1991), prepared by the Adoption Legislative Review Committee, states: “... the reality that the adoptive child has two sets of parents must be recognised. It is the Committee’s view, based on research and anecdotal evidence, that any attempt to obscure this fact by a shroud of secrecy is dysfunctional for all concerned. This does not imply that both sets of parents would or should be actively involved in parenting the child. “The child should never be placed in the position of having to choose between stands taken by the two parties...”. See para 3.17.

45. See Chapter 7 of this Paper for a discussion about what constitutes a reasonable amount of time in the giving of consent by a birth mother.

46. C Bridge, “Changing the Nature of Adoption: Law Reform in England and New Zealand” (1993) 13 (1) *J Soc Public Teachers of Law* 81-102, at 87(quoting John Triseliotis).

47. United Kingdom. Department of Health and Welsh Office *Review of Adoption Law: Report to Ministers of an Interdepartmental Working Group* recommends , at pages 42-3, that the care givers should be able to apply at any time in cases where there is agreement from those with parental responsibilities, and (where the child is in care) the local authority. Where there is no agreement, the persons should be able to apply where the child has lived with them for a total of three years within the last period of five years; or where the court gives leave. However, “a local authority foster parent needs the consent of the authority”.

48. Existing legislation requires the mother to adopt her own child; but this rule can easily be changed and does not require discussion here.

49. Paragraph 2(2) at 6.

50. See Chapter 14 for a discussion of issues in step-parent adoption arising out of amendments to the *Family Law Act* 1975 (Cth).

5. Regulation of Adoption Placements

PROVISIONAL PROPOSALS FOR REFORM

1. The period between the consent being given and the making of the adoption order should be more closely regulated by law; but the form of regulation should be flexible enough to facilitate the making of sound decisions in the wide variety of situations that adoption can involve.

2. There should be a *preliminary hearing,* which would occur early in the adoption planning process, and result in court orders authorising the arrangements which are intended to lead to adoption.

3. The *adoption hearing* should occur after a period during which all necessary arrangements, assessments and probationary periods have been completed, and the court should be asked to make the order of adoption.

4. The preliminary hearing should be required in all forms of adoption. The issues arising will to some extent vary from one form of adoption to another.

5. The adoption hearing should be similar to adoption hearings under the existing law. The court should have available to it the materials filed at the preliminary hearing, together with further information relating to events since that hearing. The judge who dealt with the preliminary hearing should also deal with the adoption hearing.

6. The court at the preliminary hearing should have a discretion to dispense with the need for a later adoption hearing and proceed to make final orders, if satisfied, in the particular circumstances of the case, that it would be in the interest of the child to do so.

7. Adoption jurisdiction should continue to be exercised by the Supreme Court.

POINTS FOR FURTHER DISCUSSION

There should be mechanisms designed to ensure that in all cases the court is able to form an independent view of what the child's welfare requires, and that, at least where children wish it, their voice will be heard. The Commission is also concerned that such measures should not impose unfair responsibilities on children, and that they should be cost-effective. It would welcome comment on what mechanisms would best meet these concerns.

PRELIMINARY MATTERS

The prohibition on informal or private adoption placements

5.1 Chapter 4 of this Paper considered one of the basic features of the Act, namely the prohibition of private placements for adoption. Except in the case of adoptions by parents and relatives and foster parents, adoptions are to be arranged only by the Department of Community Services or an authorised agency. For the reasons given in Chapter 4, the Commission's provisional view is that this feature of the Act should be retained.

Legal responsibility for the child prior to the adoption order

5.2 A second basic feature of the present law is that once all necessary parental consents have been given (or dispensed with by court order), legal responsibility for the child is automatically transferred to the Director-General. (In practice, this means that the powers are given to officers of the Department of Community Services, because the Director-General delegates his or her powers to departmental officers.) This is as a result of s 34 of the Act, which provides, in substance, that on the giving of consent the Director-General is the sole guardian of the child. The Director-General normally retains such guardianship until the adoption order is made.[1] It follows that the signing of consent has two quite distinct consequences. The first and most obvious is that it enables an adoption order to be made, normally after the revocation period of 30 days has elapsed. This aspect, and the general question of consent, will be considered in more detail in Chapter 7. The second consequence of

giving consent is to transfer guardianship of the child to the Director-General, and this is the subject of the present discussion.

5.3 The practical result of the transfer of guardianship upon the signing of consents is that what happens to the child between the giving of consent and the making of the adoption order becomes a matter for the Director-General to decide. He or she has the legal power to determine, for example, whether the child remains with a birth parent, or is placed with temporary foster parents, or is placed with the proposed adoptive parents. As guardian, the Director-General can make decisions on such matters as whether there will be any sharing of information between the two families, or any contact between the child and a birth parent.

5.4 The legislation provides no rules or guidelines as to how the Director-General is to exercise his or her powers as guardian. The only form of supervision appears to be a provision that if the Director-General has remained guardian for one year, he or she must make a written report to the Court, which may, if it thinks fit, make orders for the care and control of the child; it may also order that the child remain under the Director-General's guardianship for another year.[2]

5.5 The existing law, clearly enough, is highly convenient for the Department of Community Services. It means that departmental staff can control the arrangements for the child according to their prevailing policies, until the adoption order is made. Departmental officers can deal swiftly with any matters that arise during this period; not only matters relating to the placement of the child, but also problems such as a need to arrange for medical treatment. Despite these important practical advantages for the administration of adoption, there are reasons to reconsider the existing legal framework for the period between the giving of consent and the making of an adoption order.

5.6 In contrast to the wide powers of the Department, neither the child, the birth parents and/or adoptive parents have any significant legal powers during this period. From a legal point of view, when birth parents sign consent forms they place the child almost entirely in the control of the Department, their only real power being the power to revoke consent within the 30 day period. It may well be that *as a matter of practice* the Department exercises its power in a way that takes account of the wishes of the individuals involved, but there is no legal guarantee that this will happen.

5.7 A second consequence of the existing law is that the Court's effectiveness is potentially undermined. Under the existing provisions, it would be possible for a child to be placed with proposed adopters immediately after consent has been given, but the adoption application delayed for up to one year without any form of external scrutiny. If an application was made towards the end of that period, the child might be so settled that the placement would be difficult to challenge. In the result, the court would be presented with something of a *fait accompli*. At the other extreme, the adoption application could be made very shortly after, or even before, the child has been placed with the proposed adopters. Similar flexibility applies to applications to dispense with consent. These could be made separately, before any adoption placement has been arranged, or at the time the adoption application comes before the court.

5.8 The law therefore gives the Director-General enormous power, and provides very little guidance as to the timing or sequence of the various steps associated with adoption applications. This extensive power is at the expense of the rights of the individuals involved, and, as one submission pointed out, creates the possibility, depending on what decisions are taken by the adoption authorities, that the Court will be little more than a "rubber stamp".[3] A contrast may be drawn with the child welfare area, in which there is considerable legal regulation of the power of the Department, which can intervene only if the child is "in need of care", and must comply with a set of rules relating to such matters as the time within which the child must be brought before the Court.[4]

5.9 It may well be that the Department's practice has avoided many of the potential difficulties arising from the present law. However it is one of the tasks of the present review to bring the law more into line with good practice. The Commission's provisional view is that the period between the consent being given and the making of the adoption order should be more closely regulated by law; but the form of regulation should be flexible enough to facilitate the making of sound decisions in the wide variety of situations that adoption can involve. The following proposal is directed to this end. For present purposes we shall assume that the Supreme Court will retain jurisdiction in adoption; the question whether this should be so is discussed later in this Chapter.

A TWO-STAGE PROCESS

Legal regulation

5.10 The Commission's tentative view is that the desired objectives of flexibility and legal regulation might be met by a two-stage court process. The first stage we shall call the "preliminary hearing", and the second the "adoption hearing". The *preliminary hearing* would occur early in the adoption planning process, and result in court orders authorising the arrangements which are intended to lead to adoption. We envisage that there would be a rule requiring a preliminary hearing within, say, one month after the giving of any necessary parental consents. Where consents have not been given, a preliminary hearing would be necessary to obtain orders dispensing with them. The *adoption hearing* would occur after a period during which all necessary arrangements, assessments and probationary periods have been completed, and the court would be asked to make the order of adoption. Any change in the regime established by the orders made at the preliminary hearing, prior to the adoption hearing, would require the authorisation of the court.

The preliminary hearing

5.11 The purpose of the preliminary hearing is to provide legal authority for the arrangements leading to the proposed adoption. Guardianship of the child will not be automatically transferred to the Director-General when consent is given for the adoption. Instead, the Court will have power at the preliminary hearing to make whatever orders are appropriate for the particular case. Such orders may include, for example:

> that custody of the child should be transferred to identified temporary foster parents for a prescribed period;
>
> that the child should be placed in the custody of the proposed adopters;
>
> that the birth parents, or other members of the birth family, should be provided with information or photographs, or should be allowed to visit the child;
>
> that until the adoption hearing the child should be known by certain names;
>
> that certain persons should be restrained from interfering with or contacting the child;
>
> that guardianship of the child should be transferred to the Director-General (or to other persons);
>
> that certain persons should be made parties to the process (eg by having the right to be served with documents, and to be heard in the adoption hearing, and to be involved in any further hearings prior to the adoption hearing); and
>
> that the consent of certain persons should be dispensed with.

5.12 It is envisaged that in the vast majority of cases the court will approve arrangements that have been previously worked out among the parties. There will be no need for a full hearing in such cases. An important role for the court, however, would be to ensure that the necessary people had been appropriately involved in the proceedings, and, for example, that any consents given by the parents or the child were freely given after appropriate counselling. If the court was not satisfied about such matters, it could, for example, adjourn the hearing while the unresolved issues were considered. Provision should be made for the independent representation of the child.

5.13 Such a hearing would have a number of potential advantages. It would involve judicial scrutiny at an early stage, and in cases where the adoption was not seen to be in the child's interests, it would provide an opportunity to take other steps which would better promote the child's welfare. In cases where the adoption plan is pursued - no doubt the majority - the hearing could have several benefits: it could involve orders which give appropriate security to the people having the child's care, whether they are foster parents or the intending adopters; they would know that the orders made by the Court would remain in place unless set aside; and they would have the opportunity to participate in any proceedings seeking to change the arrangements. Further, the process itself

would provide all parties with the opportunity to explain and clarify their position, and know that they had been given a fair hearing.

5.14 It is intended that this preliminary hearing would be required in all forms of adoption. The issues arising would to some extent vary from one form of adoption to another. In the case of infants, the focus would normally be on whether full and free consent had been given, the extent to which it is proposed that the adoption be "open", and the suitability of the proposed adopters with regards to meeting the needs of the particular child. In the case of wards, the issues would often include a consideration of the child's wishes and understanding of the proposal, and a comparison of the likely benefits of the various alternatives, such as foster care and adoption. In the case of special needs, the suitability of the proposed adopters to provide for the child's particular special needs will be important, and also, perhaps, questions about possible financial or other support. In the case of inter-country adoptions, and local adoptions involving racial or ethnic issues, questions of cultural continuity would be of special concern.

5.15 The Commission has considered whether the preliminary hearing should be required only in some adoption applications. Its present view, however, is that in all cases there are important issues involving the legal status of the child and the child's relationship with various family members, and that it is impossible to identify categories of adoption where there would be no need for a preliminary hearing. In particular, it would be wrong to confine preliminary hearings to contested matters, since it is especially important in uncontested cases that an independent body such as the court examines, at an early stage, whether the proposed arrangements are desirable. It is not only in contested matters that the needs of the child must be properly represented in the decision-making process.

The adoption hearing

5.16 The adoption hearing would be similar to adoption hearings under the existing law. The court would have available to it the materials filed at the preliminary hearing, together with further information relating to events since that hearing. The judge who dealt with the preliminary hearing should also deal with the adoption hearing. The court could deal with applications to dispense with consent which had not been determined at the preliminary hearing, and could, if there was fresh evidence, reconsider any dispensing orders made at the preliminary hearing.

Dispensing with two hearings in some cases

5.17 Although it does not seem possible to identify categories of cases where two hearings are not required, there might well be individual cases where having two hearings would involve unnecessary expense. The Commission therefore proposes that the Court at the preliminary hearing should have a discretion to dispense with the need for a later adoption hearing and proceed to make final orders, if satisfied, in the particular circumstances of the case, that it would be in the interests of the child to do so.

Independent representation at court hearings

5.18 The court's role is to bring an independent and impartial approach to the decisions relating to the child. In contested cases, it will give the relevant parties the opportunity to be heard, and make a decision. Its role is more problematical in uncontested cases, especially at the preliminary hearing. Where agreement has been reached, in the absence of anyone raising possible difficulties or presenting contrary views, there is always a danger that approval by a court will involve very limited scrutiny. It is important that the court process involves substantial, not token, scrutiny.

5.19 It seems necessary, therefore, that some person or body quite unconnected with the adoption be available to draw the court's attention to any difficulties, and to ensure that the court has examined all other alternatives.

5.20 A closely related issue, the subject of a number of submissions, is the representation of the children. As noted above, most submissions agreed with the position that the interests of the child should be the paramount consideration when devising adoption law and policy. The *Convention on the Rights of the Child* provides:

> Article 12

> 1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

5.21 Children's rights to be heard in legal proceedings have been increasingly recognised in recent times. In criminal cases, there have been a number of reforms intended to increase the participation of child witnesses, especially in cases where they are alleged to have been the victims of abuse. In child welfare law, there are a number of provisions designed to ensure that children have a right to be heard, and they are usually represented, at least in metropolitan areas, through the legal aid system.

5.22 The *Family Law Act* 1975 (Cth) contains provisions to the effect that the wishes of children should be taken into account by the Court and given such weight as is appropriate in the light of their maturity and other circumstances. It also provides that children should not be required to express wishes. The Court can appoint a separate representative for the child. Such appointments are not uncommon, and are often made where child abuse is alleged, but they are funded through the legal aid system and are limited by resource considerations. In Family Court matters, children's wishes are often conveyed to the Court in various ways, and most importantly through "family reports" normally prepared by members of the Court's counselling staff.

5.23 By contrast, the *Adoption of Children Act* 1965 makes no provision for children's wishes to be taken into account or for their separate representation. It does however include a provision that children over 12 years of age are normally required to consent to their own adoption.[5] Further, the Act contains the remarkable provision that where the child is over 12 and the application is by persons who have brought up the child for five years before the application, the child's consent is the *only* consent required.[6] The question of consent is discussed in Chapter 7.

Views in submissions

5.24 Centacare and Barnardos indicated in their submissions that there should be greater opportunity for children to actively participate in court proceedings relating to adoption.[7] The contrary view has been presented by the Country Women's Association.[8] The former have argued that the presence of the child in court at the time the adoption order is made is of special significance to the child, providing a ceremony by which the transfer of family membership and the commitment of the parties is recorded. This submission does not touch upon the more substantive issue of the involvement of the child in the selection of adoptive parents.

5.25 Several submissions identified the need for provisions relating to the input of the child to be maintained, or expanded. Centacare (Adoption Services), for example, recommended:

> ...that the child must always be consulted to ascertain their view on the intended adoption, commensurate with age and level of understanding, and from the age of 12 consultation with the child should be explicitly included in the legislation.[9]

5.26 The submission went so far as to suggest that the child be vested with a right to veto any adoption which he or she wished not to proceed. Separate representation should be made available to the child and that, in contested matters, such representation should be compulsory. The NSW Committee on Adoption have submitted that the child should have the status of a party to the adoption upon reaching the age of 14 years, while younger children should be represented by a guardian *ad litem*.[10] It added that where a child of 12 years or older dissented from an adoption order of which he or she was the subject, the Court should require very good reasons for proceeding against those wishes.[11]

5.27 The issues raised are both familiar and difficult. On the one hand it is arguable that the child is in the best position to determine questions about his or her best interests. It would seem difficult to argue that in a process in

which, theoretically, the child's interests are paramount, the child was placed with unwanted adoptive parents simply because his or her views were not considered relevant or important. However, it is also arguable that a child, particularly a young child, may be ill-equipped emotionally and/or intellectually to make such decisions for his or herself. Further, it may be unfair to children to impose such a choice on them. This aspect underlies the provision of the *Family Law Act* preventing children from being required to express wishes, and the practice of the Family Court normally to refuse to allow children to be required to give evidence. There is also a danger that if children play a significant role in the decision-making process, they might be subjected to pressures from various family members to exercise their powers in particular ways, and so influence the decision in favour of a particular adult.

A new approach

5.28 What should the new adoption legislation provide in this area? One familiar approach is to give the court a discretionary power to appoint a representative for the child,[12] but such appointments would be unlikely to be made in uncontested cases, and it is precisely in these cases that independent scrutiny is required.

5.29 A second approach is to appoint some person or body in a role analogous to that of counsel assisting a commission of inquiry. It is not necessary that such a person be a lawyer, but it is important that the person be truly independent. A social worker employed by another adoption agency would perhaps be inappropriate, because of the danger that he or she would tend to accept the assumptions of the agency involved. Ideally, perhaps the person should have a knowledge of adoption issues but would not have an association with adoption workers or agencies that was so close as to inhibit the person from making a truly independent contribution. It is a difficult question whether such a person should be regarded as the child's representative.[13] While the child's welfare is the paramount consideration, the law should also ensure, for example, that birth parents' consent is fully informed, and that necessary notice of the proceedings has been given to people concerned in the child's life. It may be that the purpose to be served is somewhat wider than is suggested by the notion of a child's representative.

5.30 A further issue is to what extent the person should feel obliged to present arguments in accordance with what the child wants, as distinct from what the person feels would be in the child's interests.[14]

5.31 Another possible approach, which could be used in addition to or instead of separate representation, would be for an independent person to prepare a report for the Court, and that report would include material on the child's wishes, feelings and perceptions.

5.32 The Commission's present view is that there should be mechanisms designed to ensure that in all cases the Court is able to assist in forming an independent view of what the child's welfare requires, and that, at least where children wish it, their voice will be heard. The Commission is also concerned that such measures should not impose unfair responsibilities on children, and that they should be cost-effective. It would welcome comment on what mechanisms would best meet these concerns.

WHICH COURT OR BODY?

5.33 In 1976, the McLelland Committee recommended that jurisdiction in adoption be exercised by a tribunal rather than the Supreme Court.[15] It argued that this conclusion flowed from an acceptance of the premise that no person has a right to another person's child, and the consequent need to assess applicants' suitability for children. It wrote that the court was "no longer the ideal forum for determining adoption issues" because a multi-disciplinary approach was required because "judgments of social issues with their behavioural nuances are best freed from the adversary system", and because:

> the wider implications of adoption lend themselves to a continual up-dating of adoption practice. It is, therefore, appropriate that those involved in the practice of adoption should also be involved in the decision-making process, not only in relation to individual cases but also in the determination and the refinement of criteria.

5.34 An amending bill was subsequently presented to Parliament. It would have given adoption jurisdiction to a tribunal, but would not have given the tribunal the policy-setting role envisaged by the McLelland Committee. While there was considerable support at the time for a tribunal, the specific terms of the bill received a mixed press, and it never became law.[16]

5.35 The creation of a tribunal was strongly supported by the submission of the NSW Committee on Adoption (COA).[17] The Submission makes the following comments about the Supreme Court:

> The Supreme Court, in terms of its work load, accessibility and responsiveness is not the most appropriate Court for many adoption issues. In making this comment the COA is mindful of
>
> the delay in having matters heard may disadvantage a child
>
> the Supreme Court judges vary considerably in their knowledge of adoption principles
>
> the setting is adversarial and not conducive to the consideration of behavioural nuances
>
> the parties to an adoption rarely participate in the Court process
>
> consideration of adoption issues is frequently from the perspective of adult needs and views - not from the perspective of the welfare of the child. The child is usually unrepresented.
>
> The COA notes that the Supreme Court is generally only involved in the adoption matter sometime after an adoption placement has been made and has the function of “rubber stamping” that placement decision.

5.36 The proposed tribunal would be presided over by a legal practitioner and including members of other relevant professions. Like the McLelland Committee in 1976, the COA recommends giving the tribunal a wider role than the Supreme Court has now:

> The functions of the Tribunal would be to
>
> i oversight (sic) consent taking and placement decisions.
>
> ii make placement orders approving the placement of a child for the purposes of adoption prior to the making of an adoption order.
>
> iii consider dispensation of parental consent prior to selection of suitable adoptive parents and make freeing orders
>
> iv make final orders of adoption
>
> v consider and determine appeals against refusal by the Director-General or the Principal Officer of a private adoption agency to approve applications for suitability to adopt
>
> vi consider and determine appeals against revocation by the Director-General of the licence of a private adoption agency
>
> vii provide general monitoring of adoption practice in both private agencies and in the Department of Community Services
>
> viii dispense with the need for 2 hearings in some circumstances.

5.37 The COA submission also recommends that the tribunal would employ independent caseworkers who would makes assessments and reports on various matters. These include the extent to which the birth parent(s) had been offered appropriate information, and had freely consented, and (where appropriate) the wishes of the child.

5.38 Some of the COA proposals, such as the legal representation of the child, and the idea of an early hearing to authorise the placement, could be implemented without substituting a tribunal for the Court.

5.39 The question whether a tribunal should replace the Supreme Court raises a number of important issues, mentioned in the following paragraphs, on which the Commission would welcome comments.

Advantages of a tribunal

5.40 There might well be advantages in having orders made by a body with expertise in adoption. However, while different views may be taken of the merits of particular decisions, the Commission is not aware of any evidence to support the suggestion that a tribunal would be more likely than the Court to consider the issues from the perspective of the child, at least where the same procedures, such as having the child represented, were involved.

5.41 The Commission would appreciate further comment on the desirability of combining policy-making and adjudication in one body. It is desirable, of course, that the best available professional advice be used in developing adoption practice and policy, but this could perhaps be achieved in other ways than by giving jurisdiction to a tribunal. Under the present system, through departmental staff and staff of adoption agencies, and through the NSW Committee on Adoption, practice is developed under the influence of professional and expert opinion, and it is not obvious that the results would necessarily be better if there were to be a tribunal.

Disadvantages of a tribunal

5.42 While a tribunal might have the advantage of expertise, it might have disadvantages too. Specialist tribunals may lack the independence of courts, and may be subjected to pressure to conform to the prevailing wisdom, or the wishes of the government of the day. They may also be more vulnerable than a court to the criticism that they embrace a particular theory or approach in areas where there are competing theories. Adoption involves wide-ranging consequences for all those involved, and a very significant alteration of the legal status of individuals. Courts, while lacking specific expertise, are characterised by independence and a preoccupation with procedural fairness. It is arguable that these are important qualities in adoption, and that the most satisfactory system is one in which the final decisions are made by such bodies, having the benefit of expertise in the form of reports and evidence from adoption agencies.

The Commission's view

5.43 The question whether jurisdiction in adoption should be exercised by a court or a tribunal turns partly on a more general question of assessing the relative importance of independence and expertise. It cannot be said that either view has clearly prevailed in New South Wales. Although power to alter people's legal status is generally reserved for courts, in some areas, such as guardianship, special tribunals have been established. There appears to be no satisfactory evidence about the relative performance of courts and tribunals in adoption. The Commission's provisional view is that there is no obviously "correct" answer to the choice between a court and a tribunal. There are arguments each way.

5.44 Finally, it is possible that the respective merits of the Court and a tribunal may depend on the nature of the proceedings. For example, it might be desirable for a tribunal to deal with uncontested cases - the vast majority - but for the Supreme Court to deal with contested cases. Another approach attempting to combine the best of both systems would be to provide for an appeal, by way of full rehearing, to the Supreme Court; such an appeal could be instituted by any of the parties, or by the child's representative.

5.45 Assuming that jurisdiction is to be exercised by a court, it would be possible to provide in the legislation for such jurisdiction to be exercised by the Family Court of Australia, or by the Supreme Court, or by the children's court. Investing the Family Court of Australia with adoption jurisdiction would involve State-federal issues which are discussed elsewhere.[18] Although some jurisdictions have allowed inferior courts to exercise jurisdiction in adoption,[19] the Commission has received no submission suggesting that this approach should be followed in New South Wales, and is inclined at this stage to recommend that adoption jurisdiction should continue to be exercised by the Supreme Court.

APPEALS AND REVIEW

5.46 In the Issues Paper, we raised questions about the most appropriate forms for appeals and review in adoption. Centacare has submitted that the individual adoption agencies should provide a system of appeal for those prospective adoptive parents who are unsuccessful in their application.[20] Further, the Department of Community Services 'Appeals and Complaints Mechanism' was in an appropriate position to be the final stage in the appeal process.[21] If the proposals in this Chapter are accepted, these issues will become less urgent, since much of the decision-making power will be transferred from the Department to the Court, especially in the preliminary hearing. In relation to questions that arise between the giving of consent and the final disposition of the case, the individuals involved will be able to have their say, both at the preliminary hearing and at the final hearing. There will be an appeal from the judge to the Court of Appeal, on usual principles. Those principles, very briefly stated, are that the Court of Appeal will set aside an appeal from a judge exercising discretionary powers where there has been some clear error of fact or law; the Court of Appeal does not allow an appeal merely because, had it been hearing the original proceedings, the appeal judges would have preferred a different result.

FOOTNOTES

1. The Director-General's guardianship may also cease where consent is revoked, where the court makes an order, where the Director-General decides to place the child in the care of a parent or other person, where the Director-General relinquishes guardianship, and where the child becomes a ward under the *Children (Care and Protection) Act* 1987: s 34(5).

2. *Adoption of Children Act* 1965 (NSW) s 34(3) and (4).

3. The New South Wales Committee on Adoption *Submission* (9 September, 1993), at 30.

4. *Children (Care and Protection) Act* NSW (1987).

5. Section 33.

6. Section 26(4A).

7. Barnardos Australia *Submission* (6 September 1993) at 12.

8. Country Women's Association of New South Wales *Submission* (23 June 1993) at 2.

9. Centacare (Adoption Services) *Submission* (31 August 1993) at 13.

10. NSW Committee on Adoption Inc *Submission* (9 September 1993) at 40.

11. NSW Committee on Adoption Inc *Submission* (9 September 1993) at 40.

12. As in the *Family Law Act* 1975 (Cth) s 65.

13. This was recommended in the Western Australian Review, Adoption Legislative Review Committee, *A New Approach to Adoption: Final Report,* (February 1991), recommendation 15 at 22.

14. This is a familiar and difficult issue in relation to *Family Law Act* 1975 (Cth) s 65. See, for example, Family Law Council, *Representation of Children in Family Law Proceedings* (AGPS, 1989); *In the Marriage of Bennett* (1991) 14 Fam LR 397; *Separate Representative v JHE and GAW (1993) 16 Fam LR 485*.

15. *Adoption Legislation: Report of the Review Committee* (Department of Youth, Ethnic and Community Affairs, Sydney, 1976), at 9-11.

16. *Review of Adoption Policy and Practice, NSW*, Report (Marshall Report), 1984, at 134-5; R Chisholm, "The end of Uniformity: New Adoption Laws for NSW" 5(2) *Legal Service Bulletin* 1980 at 49-50.

17. New South Wales Committee on Adoption *Submission* (9 September, 1993), at 30-33.

18. See below, Chapter 14.

19. See, for example, *Adoption Act* 1984 (Vic) s 6 (County Court).

20. Centacare (Adoption Services) *Submission* (31 August 1993) at 14.

21. Centacare (Adoption Service) *Submission)* (31 August 1993) at 140.

6. Regulation of Adoption Placements

PROVISIONAL PROPSALS FOR REFORM

1. The assessment of applicants should be based on the suitability (as defined) of the applicant in relation to the particular child.

2. The assessment of applicants should be conducted in a way that is consistent with the *Anti-Discrimination Act* 1977 (NSW) and with similar Commonwealth laws and international agreements to which Australia is a party.

3. Where the child is capable of expressing wishes that are relevant to the selection of adoptive parents, those wishes should be given such weight as is appropriate in the light of the child's maturity, understanding, and other relevant considerations.

4. The assessment should take into account the wishes of the birth parents, and where appropriate other members of the birth family, having regard to the long-term interests of the child and the possibility of the child having contact with members of the birth family, or obtaining information about them, at any time in the child's life.

5. The assessment should take into account the applicant's attitudes to possible contact between the child and members of the birth family at any time in the child's life, and to the obtaining of information as provided in Part *XYZ* of the Act . *(This will refer to that part of the Act which incorporates the provisions now contained in the Adoption Information Act* 1990) .

6. The assessment should take into account the general desirability of placing children with adoptive parents who are of an age at which it is common for people in the community to become parents.

7. The assessment should take into account the extent to which by reason of age, ill-health or other factors the applicant might find it difficult to satisfy the needs of the adopted child in the way parents are expected to do, both before and after the adopted child reaches adulthood.

8. Children should not be placed for adoption with applicants who are more than 55 years of age, or more than 41 years older than the child, unless there are circumstances indicating that notwithstanding this the applicant is suitable to adopt the child.

9. Consideration of an applicant's suitability to adopt a particular child will involve an examination of his/her family and other relationships.

10. The assessment should ensure that unfair or unjustified assumptions are not made about relevance of applicants' sexual orientation and their suitability as adoptive parents. The assessment should focus on the ability of the applicant(s) to meet the parenting needs of the particular child.

11. The religious beliefs or practices of applicants should not be taken into account except where they can reasonably be regarded as useful in determining the applicant's suitability. They might be relevant, for example, where the child has religious beliefs, or where there is likely to be future contact between the child and members of the birth family, and the birth parents have expressed wishes in relation to the religious upbringing of the child.

12. The assessment should take account of the willingness and ability of the applicants to provide personally for the needs of the child. There should not however be a standard requirement, for example, that one of the adoptive parents should give full-time care to the child for the first year. This matter should be assessed in relation to each child. Some disturbed or handicapped children may indeed require such

full-time care from a parent. In other cases, for example teenage children adopted by foster parents, such a requirement would be quite inappropriate.

13. The applicant's health should be taken into account in assessing their suitability to adopt the child.

14. The assessment should give consideration to the effect on the child of any other children of the applicants. Children should not be placed with applicants who have a child under two years of age, unless there are circumstances indicating that notwithstanding this the applicant is suitable to adopt the child.

15. There should be no requirement that applicants must be infertile. No preference should be given on the basis of applicants' ability or inability to have their own biological children. However the assessment should include a consideration of the applicants' attitudes to their own fertility or infertility, and the likely impact of such attitudes on their suitability as adoptive parents. This applies equally to local and inter-country adoptions.

16. *Continuity*: Assessment should take into account the desirability of maintaining continuity in children's lives. Especially where children are beyond infancy, consideration should be given to any advantages that might derive from placement with adopters who will raise the child in familiar circumstances. More specifically, there will usually be advantages to children in placements which enable the children to maintain aspects of their lifestyle, language, and culture. Normally, it will be appropriate to place children with adopters of similar racial or ethnic background.

17. *Normality*: Adoption placements should not express a preference for a particular sector or class of the community. It should take into account the existence of many family forms in the community, and the diversity of views about child rearing, lifestyle, and other values. They should however recognise that adopted children might be harmed or distressed if, in addition to dealing with their adoptive status, they have to deal with other important and visible differences between their family and the families of their peers. It is proper in making adoption placements to seek to reduce such additional reasons why adopted children might feel disadvantaged by being seen as different from their peers.

18. The formal eligibility criteria should be flexible. However, guidelines should identify the factors that may be taken into account in assessing suitability, and these should include marital status and family structures. Guidelines relating to the "pool" of approved applicants might include such provisions as the following:-

The selection of applicants for the pool shall be based on the following principles:

1. In these provisions:

(a) "Applicant" includes individual applicants and joint applicants.

(b) "The pool" means those applicants who at the relevant time have been approved as eligible to adopt children and whose applications remain current.

(c) An applicant is "suitable", in relation to a particular child, if and only if:

(i) the applicant has been assessed as being able to meet the needs of that child;

(ii) no other applicants known to the Department appear better able to meet the needs of that child; and

(iii) it appears unlikely that another applicant might be found within a reasonable time and using reasonable efforts, who would be better able to meet the needs of that child.

2. At any given time, the membership of the pool should be determined having regard to the following considerations:

(a) the need to maximise the likelihood of placing children who become available for adoption with adopters who will meet their needs to the maximum possible extent.

(b) The desirability of avoiding undue delay between entry to the pool and placement of a child, and

(c) The need to give appropriate consideration to all persons currently in the pool in relation to each child becoming available for adoption.

3. Membership of the pool does not create any right to have a child placed with the applicant for the purpose of adoption.

4. In relation to each child becoming available for adoption, the Department shall consider in the first place whether any applicants are suitable to adopt that child. Birth parents should be given reasonable opportunity to be involved in the process of selecting applicants from the pool.

5. If an applicant in the pool is suitable to adopt the child, the child may be placed with that applicant for the purpose of adoption.

6. If no applicant in the pool is suitable to adopt the child, the Department may take such steps as it sees fit to arrange placement of the child with suitable adopters. Such steps may include making inquiries from other adoption agencies, and other individuals or organisations, and may include the use of advertising or other reasonable measures in order to seek suitable adoptive parents for the child.

POINTS FOR FURTHER DISCUSSION

The Commission has not yet reached a conclusion on whether infertility should be taken into account in a limited way as a method of choosing between applicants who are otherwise indistinguishable in terms of suitability to adopt children. If it were to be, the law would base selection in the first instance on criteria that relate to the child's welfare, but would also state that, provided that there is no disadvantage to the child, preference should be given to infertile applicants. The Commission would welcome submissions on this general topic, and in particular on this issue.

While there may be cogent arguments in favour of requiring one adoptive parent to stay at home for the first six months after the child is placed, there are also arguments against this. The requirement would appear to restrict adoption to those who can afford to live on one income alone (unless the couple have jobs which entitle them to parental leave). The requirement appears to be based on assumptions that would be questioned by many parents in the community today, namely that good parenting requires one full-time carer for the child or, perhaps, that young children need to be in the care of their mothers. These assumptions appear to reject the contrary view that parents who have flexible jobs or part-time jobs are capable of bonding with their child in the hours before and after work and on weekends. The Commission would be glad to hear comment on the desirability of such a requirement.

INTRODUCTION

6.1 This Chapter deals with one of the more difficult and controversial aspects of adoption law, namely the selection of adopters. The Chapter first examines existing law and practice, then considers a number of particular issues such as adoption by single people and homosexual couples. The final section of the chapter deals with more general and procedural issues.

6.2 Submissions indicated that there was overwhelming support for the basic propositions that the process of adoption should be regulated by law, and that the child's welfare should remain the paramount consideration in adoption. There is widespread sympathy for infertile adults who wish to have children, and the stress and inconvenience of being assessed for the purpose of adoption is also well recognised. However, it has frequently been pointed out that the principle that the child's welfare is paramount means that it is not the purpose of adoption to provide children to fulfil the needs of adults who wish to create or complete their families. The purpose is to provide the most suitable families for children who require permanent parental care. It follows that

the law should provide a framework for determining which of the available intending adopters are best able to promote the particular child's welfare. As is frequently stressed in the adoption literature, and in many submissions to the Commission, no individual or couple have the right to adopt a child.[1] This applies equally to local and to inter-country adoption.

6.3 The specific tasks of the selection process varies from one category of adoption to another. In some cases, such as step-parent adoption, there is no question of selection at all, the issue normally being whether the child's welfare will be served by changing the child's legal relationship to those who will continue to have custody of the child. In other cases, such as children with special needs, the main task may be to find people willing and able to care for a child with particular needs. In the case of healthy infants, the task may be to choose from a potentially very large number of applicants, many of whom would be well able to provide satisfactory families for the child.

6.4 It does not follow from the concept of the child's welfare as paramount that the law should be unfair or discriminatory in the selection of adoptive parents. Indeed, unfairness or discriminatory approaches to this difficult task, as well as being objectionable in themselves, would be inconsistent with treating the child's welfare as paramount. This issue will be considered in more detail after examining the present law.

THE PRESENT LAW AND PRACTICE

6.5 The present system gives the Department of Community Services and authorised adoption agencies the power to select parents using selection criteria that are specified by law. The selection process involves a number of different stages. To obtain an order for adoption, the applicants need to be approved by the Department of Community Services or an authorised adoption agency who present the application to the Court. The order for adoption can then be made only if the Court is satisfied about various matters.

Requirements for eligibility in the Act

6.6 The applicants must meet a number of requirements set out in the Act. For most of the legislative requirements, there is a degree of flexibility, and the Court is likely to relax them if this will promote a particular child's welfare. In practice, they are likely to be relaxed when it is difficult to find a suitable placement for a child, and the prospective adopters, notwithstanding their failure to meet the particular requirement, appear well qualified to serve the needs of the child. This is most often the case where the child has a special need such as a physical disability.

Age

6.7 The applicants must normally be 21 years or older and must be either 18 years older (male applicants) or 16 years older (female applicants) than the child.[2] In addition, the Court is required to have regard to their age, and that of the child, in considering their suitability to adopt the particular child.[3]

Marital status

6.8 Subject to various qualifications, the Court may only make adoption orders in favour of married couples. In particular circumstances, the Court can make an order in favour of one person.[4] In very restricted circumstances the Court can make an order in favour of a couple living in a de facto relationship.[5] This kind of order can normally be made only in relation to a child who has been brought up by the applicants for at least two years and the applicants' relationship must have lasted for at least three years. Such an order can also be made in relation to children with special needs and, where the child is Aboriginal, in favour of applicants who are Aboriginal.

Character

6.9 Each applicant must be "of good repute" and "a fit and proper person to fulfil the responsibilities of a parent".[6]

Religion and education

6.10 The religious convictions of the applicants and their intentions regarding the religious education of the child are not relevant to their general suitability to adopt.[7] However, the Court is required, when considering the applicants' suitability to adopt a particular child, to have regard to the "religious upbringing or convictions (if any) of the child and of the applicant or applicants".[8] Under this provision the Court would consider, for example, whether it would be wise for applicants of one religion to adopt a child who had embraced the beliefs and practices of a different religion. There is a similar provision about education. The Court must have regard to the "education (if any)" of the child and the applicants.[9] This appears to refer to the educational similarities between the child and the applicants and does not mean, for example, that the Court should prefer well-educated applicants.

6.11 Religion is also relevant in another way. The Act requires the Court to consider whether the applicants are suitable to adopt the particular child having regard to, amongst other things, "any wishes that have been expressed by a parent or guardian of the child in the instrument of consent...with respect to the religious upbringing of the child".[10] It seems clear that, although the contrary has been suggested,[11] this does not prevent an order being made contrary to such wishes, since the wishes are only one of a number of relevant matters which have to be taken into account. The provision is controversial because it assumes that the wishes of the relinquishing parents are a relevant consideration when assessing the suitability of the adoptive parents.[12]

Health

6.12 The state of health of the child and the applicants is also relevant.[13] In practice, this has been interpreted as requiring that the state of health of the applicants should not interfere with their ability to look after the child.

Other prescribed eligibility requirements

6.13 Under the powers contained in the regulations made under the Act, the Director-General of the Department of Community Services has published more specific criteria for the assessment of adoption applicants.[14] The assessment of a couple is based on a mixture of specific requirements, such as having Australian citizenship, and more general requirements, such as being "of good character and repute" and "mature and well-adjusted".[15]

6.14 Each applicant must have "the capacity to be a loving parent to an adopted child and to meet the social, cultural and special needs" of the child.[16] The criteria also require applicants to "have the capacity and willingness to... ensure the child is fully aware of his or her...culture and origin from the time of placement".[17] Applicants are to be between 21 and 55 and must not be more than 41 years older than the child proposed to be adopted.[18] If they have a child, the child must be at least two years older than the child to be adopted.[19]

6.15 There is also a requirement that the couple be infertile.[20] Unlike all the other criteria, which apply to all categories of adoption, this requirement does not apply to applicants for inter-country adoption.

Non-prescribed eligibility requirements

6.16 It appears that in addition to the prescribed matters, both the Department and the agencies require applicants to conform to other requirements. Some of these are described in this section. Since these are matters of practice it may well be that the Commission's present understanding is incomplete. The Commission would be glad to receive comments on the accuracy and comprehensiveness of what follows.

Undertakings for one parent to be a full-time carer

6.17 A recently approved Department policy requires both local and inter-country adoptive parents to give an undertaking that one of the parents will be a full-time carer for the child for six months after placement. The undertaking will be included in the general "agreement and undertaking" the adoptive parents have to sign when they take the child into their care. The Department's rationale is that adoptive parents have not had the nine month bonding process with their child that biological parents have had and they consequently need that time to bond with their child. The Department argues that adoptive parenting is different to biological parenting and that in accordance with the gazetted criteria, the parents need to be able to meet the "special needs" of an adopted

child.[21] Those "special needs" include a full-time parental carer for six months. The policy only applies to adoptive parents of pre-school age children.

6.18 The Department is particularly concerned about inter-country adoptees needing this full-time carer. Department officers feel that children who have been institutionalised and then moved to another country need time to settle in and "attach" to their new parents. If they are not given this opportunity, they may never attach.

6.19 Problems have apparently arisen in this area. On occasion, parents have signed an undertaking to stay at home for six months but have immediately returned to work once they have picked up their child. Undertakings are not binding so the Department cannot force people to comply with them.

6.20 While there may be cogent arguments in favour of requiring one adoptive parent to stay at home for six months, there are also arguments against this. The requirement would appear to restrict adoption to those who can afford to live on one income alone (unless the couple have jobs which entitle them to parental leave). The requirement appears to be based on assumptions that would be questioned by many parents in the community today, namely that good parenting requires one full-time carer for the child or, perhaps, that young children need to be in the care of their mothers. These assumptions appear to reject the contrary view that parents who have flexible jobs or part-time jobs are capable of bonding with their child in the hours before and after work and on weekends. The Commission would be glad to hear comment on the desirability of such a requirement.

Other requirements imposed by agencies

6.21 The Commission understands that the private agencies have developed additional criteria which applicants must meet to be accepted by those agencies. Examples are lower age criteria, religious affiliations[22] and acceptance of open adoption. An example is that Careforce apparently insist that applicants accept news and information exchange. In general, there appears to be a perception that private agencies have greater autonomy and flexibility than the Department to determine selection criteria. The Commission would be glad of comments in this area.

Assessment of applicants and allocation of children to approved applicants

6.22 All applicants normally go through an initial process of registering their interest in adoption and providing certain information, and also attending information sessions. This initial process is intended to serve an educational purpose, and a significant number of applicants, on learning what adoption involves, decide not to pursue their application. The Department attaches considerable importance to this initial procedure.

6.23 Those who remain applicants are then assessed for their suitability. The assessment of applicants and the allocation of children to approved applicants varies from one category of adoption to another. In the case of local adoption of healthy infants, there are, as already noted, far more people wishing to adopt than there are Australian children available for adoption. It seems that many of these people would fulfil the legislative requirements set out above. In practice, as the Commission understands it, the agencies periodically approve a limited number of applications so that at any given time there is a pool of potential adopters with whom available children may be placed. This pool may consist of as many as seventy couples, the general intention being that it should be large enough to include a range of adopters who will be suitable for the diverse needs of the children, but small enough that persons in the pool will have a realistic chance of having a child allocated to them within a reasonable time. The selection of people for particular children is not governed by any particular rules (for example, there is no "first come, first served" principle), but is essentially a professional decision made by the agency staff, based on their views about which of the available adopters will best meet the immediate and long-term needs of the particular child.

6.24 The practice relating to the pool has been described as follows:

> Management of the "Pool"
>
> All agencies involved in the adoption placement of locally born infants place approved applicant adoptive parents in a "pool" from which they can be selected as the most suitable adoptive parents for a child.

> In the Department applicants are accepted for inclusion in adoption training and assessment programs on the basis of minimal information provided in expressions of interest. If they then meet gazetted criteria placement in the pool is guaranteed. If more extensive information was known about some applicants at the time they were selected for training and assessment then it is possible they would not have been included. The use of minimal information to select applicants for assessment may equally keep out very suitable applicants from the "pool".
>
> Although applicants are selected to be assessed for approval on the basis of their having qualities which make it likely that they will be placed with a child within 2 years of approval some remain in the pool for a greater length of time. The main difficulty with the "pool" system is addressing the issue of applicants who remain unselected in the pool for greater than 3 years. This is an issue for all agencies who may need to address the methods of selection for including applicants in training.
>
> The pool system has been operating since 1987. In the first few years having applicants in the pool who were approved for adoption but unlikely to be placed with a child did not pose a problem but as the number of these applicants accumulates the issue of their continued pool membership needs to be addressed.
>
> Perhaps in response to frustration and a desire to be able to select adoptive parents suitable to the needs of a child some agency workers would like a maximum time of "pool life" to be considered eg 4 years. Under this suggestion any applicants who had not had a child placed with them within 4 years would be removed from the approved applicant pool. Applicants who currently continue to meet minimal gazetted criteria cannot be removed from the "pool".[23]

6.25 In "special needs" adoptions, the Department maintains a list of potential adopters, and from time to time advises them, by circular letter, of particular children who become available for adoption. Expressions of interest are invited. If more than one potential adopter comes forward, the Department selects the adopter, or adopters, considered to be the most suitable for that particular child.

6.26 In "special case" adoptions, and step-parent and relative adoptions, as previously explained there is normally no selection process required, as the question is whether the children's legal relationship with the person having their care should be changed by adoption.

6.27 In adoptions of wards, there may be a selection process using the pool, or, where the child is in foster care, it may be that the only question is whether the foster parents should adopt or should remain as foster parents.

6.28 The above paragraphs are also generally applicable to the selection processes used by private agencies, although the private agencies are not involved in all the categories of adoption. Generally, each agency selects from among the intending adopters who have applied to and been approved by that agency. The Commission understands, however, that in some cases, especially involving "difficult to place" children, there can be co-operation among agencies, and the Department, so that if the agency concerned has no suitable adopters, approved applicants from another agency might be considered.

The Court's discretion

6.29 If the applicants satisfy all the requirements and receive a child, the Court may, on hearing the application, make an order for the adoption of that child. In making its decision the Court must regard the child's welfare as the paramount consideration and must be satisfied that the child's welfare and interests will be promoted by the adoption.[24] It is thus possible that the Court will refuse to make an order in favour of applicants who have been approved to adopt the particular child. In practice, however, this is extremely unlikely, as, in the present system, the child has usually been with the intending adopters for a considerable time before the matter comes before the court.

PARTICULAR ISSUES RELATING TO SELECTION OF ADOPTIVE PARENTS

6.30 Present practice of adoption in New South Wales places a great deal of emphasis on the process of selecting adoptive parents. In the case of local infants and inter-country adoptions, the process has led to a number of complaints. To some extent, these complaints appear to resent or misunderstand the need for assessment or appear to assume that infertile couples have a right to a child, and to that extent have been dealt with in the introduction to this Chapter.

6.31 Some comments, however, raise more serious issues. A recurrent theme is that the process is "discriminatory", and this issue requires separate consideration.

Discrimination

6.32 The question arises whether some decisions that might be made in adoption, for example the selection of married couples in preference to unmarried couples, might violate the *Anti-Discrimination Act* 1977 (NSW) (ADA), and, more generally, what should be the relationship between the adoption laws and the ADA. A detailed consideration of this issue is more a matter for review of the ADA than the adoption legislation, but at least a brief consideration is necessary here.

6.33 It is important to realise that the ADA is restricted in two main ways. It applies only to discrimination on particular grounds, namely race, sex, marital status, physical impairment or homosexuality. Second, it applies only in particular areas, such as employment, and education. The main question then is how adoption relates to "the provision of services" as defined in the anti-discrimination legislation. The Anti-Discrimination Board (ADB) has submitted that adoption involves the provision of services (both to the relinquishing and adoptive/fostering parents) and as such, should not discriminate on any of the grounds listed above.[25] There may be room for argument about whether adoption falls within this phrase. It is now well established that in adoption the child's welfare is the paramount consideration, and that the main concern is to find homes in order to benefit children, not to supply children for the benefit of intending parents. It could therefore be argued that adoption should not be seen as an area in which there is "provision of services", and that the ADA does not apply. On the other hand, as the ADB has submitted, it might be that the selection of adoptive parents could be considered the provision of a service for the purpose of the Act. Similarly, if it were to be argued that some aspect of adoption practice discriminated among children on such grounds as race, it might be said that the adoption practice involved the provision of a service for children.

6.34 For the purpose of this discussion, it will be assumed that at least in some areas adoption involves the "provision of a service" within the meaning of the ADA.

What is the "discrimination" that the Act forbids?

6.35 While discrimination on each ground (race etc) is separately defined, the following definition, relating to marital status, is typical:-

> 39(1) A person discriminates against another person on the ground of his marital status if, on the ground of -
>
> (a) his marital status;
>
> (b) a characteristic that appertains generally to persons of his marital status;
>
> (c) a characteristic that is generally imputed to persons of his marital status,
>
> he treats him less favourably than in the same circumstances, or in circumstances which are not materially different, he treats or would treat a person of a different marital status.
>
> 39(2) ...
>
> 39(3) A person discriminates against another person on the ground of his marital status if he requires the person discriminated against to comply with a requirement or condition -

(a) with which a substantially higher proportion of persons not of the same marital status as the person discriminated against comply or are able to comply;

(b) ...

(c) with which the person discriminated against does not or is not able to comply.

6.36 The application of the ADA is however limited by the following provision:-

54(1) Nothing in this Act renders unlawful anything done by a person if it was necessary for him to do it in order to comply with a requirement of -

(a) any other Act...

(b) any regulation, ordinance, by-law, rule or other instrument made under any such other Act;

(c) an order of the Tribunal;

(d) an order of any court...

6.37 Under the present law, acts which are "necessary" as a result of the adoption legislation are not forbidden by the ADA. Where the adoption legislation *requires* that preference should be given to married couples who wish to adopt, doing so would not be prohibited. Similarly, if the legislation provides that those responsible for assessing applicants should assess which applicants will best promote the welfare of the child, and in doing so should take into account various matters, it seems clear that assessments made in good faith and on a professional basis, taking those matters into account, would not constitute unlawful discrimination under the ADA. This would be so even if they led, for example, to a higher rate of approval of married couples than of individuals or people in de facto relationships or other family structures. Age provides another example; an arbitrary preference for adoptive parents of a particular age might be vulnerable to attack as discrimination, whereas a policy of preferring applicants whose age in relation to the child would be normal for the community might well be defended as an appropriate selection criterion, based on the child's welfare.

6.38 The Anti-Discrimination Board, noting the exception under s 54, has submitted that the Department of Community Services, like other agencies which administer legislation containing discriminatory provisions:

...should be given 3 years to either amend the legislation or convince a parliamentary committee that it should remain despite the fact that it is discriminatory.

6.39 The question whether the existing legislation includes "discriminatory" provisions should be considered together with the ADB's submission that there are four key principles which should be adhered to in the area of adoption:[26]

Adoption laws and policies should:

1. not discriminate either directly or indirectly and should conform with international human rights standards

2. redress the consequences of past discriminatory law and policy

3. observe the standard of the child's interests being paramount by selecting adoptive parents on the basis of ability to meet the child's interests, not on the basis of stereotypes about marital status, sexual preference, age, etc

4. addressing (sic) the resolution of potential conflicts of rights by using the principles of proportionality (for example in the case of conflicts concerning religion, whether the harm the law or policy seeks to prevent is proportionate to the threat to the belief or practice at stake) and least intrusive means.

6.40 Discrimination of the kind envisaged by the legislation, for example preference for or against members of particular racial or religious groups, would clearly be objectionable. However in the context of adoption they would be objectionable both in themselves and because they would be unrelated to the fundamental objective of adoption, to promote the welfare of children.

6.41 On the four principles asserted by the ADB, the Commission's preliminary view is that the first is acceptable so long as it is applied consistently with the paramountcy of the child's welfare. It is appropriate for the law of adoption to select adoptive parents on the basis of their capacity to promote the welfare of the children concerned. Clearly it is wrong to discriminate in the sense of giving preference to intending adopters on grounds that are unrelated to the welfare of the children. An important example, discussed below, is a preference for infertile couples. On the other hand it is appropriate to prefer adopters who have characteristics that indicate they would be better able to promote the children's welfare than adopters who lacked those characteristics. 6.42 This view appears to conform with the fourth principle suggested by the ADB. Indeed quite a number of submissions linked non-discrimination with the child's welfare, urging that a focus on the welfare of children, combined with an unbiased consideration of the evidence on parenting capacity, would tend to eliminate discriminatory practices.[27]

6.43 It is important, as the ADB submits, that adoption does not rely on stereotypes. There should be a focus on the needs of each child who becomes available for adoption; such a focus should avoid stereotyping, both of the child (whose individual needs must be considered) and of the applicants (whose individual capacities need to be considered). Consistent with this, however, it is appropriate to take into account those characteristics of applicants that are reasonably thought to be helpful in predicting their suitability as adoptive parents.

6.44 The Commission takes the suggested second principle to mean that adoption laws and policies which have been discriminatory should be removed, and that if necessary measures should be put in place which would prevent such discrimination in the future. As indicated below, the abuse of adoption and child welfare laws in the past in order to assimilate Aboriginal children requires careful consideration in this regard. Understood in this way, the principle is valuable, and indeed it underlies some of the proposals outlined in this Chapter.

6.45 The second principle is not appropriate, however, if understood in a way that would compromise the welfare of children. Thus if it were considered that Parents A would promote the welfare of a particular child better than Parents B, it would be wrong to place the child with Parents B, even if it could be shown that people in the category of Parents B had been unfairly discriminated against in the past. The interests of children today should not be sacrificed in an effort to redress past injustices.

6.46 The fourth principle raises difficult issues. In brief, it appears appropriate if it suggests that the law's means should not be excessive or unduly intrusive, but not appropriate if it means that other interests can be allowed to prevail against the welfare of children. For example, it is reasonable to say that the process of assessment of intending adopters invades their rights to privacy. It is permissible, however, if the measures taken are really necessary in order that the selection process can maximise the chance of finding the most appropriate adopters for each child. It is not a matter of balancing the degree of intrusion into the applicants' privacy with the degree of benefit to the child. The principle also suggests, however, that it is important that persons seeking to adopt should be given full information about the nature of the assessment process, so that they can make an informed consent. As we shall see, this may have particular application in relation to inter-country adoption.

6.47 In summary, the Commission's provisional view is that the principle that the child's welfare is paramount and the need to avoid unlawful discrimination are fundamentally in harmony. Both require that the law should be based on grounds that relate to the welfare of the children, rather than on grounds which are based on stereotypes or are otherwise unrelated to children's welfare, or which seek to use adoption to achieve some other social ends. The application of this approach will require some further consideration in relation to particular aspects of adoption law, especially in relation to the selection of adopters.

Infertility

6.48 The present law treats infertility as an eligibility criterion in the case of local adoption but not in the case of inter-country adoptions. This apparent inconsistency may reflect the difficulty of the present topic, namely whether infertility should be among the matters taken into account in assessing applicants for adoption. Although much discussion of adoption proceeds on the assumption that the child's welfare is effectively the only principle,

in at least one respect existing law and practice cannot be seen in this light. The law's preference for the adoption of children by infertile people cannot easily be related to the child's welfare. There seems no evidence, and it would seem not even any argument, for the proposition that infertile people make better adoptive parents than people who have children of their own, or who are capable of having their own children. The Commission has received diametrically opposed submissions on this subject.

6.49 Both Centacare (Newcastle) and the NSW Committee on Adoption submitted that infertility should not be a criterion in the selection process. Centacare (Newcastle) stated:

> Currently infertility is an eligibility criteria which has resulted in some belief that adoption is a service for infertile couples to have children, whereas the purpose of adoption is to find a suitable, permanent family for a child unable to be cared for by its birth parents. Exclusion of infertility as an eligibility requirement could reduce this perception and ensure the potential pool of adoptive parents includes couples who have been assessed as being suitable adoptive parents.[28]

6.50 The Anglican Adoption Agency also supported removing infertility as a criterion.[29]

6.51 By contrast, the Women's Action Alliance [WAA] suggested that an adoption application should only be granted to infertile married couples, on the grounds that it is "only just" that the relatively few available children should be made available to people who cannot have biological children of their own.[30] Infertile couples have told the Commission that they think it would be unfair to allow fertile couples to apply to adopt as this would discriminate against the infertile and increase their difficulty in creating their family.

6.52 The "needs" of infertile people to have children of their own are closely linked with assumptions and aspirations in the community. If there are strong community expectations that most adults should have children of their own, couples will be inclined to see infertility as a problem. If such community expectations were weak, and if many fertile couples chose not to have children, infertile couples would presumably be less likely to see themselves as having a problem or need.

6.53 In these matters personal needs and aspirations are combined in a complex way with perceived altruism on the part of adoptive parents. There would be few adoptive parents who would claim that their own needs played absolutely no part in their decision to adopt children. Some infertile couples experience great disappointment on discovering their infertility, and then may undergo long, costly and stressful attempts to have children by assisted conception methods such as artificial insemination. They might turn to adoption as the last available option, and in some cases will do so only when they are towards the end of the normal child rearing ages. The literature, as well as the Commission's own inquiries, indicates that for some people the desire to adopt is very strong and urgent. The urgency may be accentuated when the applicants learn of the deprivation suffered by some children in Australia and overseas, and the potential of adoption to serve both their own needs and those of the children. The task of disentangling self-interest and altruism in these cases would be daunting indeed, and many accounts by people who have been through the experience indicate that intense self-questioning and re-evaluation is often involved.

6.54 In this context, adherence to the principle that the child's welfare is the paramount consideration has important ramifications. It means that adoption should not be seen as a relief or remedy for infertile couples, but as a service for children. In a number of areas, it stands between intending adopters and what they might see as a reasonable response to their own needs. One of these areas is the relevance of infertility in the selection of adopting parents. To put it briefly, from the point of view of the needs of infertile couples it might seem that justice requires that available children be placed with them; but it could also be argued that from the point of view of the welfare of the children, there is no satisfactory reason to give preference to infertile couples. The needs of children and the needs of intending adopters may conflict. For example, some older children, who have suffered various types of abuse, may be unable to bond completely with an adoptive family. Barnardo's Australia have found that in some cases it is preferable for the child and adoptive parent(s) to sign a contract with each other, clearly stating their roles and responsibilities to each other so that neither party can entertain false expectations of the others. Such arrangements may fall short of the aspirations of infertile couples to have a family of their own, but may be desirable for the children.

6.55 Historically, there has often been a close connection between adoption and infertility. Infertile couples have often been advised to consider adoption as a "solution" to the "problem" of not being able to "have a family". In other societies, and at other times, children have often been placed with childless couples or individuals, often within the extended family, with the aim of spreading the workload of child-rearing, although in such cases it is no doubt generally assumed that the children would be satisfactorily raised. However it appears to be widely accepted that adoption law should be based on the principle that the child's welfare is paramount, and indeed this is required by the *Convention on the Rights of the Child*.[31]

6.56 It can be argued that it is contrary to the child's interests to give preference to infertile couples, because to do so narrows the range of potential adopters and thus limits the field of choice. In theory, any narrowing of the pool of possible adopters might eliminate some people who would have been the best for the child. In practice, however, there are limits to our capacity to rank suitable adopters in order of merit. It is a difficult enough task to distinguish between suitable and unsuitable adopters. At least in the case of healthy local infants available for adoption, the number of suitable infertile couples, it could be argued, is so large that adding fertile adopters to it would not in reality improve the quality of adoptive placements.

6.57 This argument is more difficult to maintain in categories of adoption where the number of potential adopters is small, as with "special needs" children. If we assume that only a few people would be willing to adopt a "special needs" child, it may indeed prejudice the child if a preference for infertile adopters led to the exclusion of fertile adopters who might be demonstrably better for that child than any of the available infertile adopters. It is not surprising, therefore, that in practice infertility is not insisted upon in this category of adoptions; many of those who take "special needs" children are older parents, with families of their own. Their experiences within their own families, for example in caring for a child with a particular handicap, may be directly relevant to their suitability for the child in question.

6.58 The argument also assumes that infertile couples are at least as likely to be suitable as fertile couples to adopt children. If fertile adopters were significantly better adoption prospects than infertile couples, giving preference to the infertile could be seen as compromising the welfare of the child.

6.59 It is very difficult to estimate the respective merits of fertile and infertile couples as adopters. One difficulty is that, since we have had a preference for infertile couple, relatively few couples with children of their own have actually adopted. Another difficulty is that any research on past adoptions will largely be a study of people who have adopted in the climate of "closed" adoptions. If we assume that the policy of openness is here to stay, the welfare of children now being placed for adoption will be influenced by the capacity of their adoptive parents to be "open adoptive" parents. It is possible that this will be more difficult for infertile couples than for fertile couples. Perhaps fertile adopters, having their own children or the potential of their own children, will find it easier than infertile adopters to acknowledge the importance of the child's biological links, and to have a relationship with the birth parents. While their strong desire for children might well suggest that infertile couples would be very committed to the welfare of their adopted children, it is possible that the intensity of their feelings may lead to difficulties, especially in the context of open adoption. On the other hand, although their experience with other children, and the presence of other children in the family, might be advantageous, it is not clear to what extent there is a demand for adoption among fertile couples. It is possible that they may be less committed to the adopted child than infertile couples.

6.60 We cannot confidently state whether infertility is an advantage or disadvantage to intending adopters. Therefore, a strict approach to the principle that the child's welfare is paramount would suggest that infertility, being at best irrelevant to the child's welfare, should not be considered at all. Retaining a preference for infertile couples seems a clear violation of the principle that the child's welfare is to be the paramount consideration, a principle which is affirmed in the *Convention on the Rights of the Child*, and in the existing *Adoption of Children Act* 1965 (NSW).[32]

6.61 Other compromise approaches could be taken. The law could proceed on the basis that it is proper for the law to seek to accommodate the needs of infertile people provided that there is no disadvantage to the child.

6.62 The Commission has knowledge of one agency which has removed infertility as a criterion for adoption of infants.[33] Although this criterion was removed three years ago, the majority of applicants have continued to be those with a declared infertility. The agency has not been overwhelmed with applications from fertile couples

wishing to extend their families through adoption. By removing infertility as a criteria the agencies believe they have widened the range of suitable families for the children relinquished through that agency. They believe that in some instances persons with previous parenting experience have qualities which are required for specific children.

6.63 The Commission's provisional view is that in relation to infertility the rules should be the same for local and inter-country adoptions. There should be no requirement that applicants should be infertile. The Commission has not yet reached a conclusion on whether infertility should be taken into account in a limited way as a method of choosing between applicants who are otherwise indistinguishable in terms of suitability to adopt children. If it were to be so taken into account, the law would base selection in the first instance on criteria that relate to the child's welfare, but would also state that, provided that there is no disadvantage to the child, preference should be given to infertile applicants. The Commission would welcome submissions on this general topic, and in particular on this issue.

Marital status and family structure

6.64 Discussion about marital status as a selection criterion often reflects differences about personal and social morality. The question appears to be to what extent, if at all, marital status is a useful indicator of an individual's or a couple's suitability to adopt. If marital status were to be considered as an advantage, a number of possible legal consequences might follow. At the most extreme, the law could simply forbid adoption except by married couples. Another option would be a rule that people other than married couples could adopt only in particular cases, for example, particular categories of children, or cases where no married couple was available to adopt a child. An alternate version would be that the law could state that in assessing the suitability of adopters, a married couple should be assumed, other things being equal, to be better able to promote the welfare of children than other applicants.

6.65 A closely related criterion is family structure. Some submissions suggested, for example, that a stable heterosexual couple, whether married or not, should be preferred to others types of applicants, such as single applicants or homosexual partners. No doubt some of those who preferred adopters to be married treated marriage as an indication that the family would have certain characteristics, such as a commitment to a long-term relationship and to providing a warm, secure and stimulating environment for children. Some, though not all, would accept that the significant number of other family structures in the community, and the high rates of marriage breakdown, make marital status only an approximate guide to the strengths of the applicants.

6.66 The United Nations has declared 1994 to be the International Year of the Family. The Social Policy Directorate[34] has recommended that consideration should be given to promoting a concept of the family that recognises diversity both of individuals and of society itself.[35] The Australian Institute of Family Studies has produced the following definition of families:

> 'Family' means to each of us different things, so to try to generalise and say what is 'normal', 'typical', 'traditional' can mislead our thinking and ignore the diversity of realities facing families in the 1990s.
>
> 'Family' is not so much a matter of form, or type, or who is in it, as it is a matter of sharing, emotional closeness, mutual support, caring and creating and passing on values and traditions to the next generations
>
> 'Family' involves individuals who share common resources but who also have individual needs and rights.
>
> 'Family means both cooperation and conflict, both rights and responsibilities, both privacy and public obligations.[36]

6.67 As in the case of marital status, views about the respective merits of different family structures could be translated into a variety of legal proposals, from proposals forbidding adoption by the less favoured groups, to proposals that the law should assume, other things being equal, that certain family structures are more likely than others to promote children's welfare.

6.68 Perhaps predictably, submissions in this area indicated a wide variety of views. The ADB submitted that the Act should be amended so that de facto couples and single persons would not be eliminated on the basis of their marital status, pointing out that a variety of families exist in "real life", and that the policy of the Act and of the Board which implements it should not be based upon prescriptive "ideal concepts" of the family.[37] The Women's Electoral Lobby has also indicated that the current law and practice discriminates against de facto couples.[38] The Gay and Lesbian Rights Lobby argued:

> The emphasis on marital status should be removed from the legislation. It assumes that people who have made a public commitment by way of marriage and who have legal responsibility to each other are more likely to provide a child with stability and security. This assumption is problematic for a number of reasons:
>
> > A single person is equally capable of providing responsible and effective parenting to a child. Indeed it may even by argued that the threat of the adopters relationship breaking down is removed when it is a single person who adopts the child.
> >
> > Married couples may end their relationship. When the relationship breaks down the arrangements for the child depend largely on the individual circumstances of each parent which may not be in the best interests of the child.
> >
> > Lesbians and gay men cannot make formal public commitments to their relationship. There is no justification for regarding a factor, such as public commitment as a determinant of suitability for adoptive parents.

6.69 By contrast, the Women's Action Alliance (WAA) has submitted that adoptions should be restricted to being in favour of married (infertile) couples, arguing that such relationships provide the most secure and stable environment for the child to grow up in.[39] The Country Women's Association (CWA) presented a similar view, submitting that adoptions should be made to couples who were not married only in exceptional circumstances.[40] The WAA has drawn upon the recent report of the United States' *National Commission on America's Urban Families* in support of its views. The WAA believes that approval to single person adoptions ratifies a point of view which says that the one person (usually the father) is not important in the upbringing of the child, while de facto relationships lack the requisite commitment and stability for the adoption of a child to be workable.

6.70 Submissions from organisations working in the adoption area tended to argue that placements should generally reflect community norms, but should be sufficiently flexible to allow for children to be placed with single people, or non-traditional families, when this was appropriate for a particular child. A sample of submissions follow:-

Burnside:

> Marital status should be revised so that single people are eligible to adopt. There is no guarantee that marriage results in the stability of a relationship. Thus, de facto relationships are then considered one of the range of relationships able to adopt. As indicated this is especially appropriate for Aboriginal children and children with special needs.[41]

Careforce:

> The raison d'etre for the Anglican Church auspicing an adoption agency is to provide Christian families for children. As such intending adoptive applicants are in a married rather than de-facto relationship. However, should the needs of a child be better met by a single parent, such an applicant may be considered.[42]

The New South Wales Committee on Adoption:

> Based on practice wisdom and research it is known that children feel most secure and accepted when they are placed with families whose characteristics are within the norms of their community.

> A child, by virtue of his/her adoptive status is already different from his/her peers and unless he/she has identified needs which necessitate placement outside community norms that child should not be further marginalised.
>
> The issue becomes contentious when selection criteria is (sic) applied to applicants at the time of their application to be adoptive parents and not at the time of the placement decision when the needs of a specific child would be known.
>
> Currently all adoption agencies accept applications for the healthy infant and overseas adoption programs from those applicants who are within community norms. Such norms are usually reflected in criteria relating to age, length of relationship etc. In these programs the child is either too young to have identified specific needs, apart from those required by all children, or for whom no background information is available which would indicate the desirability of a placement outside community norms.[43]

Centacare (Adoption Services):

> Adopted children should not be marginalised. They should have the right to be placed with a family falling within society norms and therefore eligibility criteria need to reflect prevailing community norms. Legislation must make provision for relaxing the criteria in certain circumstances if the attributes of a particular family are considered to put them in the position of best meeting a particular child's needs, eg where there is a need for racial cultural continuity, medical/health needs of the child...
>
> This agency recommends that provision for flexibility in the criteria needs to exist for situations where it is necessary to recruit families who may be better suited to meeting the specific needs of a particular child.[44]

Centacare Newcastle:

> The assessment criteria should be able to address relevant issues such as own childhood/family of origin experiences; strength of marital relationship; parenting experience; attitude toward and expectations of parenting an adopted child; intention to inform child of adoptive status and method to achieve this; attitude toward ongoing exchange of information with birth parents. These are no "subjective" matters, but issues which can be professionally assessed to gain an understanding of the applicants suitability to be adoptive parents and meet the needs of an adopted child.[45]

6.71 In the Commission's provisional view, the law should be flexible, so as to maximise the range of choice for children who become available for adoption. In relation to de facto couples, for example, there are many reasons why a couple may choose not to enter into a marriage but decide to cohabit. Some couples may wish to avoid a painful repetition of a past failed marriage or may only want a more fleeting and insubstantial sort of relationship. Other couples may decide not to marry for reasons that have nothing to do with the strength of their relationship, or their ability to commit to each other or a child. Marriage is neither a necessary nor a sufficient indicator that a couple have a stable relationship or that they have good parenting skills. The same applies to the traditional male-female family structure; this should not be assumed to be the only family capable of serving the needs of adoptive children. It seems to the Commission, that in terms of meeting the needs of the child, it is important to look at the strength of the applicants' relationships with the important people in their lives, including their extended family, in order to predict their relationship with a particular child. The Commission is accordingly not inclined to favour restricting adoption to people who are married or who are members of particular types of families. It seems clearly wrong to say that homosexual couples, or single people, or de facto couples, can never be the right choice for any child.

6.72 On the other hand, there is some force in the argument that the experience of adopted children should not be rendered additionally different by being placed randomly or capriciously in atypical families. As indicated previously, the Commission is not presently attracted to the view that adoption placements should be used to redress past injustices or discrimination against particular groups in the community. The importance for children of placement in conventional family structures, however, should not be overstated. As is often pointed out, the

Australian community today has many different family forms, and it would be wrong for adoption law and practice to be based on an assumption that only the traditional nuclear family is capable of serving the needs of children.

6.73 The Commission's provisional view is that the formal eligibility criteria should be flexible. However guidelines should identify the sort of factors that may be taken into account in assessing suitability, and these should include marital status and family structures.

Sexual orientation: gay and lesbian applicants

6.74 The Act and the regulations are silent on the sexual orientation of adopting parents. Indeed, as pointed out in the Women's Electoral Lobby (WEL) submission, there is at least one example in which the both the Court and the Department of Community Services consented to an adoption order in favour of a woman who was known by both to be involved in a lesbian relationship. The Department, according to the WEL, made it clear that the adoption was made as a single parent adoption, and not in favour of a "same-sex" couple.

6.75 Nevertheless, as submissions pointed out, a number of existing rules and policies make it very difficult for gay and lesbian parents to adopt. First, the legislation itself contemplates adoption only by a married couple, or (in limited circumstances) by a de facto heterosexual couple, or by a single person (as in the example mentioned above). It is legally impossible to make an adoption order in favour of other combinations of persons, including same-sex relationships. Second, the requirement that one partner be either infertile or under medical advice not to fall pregnant discriminates against gay and lesbian people who are not medically infertile.[46]

6.76 A number of submissions, including the Gay and Lesbian Rights Lobby, the ADB and WEL have accordingly recommended that the Act should be amended so as to positively authorise the adoption of children by gay and lesbian couples.[47] The ACT Labor Party has approved a change of policy to ensure access to adoption for homosexual couples. A number of other submissions, individual and from organisations such as the Presbyterian Women's Association, were strongly opposed to the prospect of homosexual people becoming adoptive parents, arguing that their lifestyle choices make them unacceptable as parents.

6.77 The question of homosexual parenting has frequently been dealt with by the Family Court of Australia in the context of disputes relating to custody and guardianship of children. In summary, the Court has taken the view that a parent's homosexuality is simply one factor to be taken into account. In a much quoted passage, the first Chief Justice of the Family Court said:

> the homosexuality of the mother, or lesbianism, is not of itself a disqualifying factor...It is necessary for the Court to consider the extent to which a homosexual or lesbian relationship affects the parenting abilities of the mother... The ordinary observations of life would lead me to the view that one lesbian relationship should not necessarily be judged by another. There may be many variations in the personalities involved, in the intensity of feeling, in the social relationship with other persons, male and female, heterosexual or homosexual. It could be a mistake to regard a person's sexual proclivities as the dominating trait of their personality as if it were something that occupied their sole attention and thoughts...[48]

6.78 There is a considerable body of literature on the issues relating to homosexual parents. It is not necessary to engage in an extended discussion here. The research evidence appears to indicate that children brought up in homosexual households are not disadvantaged by the experience. The question is whether the law should exclude homosexual individuals or partners from adoption, or should allow them to apply and be assessed for their suitability.

6.79 The Commission's provisional view is that there is no established connection, positive or negative, between people's sexual orientation and their suitability as adoptive parents. It follows that there is no good reason for the law to exclude people from seeking to adopt, on the ground of their homosexual orientation or family arrangements. These matters, like other aspects of their lives, should be taken into account in assessing their suitability as adoptive parents, whether in the context of placing them in the "pool" or in the context of considering them in connection with the placement of a particular child.

The wishes of birth parents

Religion

6.80 *Jehovah's witnesses***.** The Watchtower Bible & Tract Society, the organisation representing Jehovah's Witnesses, has submitted that adoption practice has discriminated against Witnesses, at least in part because of their refusal to agree to accept blood transfusions for their children. The suggestion is that adoption policy has been based on the fear that a child adopted by Jehovah's Witnesses could be placed in a dangerous or life threatening situation because of the refusal of the parents to consent to a transfusion, and that the child is at an increased risk of losing one or both parents by their refusal to submit to such treatment themselves.

6.81 The Society has submitted that such discrimination is unjustified because blood transfusion therapy is merely one of many available forms of medical treatment, and that doctors possess statutory authority to administer a transfusion in an emergency, which includes the power to override the possible objections of the parents concerned.[49] In regard to the risk posed by one or both of the parents dying through the refusal of a transfusion, the submission argued that there are other behaviours, such as smoking and driving a motor car, which are far more likely to cause death, and which are not subject to adverse assessments where adoption selection is concerned. The submission also referred to the ADB's 1984 publication, *Discrimination and Religious Conviction,* which criticised the double standard by which some religious groups were forced to meet more exacting standards by requiring them to account for "remote hypothetical possibilities."[50]

6.82 Adoption law and practice should proceed on the basis that children are entitled to proper medical advice and treatment, and the merits of blood transfusions should be considered medically in each case. The Society's point is well taken that the law provides for blood transfusions without parental consent in life-and-death emergencies,[51] and in other cases it is possible to seek a court order allowing the transfusion. The Commission's provisional view is that the law and practice should not distinguish between Witnesses and other people, although it is entirely reasonable that the assessment of all applicants should take into account, among other things, their willingness to provide appropriate medical care to children they might adopt. The Commission is inclined to agree with the ADB that Jehovah's Witnesses should not be required to sign a form stating their agreement to blood transfusions.

The religious wish of birth parents

6.83 The existing provision that account may be taken of the wishes of relinquishing parents in relation to religion (but no other factor) no doubt derives from the history of adoption, in which adoption agencies under religious auspices played a prominent part. It might once have been argued with some plausibility that many mothers would not have been willing to relinquish their children for adoption unless they were confident that the baby would be placed with couples who would bring the child up in the religion of their choice. On the other hand, the rule appeared anomalous; why should the law respect the relinquishing parent's wishes about religion but not about other matters?

Other wishes of birth parents

6.84 All agencies use profiles by which birth parents are able to select adoptive parents for their children. These profiles are non-identifying and have been prepared by the applicant adoptive parents. Nearly all birth parents at Careforce are involved in the selection of adoptive parents from profiles; 85% at Centacare and 60% at the Department.

6.85 All agencies believe that the birth parents should not have to shoulder the full responsibility about the placement decision for his/her child. Birth parents are not privy to all of the information which the agency holds on adoptive parents. The profiles, having been prepared by the applicant adoptive parents, do not contain any other agency-held information. All agencies are therefore in favour of birth parents only being provided with a selection of the most appropriate adoptive parents for a child.

6.86 There may well be a difference in how birth parents are approached to participate in the selection of permanent alternate parents for their children. If birth parents are told "it is agency policy that all birth parents are involved in choosing adoptive parents" they may respond in a different way than if they were casually asked "do you want to be involved in choosing adoptive parents?".

> The involvement of birth parents in the selection of adoptive parents may assist agencies to avoid difficult policy considerations as shown in the following scenario.
>
> Scenario 3.
>
> A birth parent had relinquished two children. The first child was placed by the Department with an adoptive family with whom she is very happy. When pregnant with the second child she approached a private agency as she did not wish to return to the Department and have the second child placed with the same adoptive parents as the first child. She saw this as her right to choose.
>
> The private agency established that the two children had different birth fathers and that the father of the second child was part aboriginal. The agency then informed the birth mother that the child would have to either go to an aboriginal family or be placed with the first child. The birth mother wanted neither of these options for her child.
>
> She did not want the first child to question why the two children had different skin colours and therefore possibly make assumptions about her and her way of life; nor, did she want the second child to be placed with an aboriginal family "because the child is more white blood than aboriginal blood, and because I am the mother and want to choose".
>
> The birth mother then went to the Department who explained that there were advantages placing the two part siblings together and that it was policy to place aboriginal children with aboriginal families. However they further gave her the option of being involved in the selection of adoptive parents and they undertook to place the child with the family she chose. Profiles of aboriginal and non aboriginal adoptive parents were to be included in the selection.
>
> The situation did not eventuate as the birth mother revoked her consent. [52]

6.87 This issue has been rather overtaken by events because, as noted above, current practice is to involve relinquishing parents generally in the process of selecting adoptive parents.

6.88 The Commission's provisional view is that the law should reflect modern practice and provide a framework in which the relinquishing parent's concerns and wishes, whether about religion or about other matters relating to the child, can be heard and taken into account. Although this may appear, at first glance, to be contrary to placing the best interests of the child paramount, it will actually be in the child's best interests for birth parents to be involved with the development of a plan for the care of the child that they feel happy with. This will enable birth parents to deal with the decision they have had to make and may facilitate a better open adoption arrangement.

Age

6.89 Opinions expressed in submissions to the Commission were divided on the issue of suitable age of the adoptive parents. Centacare (Newcastle) agreed with the existing policy of imposing an upper age limit for adoptive parents (currently 55 years), and has submitted that the law should ensure that there is not an age difference between the child and the adoptive parents of more than 40 years.[53]

6.90 It has been argued that the law and practice should reflect the increasing age at which women give birth to children. Factors such as technological and knowledge advances in the field of obstetrics, the increased rate of participation in the workforce, and the changing roles of women generally, have been responsible for this increase, and were not foreseen at the time the original legislation was enacted. Accordingly, it has been suggested that there ought to be greater flexibility in the selection process with regards to the age limits of adopting parents.[54]

6.91 Social workers within the adoption field have spoken to the Commission at length about the relevance of the age of the adoptive parents. On one hand it is pointed out that some people at 50 are as vivacious and lively as others are at 25. On the other hand, parenting can be regarded as a lengthy process, and social workers have worried about the adequacy of parents to perform their changing roles when, for example, they may be in their 60s when their adopted child begins the sometimes difficult teenage years. The ages at which women in Australia

give birth are indicated in the figures produced by the Australian Bureau of Statistics. It is of interest that 99.97% of children born in Australia in 1992 were born to mothers less than 46 years of age, and 99.55% of children born in Australia had fathers of less than 46 years of age.[55] Social workers have informed the Commission of adoptees who have questioned why they were placed with older parents, who felt that the difference in age between their parents and those of the other children at school made them feel even more different.

6.92 Another concern expressed by social workers is that older adoptive parents may have lived for a significant amount of time without children in their lives and may find it much more difficult to adjust to the demands of modern parenting.

6.93 The Commission's provisional view is that in general the regulation of adoption should attempt to ensure that the ages of the adopters in relation to the children are within the normal pattern in society, but that the system should be flexible enough to allow placements where this is shown to be appropriate for particular children. This principle should apply equally to local and inter-country adoptions.

Racial issues

6.94 Issues relating to race and ethnicity are discussed in some detail in Chapter 9.

GENERAL APPROACH TO SELECTION OF APPLICANTS

6.95 In this section we move from specific issues to more general questions relating to the way applicants are to be assessed and selected. This section draws on the previous discussion and sets out the Commission's provisional approach to this difficult area.

6.96 The evidence available suggests that at present the legislation plays a small part in the actual practice relating to the selection of applicants, which has tended to develop independently from the legislation. A striking example is the practice of involving the birth parents in the selection of adoptive parents. There is nothing in the legislation to indicate that this should or should not happen. Such developments indicate that the law should be sufficiently flexible to accommodate change. On the other hand, it is desirable that the legislation provide a framework that is consistent with current approaches and provides both legal protection to people whose rights are affected by adoption and guidance to those who administer the law.

6.97 There appear to be several main areas to be considered:

whether there should be universal legal requirements relating to eligibility to adopt children, or particular categories of children;

the types of processes to be used in the selection of adoptive parents; and

the criteria to be applied in the approval of applicants as eligible to be considered and in the actual allocation of particular children to approved applicants.

Legislative requirements

6.98 As already indicated, the Commission's present view is that there should be very few specific legislative requirements relating to eligibility. Broadly speaking, children's welfare is unlikely to be promoted if the law excludes from consideration individuals or families that might prove suitable adopters for some child or children. It follows that the legislation should not exclude people from applying to adopt on such grounds as their marital status or sexual orientation. These are matters that may well be relevant at a later stage of the selection process.

6.99 A separate question is whether the Act, while not absolutely excluding categories of applicants, should provide that certain categories of applicants should be considered only in special circumstances, or in relation to particular categories of children. The existing Act, as noted earlier, has such provisions. The Commission's present view is that this type of regulation would be unduly rigid, and that such considerations can be more appropriately dealt with in guidelines.

6.100 For these reasons, the Act should exclude from consideration only those people who should not be allowed to adopt under any circumstances. The Commission is inclined to the view that the Act should merely provide that applicants should be over 21 years of age and must be at least 16 years older than the child. The law should also retain the requirement that they be fit and proper to fulfil the responsibilities of a parent. There seems no advantage in retaining as a separate requirement that they be "of good repute". If there were a rare case where applicants were in fact ideal persons to adopt a child but for some reason, perhaps quite unjustified, had a poor reputation, the law should not prevent their application being examined on its merits.

The assessment process

6.101 The present reference does not require a review of the details of the present processes of assessment. This is a matter of administration and professional practice rather than legislative policy. However the Commission is generally impressed with the current approach. Initial information sessions appear to be effective in helping interested people make a realistic assessment of what is involved in adoption and of their own suitability. The method of maintaining a "pool" of approved applicants seems an appropriate way of dealing with the great imbalance between the large numbers of people who wish to adopt and the small numbers of Australian born healthy infants available for adoption.[56] The practice of involving birth parents in the selection of adoptive parents has been welcomed.[57] The existing practices of circulating information about "special needs" children seem generally appropriate for the important task of recruiting families for these children, since there may be very few potential adopters with the willingness and the ability to be able to cope with their needs.

6.102 The Commission is aware that because of the way the Department of Community Services is presently structured many of the important decisions are made by general field staff rather than specialist adoption staff. While it is obviously desirable that the most highly qualified staff possible should carry out the tasks relating to adoption, this too falls outside the present reference, being more appropriate to a review of the Department than a review of the legislation. Questions of staff deployment and departmental structure are not part of the present legislation and the Commission has received no submissions suggesting that they should be.

6.103 The following discussion, therefore, will proceed on the assumption that existing practices are appropriate, but that they will be subjected to continual revision and adaptation in the light of new knowledge and developments in the field.

Eligibility and "the pool"

6.104 This section considers the criteria for determining whether a person or couple are eligible to be considered for placement of a child. As explained above, in the case of local healthy infants the present practice is to maintain a "pool" of eligible applicants, numbering about seventy couples. When a child becomes available for adoption, consideration is given to which individual or couple currently within the pool is most suitable to meet the needs of that child. The number of people in the pool is considered to be large enough to provide adopters who will meet the needs of children, but small enough to make the allocation process manageable in each case. From time to time the Department adds to the pool as numbers become depleted as a result of adoption placements, or, in some cases, withdrawals from the pool. In selecting people for the pool, the Department has regard to the anticipated needs of children likely to become available for adoption over the next year or so. Thus, for example, if a significant number of children of a particular ethnic group were becoming available for adoption, the Department would normally seek to ensure that there would be some applicants of that ethnic group in the pool. However, they are often behind the trend because they must rely on the characteristics of the last group of children placed in order to construct the pool.

6.105 Guidelines relating to the pool might include such provisions as the following:

> The selection of applicants for the pool shall be based on the following principles:
>
> 1. In these provisions:
>
> (a) "Applicant" includes individual applicants and joint applicants.

(b) "The pool" means those applicants who at the relevant time have been approved as eligible to adopt children and whose applications remain current.

(c) An applicant is "suitable", in relation to a particular child, if and only if:

(i) the applicant has been assessed as being able to meet the needs of that child;

(ii) no other applicants known to the Department appear better able to meet the needs of that child; and

(iii) it appears unlikely that another applicant might be found within a reasonable time and using reasonable efforts, who would be better able to meet the needs of that child.

2. At any given time, the membership of the pool should be determined having regard to the following considerations:

(a) the need to maximise the likelihood of placing children who become available for adoption with adopters who will meet their needs to the maximum possible extent.

(b) the desirability of avoiding undue delay between entry to the pool and placement of a child, and

(c) the need to give appropriate consideration to all persons currently in the pool in relation to each child becoming available for adoption.

3. Membership of the pool does not create any right to have a child placed with the applicant for the purpose of adoption.

4. In relation to each child becoming available for adoption, the Department shall consider in the first place whether any applicants are suitable to adopt that child. Birth parents should be given reasonable opportunity to be involved in the process of selecting applicants from the pool.

5. If an applicant in the pool is suitable to adopt the child, the child may be placed with that applicant for the purpose of adoption.

6. If no applicant in the pool is suitable to adopt the child, the Department may take such steps as it sees fit to arrange placement of the child with suitable adopters. Such steps may include making inquiries from other adoption agencies, and other individuals or organisations, and may include the use of advertising or other reasonable measures in order to seek suitable adoptive parents for the child.

Criteria for placement of children for adoption

6.106 The Commission's approach means that the major decision is focused on the needs of particular children, rather than the general eligibility of applicants as adoptive parents. Membership of the pool will essentially be based on the selection of applicants who are judged most likely to meet the needs of the children who are expected to become available for adoption over the following period of, say, one to two years. The difficult questions relating to such matters as age, marital status and the like need to be resolved in relation to particular children. The task of the law is to provide guidelines for what is essentially a professional judgment based on each individual case. Because the guidelines may need revision from time to time, it seems appropriate that they be contained in regulations rather than the Act. The present draft, appearing at the beginning of this chapter, does not purport to be comprehensive, and will no doubt need considerable revision, but deals with some of the main issues canvassed in submissions. It is offered as an indication of the sort of guidelines the Commission considers appropriate.

FOOTNOTES

1. For example, Centacare Newcastle *Submission* (1 September, 1993) at 3.

2. *Adoption of Children Act* 1965 (NSW), s 20. The requirement does not apply where one of the applicants is a parent of the child or where the Court considers that, in the particular circumstances, it is desirable to make the adoption order.

3. Section 21(1)(c)(i)(b).

4. Section 19(2). If the applicant is married, the spouse's consent is normally required: s 19(3).

5. Section 19(1A), (1B).

6. Section 21(1)(c)(i)(a).

7. Section 21A, overruling the reasoning of Larkins J in *Re an Infant E and the Adoption of Children Act* [1974] 1 NSWLR 739.

8. Section 21(1)(c)(i)(b).

9. Section 21(1)(c)(i)(b).

10. Section 21(1)(c)(i)(b).

11. *Re an Infant M and the Adoption of Children Act* (1967) 87 WN(Pt 1)(NSW) 48.

12. In the context of "open adoption" the religious wishes of the birth parents may become more relevant, since if the birth parents had contact with the child or the adoptive parents during the child's minority, this might affect the child.

13. *Adoption of Children Act* 1965 (NSW), Section 21(1)(c)(i)(b).

14. *Adoption of Children Regulations* 1966 (NSW).

15. *New South Wales Government Gazette* No 58 (8 May, 1992) at 3264, clauses 3 and 4.

16. Clause 2.

17. Clause 5.

18. Clause 6.

19. Clause 7.

20. Clause 9.

21. Clause 2.

22. It is understood, for example, that the Anglican Adoption Agency requires applicants to be practising Christians.

23. A Roughley, materials prepared for the Commission.

24. *Adoption of Children Act* 1965 (NSW), s 21(1) and s 17.

25. The Anti-Discrimination Board of NSW *Submission* (14 August 1993) at 1.

26. The Anti-Discrimination Board of NSW *Submission* (14 August 1993) at 1-2.

27. Gay and Lesbian Rights Lobby and the Lesbian and Gay Legal Rights Service *Submission* (September 1993) at 5; Burnside *Submission* (31 August, 1993) at 6 ("We agree that there should be non-discrimination on the basis of age, legal status, racial or other characteristics. That the best interests of the child should be the prime consideration").

28. Centacare (Newcastle), *Submission* (1 September, 1993) at 4.

29. Anglican Adoption Agency, *Submission* (2 September, 1993) para 5.17.

30. Women's Action Alliance (NSW) *Submission* (1 September 1993) at 2 and 3.

31. See further Chapter 12 below.

32. Section 17.

33. Information provided by A. Roughley, a private social worker, employed by the New South Wales Department of Community Services. She is an honorary consultant to Law Reform Commission's Review of the *Adoption of Children Act* 1965.

34. The Social Policy Directorate addresses social policy issues across the whole of Government.

35. New South Wales. Office on Social Policy, Social Policy Directorate *Background Paper for International Year of the Family (1994) in New South Wales* (March 1993) at 2.

36. Office on Social Policy, Social Policy Directorate *Background Paper for International Year of the Family (1994) in New South Wales* (March 1993) at 2. This quote is from *Families in the 1990s - a challenge for future policy approaches* Background Paper prepared by Dr Don Edgar (Director) and the staff of the Australian Institute of Family Studies, for the NSW Social Policy Directorate.

37. The Anti-Discrimination Board of NSW *Submission* (14 August 1993), at 3. Similarly, the NSW Committee on Adoption did not regard the distinction between married and de facto status as being relevant to the adoption process: *Submission*, (9 September 1993), at 41.

38. Women's Electoral Lobby *Submission* (24 August 1993).

39. Women's Action Alliance (NSW) *Submission* (1 September 1993) at 2.

40. Country Women's Association *Submission* (23 June 1993) at 2.

41. Burnside *Submission* (31 August, 1993) at 9.

42. Anglican Adoption Agency *Submission* (2 September, 1993), at para 5.9.

43. New South Wales Committee on Adoption *Submission* (9 September, 1993) at 40.

44. Centacare Catholic Community Services (Adoption Services) *Submission* (31 August, 1993) at 14 (original emphasis).

45. Centacare Newcastle *Submission* (1 September, 1993) at 4.

46. The Anti-Discrimination Board of NSW *Submission* (14 August 1993) at 9.

47. The Anti-Discrimination Board of NSW *Submission* (14 August 1993) at 9.

48. *In the Marriage of Schmidt* (1979) 5 Fam LR 421, Evatt CJ.

49. Watchtower Society *Submission* (23 July 1993) at 6.

50. Anti-Discrimination Board, quoted in Watchtower *Submission* (23 July, 1993), at 7-8.

51. Anti-Discrimination Board *Submission* at 5, quoting *Children (Care and Protection) Act* s 20A.

52. A. Roughley. This material was prepared by her for the Commission.

53. Centacare (Newcastle) *Submission* at 3.

54. Obstetric Social Workers Group *Submission* (7 September 1993) at 3.

55. *1992 Births Australia* (Australian Bureau of Statistics, Canberra, Cat Np 3301.0), at 9-10.

56. For example the CWA has submitted that this system of assessing prospective adoptive parents should be retained, so that a suitable match of children and adoptive parents can be arranged: CWA *Submission* (23 June 1993) at 3.

57. Women's Action Alliance (NSW) *Submission* (1 September 1993) at 4; Sharon Collins *Submission* (22 July, 1993) at 3.

7. Consent to Adoption

PROVISIONAL PROPOSALS FOR REFORM

1. Consent should be obtained from those who already have parental rights and responsibilities in relation to the child, since those rights and responsibilities will be removed by adoption.

2. It would be sufficient for the legislation to provide that notice should normally be served on such persons so that they could, if they chose, apply for custody, guardianship or access, or appear or make representations relating to the proposed adoption orders. The existing provisions relating to fathers whose consent is not required, which are rather complex and unsatisfactory, should not be retained.

3. There is no need for the adoption legislation to contain complex provisions about presumptions of paternity, or to refer to the "putative" father. These matters are covered in other legislation. It is sufficient for the adoption legislation to refer simply to fathers.

4. The Commission proposes that parental consent should be required from both parents regardless of their marital status, and that applications to dispense with consent may be made either at the preliminary hearing or at the application for adoption.

5. The birth mother should not be allowed to consent to adoption until 30 days after the birth. The consent would become irrevocable after a further 30 days. It should be made clear that the mother could revoke the consent within the 30 days and begin the consent process again at any time. Counselling should be provided shortly before the expiration of the 30 day period, to ensure that the birth mother understands the position.

6. The form of consent should contain provision for the birth parents to express any views relating to the selection of the adoptive parents or the child's upbringing. Such views will also be taken into account in the early planning of the adoption, and will be reviewed at the preliminary hearing. The birth parents' interests will be protected by the hearing, and by the Commission's proposal that the giving of consent does not have the effect of transferring guardianship to the Director-General.

7. The grounds for dispensing with consent should include the existing grounds under paragraphs (a)-(d) of s32. The grounds under paragraphs (e)-(h) should be abolished. They should be replaced with the ground that:

   > the court is satisfied that the welfare of the child will be so significantly advanced as to justify overriding the wishes of the parent or guardian.

   A decision to dispense with consent requires the court, first, to be satisfied that one of the grounds is established, and second, to consider whether to exercise its discretion to dispense with consent. The second aspect should be governed by the principle that the child's welfare is to be regarded as the paramount consideration and, in determining this question, the court should be assisted by legislative guidelines.

POINTS FOR FURTHER DISCUSSION

The Commission would welcome comments on whether or not it is desirable to make provision for conditional consents.

The Commission welcomes comments on the different views surrounding the issue of the Court's power to dispense with the parents' consents in certain circumstances.

PARENTAL CONSENT REQUIREMENTS

7.1 Until very recently the only important rights of birth parents related to consent. Adoption law normally requires one or both birth parents to consent to the adoption, and there are special provisions designed to protect parents, especially mothers, from undue pressure, mistake, and other factors that might undermine the voluntary

nature of the consent. In some circumstances, however, the court has power to make adoption orders even though one or both parents refuse to give consent. These rules about parental consent form a very important part of adoption law and give rise to important issues, considered in this chapter.

7.2 In recent times, however, practices associated with "open adoption" have introduced new questions relating to the situation of birth parents. They now have a legal right to identifying information about the adopted child when the child turns 18.[1] Under current adoption practice, they may play a part in the selection of adopting couples, and they may be provided with information about their child's progress, although not normally information that would enable them to identify the child. The literature on adoption practice now frequently discusses even greater involvement of birth parents, including situations where the birth parents will be in contact with the adoptive family as the child grows up, a situation which can exist under present adoption law.

7.3 Under the present law, the rights of the birth parents depend to a considerable extent on the law relating to consent. Consent is generally required from the mother and father in the case of children of a marriage, and from the mother when the child is ex-nuptial.[2] It is also required from any person who is a guardian of the child. As we discuss below, the law is unclear about whether fathers of ex-nuptial children fall within this term.

7.4 A number of important issues are involved in the question of consent:

Whose consent is required?

How does the law seek to ensure that consent is given freely?

Can the consent take different forms, such as being limited to the adoption of the child by particular people, or particular categories of people?

Current practice in relation to consent

Receiving consents

7.5 *The use of temporary care orders prior to signing of consent.* Some of the private agencies utilise temporary care orders for children prior to birth parents consenting to adoption. Temporary care orders allow the child to be placed in a foster home while the birth parent considers the option of relinquishment. During this time, the birth parent may be able to visit the foster home regularly. In some instances temporary care orders provide for a supported trial of parenting by the birth parents. Birth parents may stay at the home of the foster parent and care for the child with the support of the experienced foster parent.

7.6 Most children eventually relinquished through Careforce have had a period of temporary care prior to the birth parent signing the consent, as have 20% of the children relinquished through Centacare. The frequent use of temporary care orders is perhaps the reason why the revocation rates at Careforce is lower than the rates for the other agencies.

7.7 The advantages of temporary care orders are that they:

allow the birth parent a trial separation from the child;

enable the birth parent to attend to other areas of his or her life, without the presence of the child;

enable a birth mother to recover from the birth of the child and to stabilise emotionally before the signing of the consent; and

enable the birth mother to get to know their child with the support of a caring foster parent.

7.8 Departmental officers use temporary care orders as one of a range of options available to them in assisting families.

Whose consent is required?

7.9 Whatever the true legal position, it appears that in practice the consent of a father has usually not been required if the child is born outside marriage. This does not mean that agencies and the Department disregard the wishes of the birth father completely. Although policies vary, all agencies and the Department will make some effort to involve the birth father if it is appropriate or possible.

7.10 Involvement of the birth father may be problematic where the relationship between the birth parents has broken down or never really existed, or where the birth father is known to be violent or abusive. In these circumstances the birth mother may wish the birth father to have no involvement, but this desire must be balanced with the child's right to know, or at least have information about, both of his or her biological parents.

7.11 Centacare have a policy of involving the birth father whenever possible giving priority to the need of the child to know about his or her biological origins. Consulting the birth father may also make the adoption order more legally secure. In the application of this policy, Centacare encourage birth mothers to identify the birth fathers. If birth mothers do not identify the birth father they are asked to sign an affidavit, which forms part of the adoption application documentation, declaring their decision not to inform the birth father.

7.12 Agencies are sometimes confronted by the situation of a birth father who denies paternity of a child, even though a woman claims not to have had a sexual relationship with any other person. The agencies cannot compel a person to undergo DNA testing to establish paternity. Agencies are not necessarily advocating such a step but are concerned that the child may be left without knowledge of his or her birth father.

7.13 A consequence of the varying policies regarding the involvement of birth fathers is that birth mothers may select an agency on the basis of whether or not the birth father will be involved. Birth mothers may elect to relinquish their child through the Department, rather than Centacare, for example, because they believe that there will not be as much pressure put on them to identify the father of the child.

7.14 It may be preferable to have more uniformity in the agency and Department policy in this area. A workable compromise may be to explain to birth mothers the importance of information about both birth parents to children and then, if the birth mother still does not want to identify the birth father, require her to sign an affidavit stating her reasons for not doing so. This affidavit should then be available to the child as part of the information available under the *Adoption Information Act*. This would avoid the possibility of the child believing in the future that his or her birth father did not care about him or her enough to place his name on the birth certificate.

The impact of privacy legislation

7.15 As a result of the relatively recent recognition of privacy principles in legislation, agencies are now limited in the ways in which they can locate birth parents whose name is known but whose contact address is not. Previously agencies were able to utilise the services of the Roads and Traffic Authorities, Electoral Rolls and the Department of Social Security (DSS) in their efforts to locate birth fathers to request their participation in the adoption process. Agencies are now limited to advertising in newspapers, an expensive and often ineffective exercise, or forwarding a letter through the DSS. The DSS will only forward these letters on the proviso that they do not contain the word "adoption" as the DSS considers this may be distressing to recipients of letters. Some adoption workers consider that this situation indicates that the right to privacy is being placed above the right to participate in the decision to place one's child for adoption. This issue does not only apply to the adoption of locally born infant children but also to the adoption of children who have been in care for long periods of time and whose birth parents have ceased contacting the Department of Community Services.

Management of the revocation period

7.16 The private adoption agencies and the Department vary in their attitudes to the revocation period in which a consent to adoption can be withdrawn. All children for whom consents have been signed are placed in pre-adoption care with foster carers, but the agencies differ on how the revocation period is to be used and how frequently they will allow birth parents to visit the child.

7.17 Careforce do not place any restrictions on the visits which may be made by a birth parent to the child during the revocation period. In contrast, Centacare regard the revocation period as an experience of separation for the birth parent and consequently allow the birth parent to visit only once a week. Centacare workers explain

to the birth parent that separation from their child "is for a lifetime" and that the revocation period is an opportunity to experience that separation. It is not just a "cooling off period".

7.18 The Department have a similar attitude to that of Centacare. The birth parent must ring the District Officer to arrange for a visit to his or her child during the revocation period. The Department emphasises to the birth parent that he or she is no longer the guardian of the child.

7.19 For birth parents who want a chance to think about adoption, temporary care orders can be made, before the signing of consent. Temporary care orders, discussed above, allow the birth parent a trial separation and an opportunity to visit the child with the support of foster parents. This can all occur prior to consent being given so that the revocation period is not the only opportunity the birth parent has to explore his or her feelings about adoption.

Post-adoption services for birth parents

7.20 All agencies provide post-adoption counselling and support for birth parents irrespective of whether the child is placed with adoptive parents or whether the birth parent revokes consent and resumes care of his or her child.

7.21 Post-adoption services might include maintaining contact with a relinquishing birth parent and sending him or her information about the child at an appropriate time. For birth parents who revoke consent, post-adoption services might be the offer of housing assistance and the provision of respite care if the birth parent ever needs "a break".

7.22 Although such post-adoption services are not specified by legislation, all agencies seem to believe they are an essential part of "good adoption practice" and incorporate them in their services.

Consent and the unmarried father

7.23 One of the most controversial issues in adoption law is the role of the unmarried father, and in particular whether his consent should be required. The term "unmarried father" is convenient but not entirely accurate, since we are speaking of the father of an ex-nuptial child: he may, of course, be married to somebody other than the mother of the child.

7.24 In the 1965 Act, the position was simple: consent was required from both parents in relation to nuptial children. In the case of ex-nuptial children, only the mother's consent was required.[4] The position of unmarried fathers was, in substance, that if they found out about the adoption proceedings they could seek leave to intervene and, if they wished, oppose the making of the adoption order.

7.25 Later amendments have changed this situation in two ways. First, in certain limited circumstances the unmarried father's consent is required. Second, there are new provisions dealing with the situation of unmarried fathers whose consent is not required.

Consent required from certain unmarried fathers

7.26 In the case of ex-nuptial children, consent is required from the father as well as the mother only "where the parents lived together after the child's birth as husband and wife on a bona fide domestic basis in a household of which the child formed part".[5] For convenience, we shall refer to this as the "common household" test. This test excludes fathers in the ordinary case where the mother gives consent shortly after the birth and the baby is immediately taken for placement elsewhere. The policy of the Act appears to be that the father's consent is required only if he has an established relationship with the ex-nuptial child and the child's mother. This provision was added in 1985 as part of a package of legislation increasing the legal recognition given to de facto relationships.[6]

7.27 It might be assumed that consent is not required from fathers falling outside the specific terms of the "common household" test quoted above.[7] However, consent is also required from any person who is a

guardian.[8] The *Family Law Act* provides that the father of a child (whether or not ex-nuptial) is a guardian of the child.[9] The Family Court has held that he is therefore a "guardian" whose consent is required under the *Adoption of Children Act* 1965.[10] If this decision is correct,[11] the present position is that the unmarried father's consent is required unless the father has not been granted custody and guardianship by court order, and he has not lived with the mother and the child in a household. Remarkably, the Commission has been informed that present departmental practice is to treat the consent of unmarried fathers who do not fall within the "common household" test as not required.[12] It is not necessary here to explore the merits of the competing legal arguments about the interpretation of the relevant state and federal statutory provisions. It is obvious that the Commission's task is to identify what the law *should* be, and amend the New South Wales adoption legislation so it unambiguously embodies that view.

Notice to fathers whose consent is not required

7.28 The Act makes detailed provision for the situation of unmarried fathers whose consent is not required. The relevant provisions are limited to men who are registered as fathers or are legally presumed to be fathers.[13] The agency is required to make inquiries to discover if any man fits this category. If there is such a man, a notice is to be served on him, telling him that the mother has consented to the adoption of the child.[14] He may then, within two weeks, file an application "relating to the care custody and (sic) guardianship" of the child and the Court may determine such an application. If he fails to do so within the specified two weeks, the Act provides that he "may not...do any thing that is inconsistent with the making of" the adoption order.[15] The policies of the various agencies in relation to assertaining the identity, and subsequently finding an unmarried father, have been discussed above, as have the difficulties agencies may have locating men as a result of privacy legislation.

Fathers' consent - a suggested principle

7.29 As already indicated, it is clear that the Act should be amended to resolve the existing uncertainty about whether consent is required from unmarried fathers. Whether consent should be required from all, or certain categories of unmarried fathers, is a difficult issue. One difficulty is that it is often difficult to establish paternity. Paternity can now be proved by the new processes of DNA testing, which enable fathers to be identified with almost 100% certainty if blood or other tissue samples can be obtained from the mother, the child, and the man whose paternity is in question.

7.30 Another difficulty is that in a significant number of cases, the unmarried father may have had no involvement with the child, and his involvement with the mother may have been brief. Indeed, in some cases the pregnancy may have resulted from a rape, or incest. It seems wrong to require consent from men in such circumstances. The traditional distinction between the law relating to nuptial children and ex-nuptial children could once have been defended, perhaps, on the ground that at least in general the marital status of the father was a reliable indicator of whether the father's involvement might benefit the child.[16] Whatever force this might have had in the past, the high proportion of children born outside marriage in Australia, and the extensive legal recognition of de facto relationships, makes this approach difficult to sustain today.

7.31 It has been strongly argued that adoption legislation and practice should not involve discrimination of the kinds which would violate the spirit of the *Anti-Discrimination Act.*[17] It would seem that such a violation has been caused by provisions which require consent from married fathers, but not from unmarried fathers, in similar situations.[18]

7.32 What is the appropriate criterion for determining which fathers' consent should be required? The Commission is inclined to adopt the principle that consent should be obtained from those who already have parental rights and responsibilities in relation to the child, since those rights and responsibilities will be removed by adoption. Since the reference of power in 1987, this question is primarily governed by Commonwealth legislation, namely the *Family Law Act* and the child support legislation. Under these laws, the biological fathers of children acquire rights of custody and guardianship, and the obligation to provide financial support, regardless of their relationship with the mother or the child. Their rights to custody and guardianship can, of course, be displaced by court orders. If the Commonwealth law had allocated parental responsibilities to some fathers but not others, it might well have been appropriate for the New South Wales adoption legislation to build on such provisions, and require consent only from those fathers who had parental responsibilities. Given the existing

Commonwealth law in this area, however, it seems appropriate for the law to require, in the case of all birth fathers except those who have lost their custody and guardianship rights by court orders, that their consent either be given or formally dispensed with.

The English example

7.33 In England, consent is required from any parent who has parental responsibility for the child under the *Children Act* 1989, and from any "guardian", defined as a person appointed by a parent to be the child's guardian in the event of the parent's death, or a person appointed by a court to have parental responsibilities if the child has no parent with parental responsibilities.[19] An unmarried father may acquire parental responsibilities either as a result of a court order[20] or as the result of an agreement with the mother.

7.34 Where a father has parental responsibilities, they are not lost by the making of a "residence" order (roughly corresponding to an Australian custody order) in favour of the mother. The English Review[21] considered that this was satisfactory, and that where an unmarried father does not have parental responsibilities his consent to an adoption should not be required. On the other hand, it recommended that every effort be made to make contact with the unmarried father and enable him to express his wishes. A cautionary note is added, however:

> We recognise, however, that there may be some circumstances where an adoption which is in the best interests of the child may be put at risk if an approach is made to an unmarried father who is thereby made aware of the child's existence, especially where this is also against the wishes of the mother. [22]

7.35 The Review is not explicit about dealing with this problem, however, merely stating that the duty to consult the father should "allow for some exceptions", which should be set out in the Regulations.

Discovering the father's identity

7.36 The existing Act requires the Director-General or the Principal Officer of an adoption agency to make "such inquiries as are reasonably necessary" to ascertain who is the father.[23] Current practices in relation to ascertaining the identity of the father have been detailed above. For a variety of reasons, the birth mother might be reluctant to disclose the identity of the father, or the suspected father. Such reasons might include fear of violence against the mother or the child, or a desire to have nothing further to do with the father, or a wish to prevent the father from establishing contact with the child. The validity of such reasons will vary from one situation to another, and they may on occasion be seen as outweighing the child's long-term interest in knowing his or her paternity. The Commission has considered whether the law should attempt to require the mother to disclose information relating to the child's paternity. On the whole, it is inclined to think that no such provision is desirable, and that it is better for the matter to be dealt with through advice and counselling. An important part of the Commission's reasoning is that as a practical matter it would be extremely difficult to enforce any such requirement, and attempting to do so may cause considerable distress. Sensitive counselling seems likely to have a better impact on the long term and short term welfare of all concerned than attempts to impose legal coercion.

Conclusions

7.37 If the Commission's proposed approach is adopted, there will be very few fathers whose consent is not required - only those who have lost custody and guardianship by court order. In the Commission's provisional view, it would be sufficient for the legislation to provide that notice should normally be served on such persons so that they could, if they chose, apply for custody, guardianship or access, or appear or make representations relating to the proposed adoption orders. The existing provisions relating to fathers whose consent is not required, which are rather complex and unsatisfactory,[24] should not be retained.

7.38 In the Commission's provisional view, there is no need for the adoption legislation to contain complex provisions about presumptions of paternity, or to refer to the "putative" father. These matters are covered in other legislation.[25] It is sufficient for the adoption legislation to refer simply to fathers. The particular problem of children created through artificial conception procedures is considered below, in Chapter 10.

7.39 One result of the Commission's provisional proposal is that careful attention will have to be paid to the process of dispensing with consent. This is discussed in some detail below. It should be added here, however, that this problem will be considerably eased by the proposal to have preliminary hearings. These hearings will provide an early and appropriate opportunity for the court to dispense with consent where appropriate. It would be possible to provide that consent should normally or even automatically be dispensed with in specified circumstances thought to identify "unmeritorious" fathers. However, there may be little benefit in such a provision, since the court would no doubt readily dispense with their consent even in the absence of such provisions. There might be cases in which the identity of the father becomes known only after the placement hearing, or relevant circumstances arise between the placement hearing and the adoption hearing, and it would be appropriate, therefore, to provide that in such cases the matter can be reconsidered at the adoption hearing. For these reasons, the Commission recommends that parental consent should be required from both parents regardless of their marital status, and that applications to dispense with consent may be made either at the preliminary hearing or at the application for adoption.

Ensuring informed and voluntary consent

7.40 The Act contains provisions designed to ensure that parental consent is given freely and is not vitiated by such factors as fraud or duress. Some of these provisions apply to parental consent generally, while others apply to the particular situation of birth mothers in relation to newborn babies, and are intended to protect them from giving consent that is affected by the physical and emotional consequences of childbirth.

7.41 There are several ways in which the Act attempts to protect parents against giving a form of consent that is not truly voluntary.

Formal and counselling requirements

7.42 The consent must be general and in writing.[26] Only consents to adoption where the child is to be adopted by a relative, as defined by the legislation, are specific in that they state that the child is being relinquished in favour of a particular person.[27] There is a requirement that the consequences of giving such a consent must have been explained to the consenting person by the witness to the consent.[28] Only certain people can witness a consent, for example, a qualified social worker, a solicitor or barrister, a minister or doctor.[29] Consents to their own adoption, signed by children of 12 years or over, must be similarly witnessed.[30]

Consent and the birth mother

7.43 Consent cannot be given prior to the birth or until the completion of three clear days after the birth. This calculation does not count the day of the birth and therefore consent is not taken until the fifth day after the birth at the earliest.[31] There are also provisions by which the Court may set aside consents which were not given in accordance with the Act or were obtained by fraud, duress or other improper means. Consents can also be set aside where the instrument of consent was later altered, or where the person was not in a fit condition to give consent or did not understand the nature of the consent.[32] The consent can be revoked within a period of 30 days, after which it becomes final.[33]

7.44 These provisions attempt to balance a number of competing considerations. On one hand the consent must be truly voluntary. On the other hand, the child's welfare is seen as requiring a reasonably speedy placement with the proposed adopters (or with temporary foster parents). The period of thirty days for revocation is seen as a compromise; to make it shorter would lessen the chances that the consent was truly voluntary and to make it longer would increase the risk that the child, after a substantial time with the proposed adopters, would be returned to the mother or both birth parents. It is sometimes suggested that it is also in the interests of the birth mother that the decision should become irrevocable within a reasonably short time, since if it remained revocable it would be more difficult for her to come to terms with her decision and the continuing possibility of having the child restored to her would place her under stress.

The effect upon the child of delaying consent

7.45 One argument against extending the time for the giving of consent and of the revocation period is that such an extension will mean that the child will spend a longer time in temporary care and that this will have a detrimental effect on the psychological well-being of the child. The argument concludes that the child should be removed from the birth mother and placed with the adoptive parents as quickly as possible.

7.46 In order to substantiate such an opinion, many people have relied upon theories of bonding and attachment such as those propounded by John Bowlby. Bowlby has studied at length the anxiety and anger expressed by children upon separation from what Bowlby describes as their "mother figure" . Bowlby himself clearly states the limitations of his work when he writes:

> How the responses of infants under seven months are best understood, and what their significance for an infant's future development may be, is difficult to know. It is plain, however, that the responses of these younger infants to separation are different at every phase from those of older ones, and that it is only after about seven months of age that the patterns that are the subject of this work are to be seen.[34]

7.47 If we look at the adoption process, there must inevitably be a split in parenting for the adopted child. In order to give the birth mother adequate time in which to make such a monumental decision and in order to not abuse her rights by allowing time for such a decision to be revoked, it is necessary to place the child into temporary care prior to final placement. No one can successfully argue that the newborn child should be removed from the birth mother at birth and immediately placed into the arms of the adoptive parents. If we acknowledge this, and the inevitability of the change in parenting, we are simply left with the question of how much time in temporary care is acceptable.

7.48 The essence of research on attachment is that children may suffer anxiety and anger during periods of separation from the "mother figure" that prevent them from emotionally reattaching to the "mother figure" on reunion.[35] This inability to reattach may be fleeting or more long term depending on the length of separation and the level of comfort and support given by other carers during the period of separation. It seems to the Commission that the process of the child developing attachments with the adoptive parents and the adoptive parents having their parenting desires fulfilled by parenting a child with whom they can bond closely, is no more important than providing a birth mother with an environment in which she can calmly make the decision to detach herself from her child and comes to terms with her decision in a manner that will allow her to continue to play a part in that child's life via open adoption.

7.49 Some people have criticised the idea of lengthening the period of consent and revocation on the grounds that there will be fewer adoptions because more birth mothers will decide to keep their children. However, if a birth mother decides that she will not place her child for adoption because she has actually had a chance to take the child home to find out that she can mother the child or she has had time to find that family or friends can and will support her raising her child, that is not to the detriment of that particular child.

7.50 Other submissions have suggested that lengthening the period of consent and revocation will apply more pressure on single women to raise their children when these children would be better off in stable two-parent adoptive families. Adoption legislation is a means for providing parenting for children who cannot be raised by their own parents. It is not a means of relative assessment of birth parents. Adoptive parents must be assessed because they have offered to undertake the very special task of parenting another couple's child and must have the requisite skill and understanding.

7.51 Theories about attachment and bonding are just some of many factors to be considered. If we place a child into the adoption arena, any child who is placed with another parent will suffer anxiety and stress. This is why adoptive parents need to be a certain type of person. In the case of adoption, we are not only concerned with the psychological well-being of the child but also of the adoptive parents and the birth parents. Adoptive parents will feel the strain if a child is placed with them and they are trying to conduct an open adoption arrangement with birth parents who have not come to terms with their decision to relinquish. The child should not be placed with the adoptive parents until the revocation period has ended as they should not be expected to care for and bond with a child whose birth mother still has the opportunity to take the child back into her care. Birth parents need to test out their decision when there is a real live baby in the equation.

Provisional proposals

7.52 The Commission proposes that the birth mother should not be allowed to consent to adoption until 30 days after the birth. The consent would become irrevocable after a further 30 days. It should be made clear that the mother could revoke the consent within the 30 says and begin the consent process again at any time. Counselling should be provided shortly before the expiration of the 30 day period, to ensure that the birth mother understands the position.

7.53 The Commission gave consideration to another possible approach, in which the mother could choose between two forms of consent. One form would become irrevocable after 30 days. The other would remain revocable until the court makes the adoption order. The intention was to adjust the system to the varying needs of mothers, some of whom might wish that their decisions should become final within a reasonably short time, and others who might want to refrain from a final commitment until the court hearing. The disadvantage of the proposal however is that it confronts the birth mother with a further complexity in what is already a very difficult situation. On the whole, the Commission is inclined to think that this proposal is unduly complex, and that the birth mother would be sufficiently protected by the recommendation that she be reminded, near the end of the 30 day period, that she may revoke the consent and sign a new one, giving her one further period of 30 days (or indeed several successive periods) to come to a final decision. Comment will be welcomed on this matter.

7.54 This proposed rule, then, is designed to avoid consent being given at a time when the mother might be affected by the physical and emotional effects of childbirth. It represents a reconsideration of the appropriate adjustment of the various interests and policies involved. In particular, it recognises that in many cases the birth mother's experience will not be the sudden and complete separation envisaged in earlier times, but rather a gradual (and sometimes only partial) withdrawing from the child's life, with some continuing participation in the selection and preparation of the child's adoptive placement. This means that the former arguments that it is in the mother's interests for the decision to be reasonably swift and complete are less persuasive than they might have seemed previously. It is recognised that some birth mothers, however, will not wish to continue being involved in the child's life, and will indeed want a more or less "clean break".

WHAT SORT OF CONSENT?

7.55 Under the present law consent must be general, that is, it must be a consent to the child being adopted by any eligible person or couple selected by the agency.[36] It cannot be conditional. With one exception, the relinquishing parents thus have no right to control or influence the selection of the adoptive parents, or the way they bring up the child. The exception is that the relinquishing parents can, in the form of consent, express a *wish* as to the religious upbringing of the child. This wish does not strictly guarantee that the child will be adopted by parents of that religion, or brought up in that religion,[37] although normally it would be respected, and the agency would seek to place the child with people of the appropriate religion.

7.56 In practice, relinquishing parents now play a much larger part in the process than the legislation indicates. It is common that they are invited to discuss with the agency the sort of people they would like to adopt their child, and the agency may invite them to make a selection from among a small number of applicants that are thought to be suitable for the child.

7.57 Such practices may once have been seen as inappropriate but, in the Commission's provisional view, there is much to commend them. Where the birth parents wish to participate, the process can give them considerable reassurance about what will happen to their child, and will enable them to feel, realistically, that they have played a significant and responsible part in making arrangements for the welfare of their child. The adoptive parents, too, might well benefit from knowing that they have been chosen by the birth parents. These consequences are especially likely to occur when, as is not uncommon, the parties have a meeting prior to the adoption order. It seems likely that such arrangements will make it more likely that any future reunions between the adoptee and the birth family will be successful for members of both families. No doubt these "open adoption" methods have their dangers, and in some cases will be unsuccessful. However in the Commission's view they have potential value and are to be encouraged.

7.58 Although as a general principle the Commission is inclined to agree that the law should facilitate and encourage such practices, detailed legal provision seems unnecessary and could be constricting. The most

obvious legal issue that arises from them is whether the law should allow the birth parents to make their consent conditional in various ways, for example by limiting it to the adoption of their child by particular applicants, or particular categories of applicants.

7.59 Many alternatives are possible. The consent could be to have the child adopted by particular people, such as a couple selected by the birth parents, or to a class of persons. It could be conditional, for example by requiring that the child be told of his or her adoption, or by requiring that the adopters allow contact between the birth parents and the child. Conditional consent could be associated with a system in which the birth parents played an active part in the planning of the adoption, including the selection of the adoptive parents.

7.60 In a number of Australian jurisdictions there are provisions for conditional consent, though the scope for conditions is limited. In Victoria it is limited to a right to make conditions relating to adoption of the child within the Aboriginal community;[38] otherwise the consent must be general.[39] In South Australia the consent may be either general or limited to adoption by a relative, or by a person who has been appointed a guardian by a court, or is cohabiting with one of the child's parents in a marital or de facto relationship, or a person in whose care the child has been placed by the Director-General.[40] In New South Wales, s 27(2) of the *Adoption of Children Act* 1965(NSW) states that consents may be conditional where the child is to be adopted by a relative or by two persons, one of whom is a parent or relative of the child.

7.61 Should there be any limitations on the conditions that may be attached to a consent? It may be that the limited scope for conditional consent reflects the view that a wider scope could lead to evasion of the regulation of adoption placements. It might be felt that if birth parents were able to limit their consent to particular individuals, they would be able in effect to by-pass the process by which agencies prepare and select suitable adopters. It might also be argued, perhaps, that the existing practice represents the most satisfactory arrangement. The child has the advantage of agency-arranged placements, and where the birth parents wish to be involved they can, in practice, play a considerable and valuable part in the selection of the most appropriate adoptive parents for their child. If the Commission's proposals for a preliminary hearing are accepted, it may also be argued that the process of agreement (or adjudication) involved in that process will be sufficient to ensure that the birth parent's wishes are appropriately taken into account. This approach might be seen as more flexible than the technique of making consent subject to conditions.

7.62 The Commission's tentative view is that the form of consent should contain provision for the birth parents to express any views relating to the selection of the adoptive parents or the child's upbringing. Such views will also be taken into account in the early planning of the adoption, and will be reviewed at the preliminary hearing. The birth parents' interests will be protected by the hearing, and by the Commission's proposal that the giving of consent does not have the effect of transferring guardianship to the Director-General. However, the Commission would welcome comments on whether or not it is desirable to make provision for conditional consent.

DISPENSING WITH CONSENT

Existing law

7.63 In certain circumstances, the court has power to dispense with the consent of a birth parent or guardian. Applications to dispense with consent may involve "contested" adoption hearings, in which one or both birth parents are seeking to prevent the loss of their parental rights and the department or agency is seeking to persuade the court that the circumstances warrant making the adoption order against the wishes of the birth parent(s). However, in practice it appears that fully contested matters are very rare, and that while a significant number of parents are not willing to give consent, they do not appear in court to contest the application to dispense with their consent. In these circumstances the application to dispense with their consent is unopposed.

7.64 There are a number of grounds on which consent might be dispensed with, so that the adoption order can be made without consent.[41] The most obvious, and least controversial, are where the person whose consent is required cannot be found, or is incapable of giving consent. The next two grounds are, in substance, that the parent is unfit to be a parent, by reason of having abandoned, deserted, neglected or ill-treated the child; and that the parent has for at least a year failed without reasonable excuse to discharge the obligations of a parent, or to make suitable alternative arrangements for the child. These grounds were part of the original 1965 Act.

7.65 The following additional grounds were added by later amendments:

> (e) the child is in the care of a foster parent or foster parents, the child has established a stable relationship with that person or those persons, and the interests and welfare of the child will be promoted by the child's remaining in the care of that person or those persons;
>
> (f) the child is in the care of a person or persons other than a parent, relative or foster parent and the interests and welfare of the child will be promoted if negotiations can be conducted and arrangements made with a view to the adoption of the child;[42]
>
> (g) there are circumstances, other than those referred to in paragraphs (a)-(f1), in which, by dispensing with the consent, the interests and welfare of the child will be promoted; or
>
> (h) a notice of intention to seek an order dispensing with the consent has been served personally on [the person whose consent is required] and the person has not, within 14 days...filed...a notice of intention to oppose the making of the order.[43]

Principles

7.66 Paragraph (g), above, is of particular importance. The Court of Appeal has pointed out that combined with the principle that the child's welfare is paramount (s 17), it means that if the court considers that the adoption will promote the child's welfare, it *must* make the orders for dispensing with consent and for the child's adoption.[44]

7.67 This conclusion gives the legislation as a whole a curious ambivalence towards the rights of the birth parents. On one hand their consent is ordinarily required, and the court can do without it only in limited circumstances. On the other hand a close examination of the definition of those circumstances indicates that everything turns on whether the court thinks the adoption will benefit the child: if it does, the child will be adopted without regard to any question of parental rights. A finding that adoption would benefit the child, therefore, is a necessary and sufficient condition for the making of the adoption order. This conclusion would appear to make the other grounds for dispensing with consent unnecessary. It has also been suggested that it could enable adoption agencies to make applications, say, for the adoption of newborn children of poor or disadvantaged parents, and the applications might well be granted, without any question of parental fault or neglect arising, if the agency could persuade the court that the children would be better off if they were adopted.[45] In contrast with the *Adoption of Children Act* 1965 (NSW), the New South Wales legislation on child welfare restricts the State's intervention to situations in which the parents are at fault or the child's needs are not being met.[46] The problem has not arisen on a widespread scale, it seems, because the agencies have not pursued such an aggressive approach.

7.68 Different jurisdictions have different provisions on this matter, but no other Australian jurisdiction goes as far as the New South Wales provision (as distinct from the *practice* of the agencies) in giving no weight to parental rights in this matter.[47] In England the rule has long been that consent can be dispensed with only if it is unreasonably withheld. The recent review of English adoption law has suggested a new test: the court may dispense with consent only where it is satisfied that the advantages to the child of becoming part of a new family and having a new legal status are so significantly greater than the advantages to the child of any alternative option as to justify overriding the wishes of the parent or guardian.[48] New South Wales law on this point, therefore, appears to favour adoption to a greater extent than other jurisdictions, and indeed to a greater extent than even the most pro-adoption social work literature.[49]

7.69 The issue involves basic questions about the rights of parents and children and the role of adoption. The existing grounds of consent may be seen as reflecting a number of separate bases on which it has been thought that an adoption might proceed without the parents' consent:

> the parents' consent cannot be obtained, because they are dead, or absent, or incapable;
>
> the parents have by misconduct forfeited their parental rights; or

in the court's view the child's welfare requires dispensing with their consent.

7.70 Of these, the first appears uncontroversial. The second reflects the view that the law should be based on pre-existing rights, and it may be that this is a somewhat outdated view, modern family law tending to focus more on an assessment of the costs and benefits of the various options available. Nevertheless the second ground may well correspond with some people's sense of justice, and operate as an appropriate limitation on state power: if the order to dispense with consent is seen as one that removes the parents' rights, it can be seen as fair that those rights should be removed only when the parent has behaved in a way that merits such a consequence.

7.71 This second ground, however, would not necessarily enable consent to be dispensed with where a parent was unable to care for the child, or arrange for others to do so, because of some incapacity or accident for which the parent could not be blamed. In such a situation, it seems necessary to say that the child's welfare requires that the court should dispense with consent. For this reason, it seems appropriate that the law should be able to dispense with consent *on the basis of the child's welfare*. It does not follow, however, that the rule should be that the court should dispense with consent whenever it thinks that to do so would promote the child's welfare. The law might say that consent could be dispensed with only when the existing situation fell short of some standard relating to the child's welfare, such as, for example, the definition of a child "in need of care" under the New South Wales child welfare legislation.[50] Most adoption legislation, other than that of New South Wales, uses this sort of approach. Thus in Victoria the grounds for dispensing with consent include:

> (g) that for any reason the child is unlikely to be accepted into, or to accept, a family relationship with the person; or
>
> (h) that there are any other special circumstances by reason of which, in the interests of the welfare of (sic) the child, the consent may properly be dispensed with.[51]

7.72 Such phrases, like the provisions of child welfare legislation, seek to ensure that the coercive intervention entailed in dispensing with consent should happen only when there is good reason to be concerned about the child's welfare, not merely where a court thinks that adoption would, on balance, be advantageous for the child. They do not involve a compromise of the principle that the child's welfare is paramount, but reflect a view that courts and welfare authorities are not necessarily able to make better judgments about children's welfare than the parents, who are initially entrusted by the law with responsibility for their children.

7.73 There is no similar requirement in custody and guardianship proceedings under the *Family Law Act* 1975 (Cth). However the court's powers in this area, at least in proceedings between the parents, could be rationalised on the basis of the parents' failure to agree on the exercise of their powers. Thus the law in this area is generally consistent with adoption law in that the court's intervention can be justified by a party showing that the child is in need of care, or that the parents, to whom the law has entrusted custody and guardianship, are unable to agree on how their own powers should be exercised.[52] On this view, it is in the interests of children that external intervention should be possible only where there is good cause for thinking that it is necessary.

7.74 The Commission welcomes comments on these views. If they are accepted, it appears that the present Act goes too far in allowing the court to dispense with parents' consent by simply substituting its own view on the child's welfare for those of the parents. Something more is required. There are many ways of formulating the "something more". The Commission is attracted to the formulation of the United Kingdom review, but considers that it could usefully be supplemented by guidelines relating to the child's welfare. Some of the existing provisions in s 32, and s 6(4A) of the present Act, could be incorporated in such guidelines.

Conclusions

7.75 The Commission's tentative conclusion, therefore, is that the grounds for dispensing with consent should include the existing grounds under paragraphs (a)-(d) of s 32. The grounds under paragraphs (e)-(h) should be abolished. They should be replaced with the ground that:

> the court is satisfied that the advantages to the child of becoming part of a new family and having a new legal status are so significantly greater than the advantages to the child of any alternative option as to justify overriding the wishes of the parent or guardian.

7.76 A decision to dispense with consent requires the court, first, to be satisfied that one of the grounds is established, and second, to consider whether to exercise its discretion to dispense with consent. The second aspect should be governed by the principle that the child's welfare is to be regarded as the paramount consideration and, in determining this question, the court should be assisted by legislative guidelines.

THE CHILD'S PARTICIPATION

7.77 Under the present law, the child's consent must normally be obtained for adoption if the child is over 12 years of age, but it can be dispensed with by the court if there are "special reasons, related to the welfare and interests of the child".[53] In other respects, although the child's welfare is required to be treated as "the paramount consideration", the Act makes no provision for active participation by the child in the adoption process.

7.78 This is perhaps not surprising. In the mid-1960s when the "uniform" legislation was being formulated, adoption usually involved newborn babies, who could hardly participate actively in the proceedings. Today, a greater proportion of children are older, and thus may have the capacity and desire to express opinions about the proposed adoption. In addition, there were few precedents for children actively participating in court proceedings, and the then current notions of children's rights emphasised children's rights to *protection* rather than their rights to have a say in decisions that affected them.[54]

7.79 More recently, there has been growing recognition of children's rights of participation, and this is reflected in case law[55] and in much recent legislation, which includes provisions for children to be legally represented, and to participate actively in court proceedings in other ways.[56] It is also reflected in the United Nations *Convention on the Rights of the Child*, which provides:

> Article 12
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

7.80 Providing for the consent of children over the age of 12 presents the child with a difficult choice. It may well be a choice that the child feels unable to make, or does not wish to make. It does not necessarily allow the child the opportunity to "express...views". A child who, for example, wished to retain a particular name, or remain in contact with a birth parent, should be allowed to express those views, and this is not achieved by merely providing for the child to consent.

7.81 The Commission's provisional view is that the law should require that the child's views, perceptions and feelings be ascertained and taken into account, provided that the child should not be required to express views if he or she does not wish to do so. The guidelines for the making of adoption orders should include a provision to the effect that the court should not make an order without the agreement of a child of 12 years and over except where it is satisfied that the order will nevertheless promote the child's welfare.

7.82 There should also be appropriate facilities for counselling children and allowing them to be represented in the preliminary hearing and the adoption hearing. It is important that in all cases some person should have the task of talking with them, and reporting to the court on their perceptions, feelings, and wishes.[57]

FOOTNOTES

1. *Adoption Information Act* 1990 (NSW), s 8. Exercise of the right is subject to the "contact veto" system: see generally, New South Wales. Law Reform Commission *Review of the Adoption Information Act 1990* (Report 69, July 1992).

2. *Adoption of Children Act* 1965 (NSW), s 26. Section 26(3)(b) of this Act states that where a child has not been previously adopted and whose parents were not married but lived together after the child's birth as husband and wife, the persons required to consent to the adoption of that child are "every person who is a parent or guardian of the child".

3. *Adoption of Children Act* 1965 (NSW), s 26(4A).

4. In addition, consent was required from any person who was a guardian of the child.

5. *Adoption of Children Act* 1965 (NSW), s 26(3)(b). In the text, "ex-nuptial child" is shorthand for "a child ... whose parents were not married to each other at the time of the child's conception and have no subsequently married each other".

6. See New South Wales. Law Reform Commission *Report on De Facto Relationships* (Report 36, 1983) at paras 15.62-15.64.

7. Earlier decisions, based on differently worded provisions of the *Family Law Act*, had held that the father was not a guardian for the purpose of the *Adoption of Children Act* 1965. See *C v Director-General of Youth and Community Services* (1982) 7 Fam LR 816, and to the same effect *W v H* [1978] VR 1; *Re H (an Infant)* [1982] Qd R 364. These decisions were distinguished in *Hoye*, at 584, on the ground that the argument now rested on the express statutory provision for guardianship in *Family Law Act* s 63F.

8. Section 26(3A) provides that the father of an ex-nuptial child is not a guardian for the purpose of the section unless he has custody of the child under a court order, or is or is deemed to be "the guardian of the child, to the exclusion of, or in addition to, the mother or other guardian, under a law of the Commonwealth..."

9. Section 63F(1).

10. Section 6 of the *Adoption of Children Act* 1965 (NSW) contains a definition of "guardian" which includes somebody who is a guardian under a law of the Commonwealth. *Hoye and Neely* (1992) 15 Fam LR 578. Section 26(3A) was held not to apply because the father was therefore a guardian under a law of the Commonwealth, and fell within para (b).

11. See the decisions cited above, footnote 7. In the first of these decisions, Waddell J suggested, at 821, that the insertion of s 26(3A) might have been intended to adopt the decision in *W v H*. The suggestion is that if the New South Wales Parliament had wanted to require consent from unmarried fathers falling outside the "common household" test, it would have amended the Act accordingly.

12. This apparent disregard of the law may be based on an opinion that the Supreme Court would not follow the Family Court's decision.

13. This is a considerably simplified summary of s 31A. See also s 31E.

14. Section 31A; s 31B (notice may be dispensed with in certain situations).

15. Section 31D.

16. Historically, of course, it may be that the consent requirement reflected the father's extraordinarily powerful position in relation to his legitimate children.

17. New South Wales Anti-Discrimination Board *Submission* (14 August, 1993).

18. See, for example, Nova Scotia. Law Reform Commission *The Legal Status of the Child Born Outisde of Marriage in Nova Scotia* (Discussion Paper, 1993) at 14-17.

19. *Children Act* 1989 (UK), s 5.

20. Section 4.

21. United Kingdom. *Review of Adoption Law* (Report to Ministers of an Interdepartmental Working Group, Department of Health and Welsh Office, 1992).

22. United Kingdom. *Review of Adoption Law* at 19-20.

23. More precisely, the Act requires in s 31A(1) that the inquiries to be directed at whether any man is presumed to be the father under particular legal presumptions, or is registered as the father. The Commission's view, indicated above, is that there is no need for such complex provisions: the legal presumptions relating to paternity operate independently of the adoption legislation and to repeat them is unnecessarily complex. Further, there is no reason to restrict the inquiries to men who fall within a presumption of paternity.

24. See D Hambly and J Chart "The Adoption of Children (Amendment) Act 1980" (1980) *Aust Current Law* at 39-42; R Chisholm, "End of uniformity: new adoption laws for New South Wales" (1980) 5 (2) *Legal Services Bull* at 49-51.

25. *Family Law Act* 1975, Part VII (Cth); *Children (Equality of Status) Act* 1976 (NSW); *Artificial Conception Act* 1984 (NSW).

26. *Adoption of Children Act* 1965 (NSW), s 27, 29.

27. *Adoption of Children Regulations* 1966 (NSW), reg 21(d).

28. *Adoption of Children Act* 1965 (NSW), s 29; *Adoption of Children Regulations* 1966 (NSW), reg 23.

29. Regulation 22.

30. Regulation 27.

31. *Adoption of Children Act*1965 (NSW), s 31(2)-(4).

32. Section 31.

33. Section 28.

34. J Bowlby *Separation: Anxiety and Anger Attachment and Loss Vol II* (Hogarth Press and Institute of Psycho-Analysis, 1985) at 55.

35. Theories regarding *attachment* should not be confused with those regarding *bonding*. The word "bonding" is often used to refer to the feelings that the mother develops towards the child and was initially believed to occur when there was close skin to skin contact between mother and child immediately after birth. Attachment, on the other hand, commonly refers to the process of two-way attachment occurring between mother and child, generally becoming apparent in the child at the age of six months. See Dr D James *Bonding: Mothering Magic or Pseudo Science* (Selected Papers No 40, Foundation for Child and Youth Studies, Education and Research Unit, NSW, 1985) at 3.

36. This paragraph does not refer to adoptions within families.

37. In this respect, Myers J's decision in *Re an Infant M and the Adoption of Children Act* (1967) 87 WN (Pt 1)(NSW) 48 appears to be mistaken.

38. *Adoption Act*1984 (Vic), s 37.

39. *Adoption Act* 1984 (Vic), s 39.

40. *Adoption Act* 1988 (SA), s 15(4).

41. *Adoption Act* 1988 (SA), s 32.

42. Para (f1), dealing with inter-country adoption, has been omitted. It is discussed below in Chapter 12.

43. This provision has been criticised (like the similar provision relating to unmarried fathers), on the grounds that it attaches disproportionately serious consequences to a failure to respond quickly and appropriately to a notice, and on the ground that unlike the other grounds, such failure seems to have little or no connection with the child's welfare: D Hambly and J Chart "The Adoption of Children Act (Amendment) Act 1980" 1980 *Aust Current Law Digest* 41.

44. *Re an Infant K and the Adoption of Children Act* [1973] 1 NSWLR 311.

45. See, for example, papers by D Hambly, and R Chisholm, in C Picton (ed) *Proceedings of the First Australian Conference on Adoption 1976* (Committee of the First Australian Conference on Adoption, Melbourne, 1976).

46. *Children (Care and Protection) Act* 1987 (NSW), s 10.

47. Most jurisdictions have provisions which refer to the child's welfare, but also require the existence of "special circumstances" or the like.

48. United Kingdom. *Review of Adoption Law* (Report to Ministers of an Interdepartmental Working Group, Dept Health and Welsh Office, 1992), at 25-7.

49. See for example, J Goldstein, A Freud and A Solnit *Before the Best Interests of the Child* (New York, Free Press, 1979).

50. *Children (Care and Protection) Act* 1987 (NSW), s 10.

51. *Adoption Act* 1984 (Vic) s 43. *Adoption Act* 1988 (SA) s 18 ("other circumstances by reason of which the consent may properly be dispensed with").

52. This analysis does not however account for the provisions of the *Family Law Act* 1975 (Cth), Part VII, insofar as they allow third parties to make applications for custody or guardianship without having to establish any threshhold requirement.

53. Section 33(1).

54. Compare, for example the United Nations *Declaration on the Rights of the Child* (1959) with the *International Convention on the Rights of the Child* (1990). On children's rights theory generally, see P Alston, S Parker and J Seymour (eds) *Children, Rights and the Law* (Clarendon Press, Oxford, 1992).

55. *Secretary, Dept of Health and Community Services v JWB and SMB* ("Re Marion") (1992) 15 Fam LR 392.

56. See, for example, *Family Law Act* 1975 (Cth), s 63C(1)(b), 64(1)(b), 65; *Children (Care and Protection) Act* 1987 (NSW), s 61A, 58(1)(a), 62B, 65(1)(a), 66, 69; see also *Adoption Act* 1984 (Vic), s 14. (child's wishes to be considered).

57. Compare *Family Law Act* s 62A.

8. Aboriginal and Torres Strait Islander Children

POINTS FOR FURTHER DISCUSSION

Aboriginal children

1. Should Aboriginal children ever be placed for adoption?

2. If they are to be placed, should there be an Aboriginal placement principle incorporated in legislation?

3. If so, in what form? What preferences should be made for placement and who should have the ultimate power of placement?

4. Who is an Aboriginal child? Should the definition of Aboriginality be simplified for children so that an Aboriginal child is defined as a child of Aboriginal descent?

5. The Victorian Adoption of Children Act 1984 states that provisions are enacted "in recognition of the principle of Aboriginal self-management and self-determination and that adoption is absent in customary Aboriginal child care arrangements". Should New South Wales legislation make a similar acknowledgment?

6. Is it symbolically or practically important for legislation to state that Aboriginal law does not recognise adoption and that the adoption of an Aboriginal child involves the imposition of non-Aboriginal child care principles on Aboriginal children?

7. Should relinquishing parents be able to prevent the placement of their child with an Aboriginal family or do the interests of Aboriginal people as a group demand that this not be the case?

8. Should there be a blanket prohibition on the adoption of Aboriginal children into non-Aboriginal families or should there be provision made for adoption by non-Aboriginal families if no Aboriginal family is available or if it is in the best interests of the child?

9. Should there be a prohibition on the adoption of Aboriginal children by *any* family on the grounds that adoption is incompatible with customary law?

Torres Strait Islander children

10. To what extent does New South Wales adoption law affect Torres Strait Islander children?

11. Should provision be made for traditional Torres Strait Islander adoption to be recognised by New South Wales law?

12. Alternatively, should Torres Strait Islander children be afforded the same protection as Aboriginal children by the enactment of a Torres Strait Islander placement principle?

INTRODUCTION

8.1 Aboriginal customary law and racial and ethnic heritage are considered separately even though there are significant ways in which they overlap. Chapter 8 will deal with adoption and the Aboriginal and Torres Strait Islander communities while Chapter 9 will cover ethnic and racial heritage generally. This has been done because although any discussion of the adoption of Aboriginal and Torres Strait Islander children will raise issues of racial heritage, the Commission considers it appropriate to distinguish the adoption of indigenous (ie Aboriginal and Torres Strait Islander) children from the adoption of children who are not indigenous. There are two main reasons for doing this. First, Aborigines and Torres Strait Islanders are not part of the large group of multicultural people who have migrated to Australia since 1788 and they should not be treated as such.

8.2 Second, adoption law has a special history of impacting in a unique and damaging way on the Aboriginal and Torres Strait Islander people. For this reason there are particular factors that need to be considered in a discussion of adoption of Aboriginal and Torres Strait Islander children.

8.3 Although the Commission's terms of reference only refer to "Aboriginal customary law and racial and ethnic heritage", this chapter will include discussion of Torres Strait Islander children.[1]

BACKGROUND

8.4 Aboriginal communities have been, and continue to be adversely affected by adoption. From 1883 until 1969, under the Aborigines Protection Board and later the Aborigines Welfare Board, it was government policy in New South Wales and other States, to forcibly remove Aboriginal children from their families.[2] Children were placed in homes and trained as domestic servants or station hands. In later years, some children, particularly those who were 'light enough to pass as white', were fostered or adopted by non-Aboriginal families.

8.5 The *Convention on the Prevention and Punishment of the Crime of Genocide* 1948 defines "forcibly transferring children of [one] group to another group" with "the intent to destroy, in whole or in part, a...racial...group" as genocide.[3] Australian government policies of that time would clearly fall within the terms of the Convention.[4] The removal of children was part of the wider policy of assimilation which attempted to socialise Aboriginal people into non-Aboriginal culture and habits so that they would not maintain their own culture. In the case of children this process has been described as "break[ing] the sequence of indigenous socialisation so as to capture the adherence of the young, and to cast scorn on the sacred life and the ceremonies which remain as the only hold on continuity with the past".[5]

8.6 The policy of assimilation is clearly illustrated in this statement from the Aborigines Protection Board, dated 1914.

> Several...were handed over to the State Children's Relief Department as neglected children. These will not be allowed to return to their former associations, but will be merged into the white population.
>
> To allow these children to remain on the Reserves to grow up in comparative idleness, and in the midst of more or less vicious surroundings, would be to say the least an injustice to the children themselves, and a positive menace to the State.[6]

8.7 The policy of removal of children continues to be the source of much suffering in Aboriginal communities. The experiences children had in homes were rarely, if ever, positive. The children were invariably treated as inferior and denied access to their families, communities and heritage. Children who were fostered or adopted often suffered the same fate, despite the well-meaning intentions of some adoptive and foster families. One commentator states that:

> Every one of the five thousand children removed from their parents had, and have, their own private and bitter memories of separation and later problems of adjustment. From the point of view of the Aboriginal race as a whole, we can hardly guess at the cost of wasted talent of those who spent a decade in the service of the whites. We can hardly guess at the number of men and women who deny their own birth-right as Aboriginal citizens of Australia. The comparisons must tell the story. Perhaps one in six or seven Aboriginal children have been taken from their families during this century, while the figure for white children is about one in three hundred. To put it another way, there is not an Aboriginal person in New South Wales who does not know, or is not related to, one or more of his/her countrymen who were institutionalised by the whites.[7]

8.8 The policy of removal and its effect must be remembered when considering the question of Aboriginal children and adoption today. As a result of the removal of children, Aboriginal people have a justifiable suspicion of, and resistance to, non-Aboriginal welfare authorities deciding the fate of their children. Adoption potentially represents a means by which Aboriginal children are removed from the care of their communities and placed with non-Aboriginal families. Children may lose contact with their heritage and even be denied the knowledge of their

Aboriginality, as has been the case in the past. In this sense, adoption can be seen as a threatening and potentially damaging option from the point of view of Aboriginal people.

ADOPTION AND ABORIGINAL LAW

8.9 Adoption, as it is currently defined, is an unknown institution in Aboriginal customary law. The separation of children from natural families and the absolute transfer of parental rights are incompatible with the basic tenets of Aboriginal society.

8.10 In its submission to the Commission, the Aboriginal Children's Service stated that:

> More than any other form of substitute care, adoption is perhaps most alien to Aboriginal thinking because, in its present form, it can totally and permanently separate an Aboriginal child from his family and potentially all Aboriginal people...
>
> Adoption legislation...is simply inadequate to deal with the special needs of Aboriginal children. Aboriginal children are not regarded in Aboriginal society as in the same way, property of the parents as they are in Anglo-Australian society. Often parents are not married, at least in any form recognised by Australian law. Further, the matter of secrecy is not nearly as appropriate as it is, or at least has been, in the case of children adopted within the Anglo-Australian community. Finally, the kinship networks available within the Aboriginal communities are such that adoption may be a form less useful in relation to at least some Aboriginal children than it is in the case of the nuclear family structures of Anglo-Australian society.[8]

8.11 Adoption is a culturally specific way of caring for children that has its roots in non-Aboriginal concepts of family. Aboriginal families do not necessarily function on the same premises as non-Aboriginal families; they have unique features which must be considered when determining appropriate ways to care for Aboriginal children.

> A dominant feature characteristic of most [Aboriginal] families is the sense of kinship. This is the feeling of family togetherness, the ability to rely on each other, and the creation of spiritual bonding which helps to form strong family relationships. Kinship also includes the creation of inter-dependence and support between the members of a family...Spiritual bonding is the bonding which goes beyond a blood relationship. This is a bond which passes on a bit of the Dreamtime, thus passing on 'Aboriginality'.[9]

8.12 It is possible for adoption legislation to acknowledge this difference between Aboriginal and non-Aboriginal families and to recognise that adoption is not part of Aboriginal law. The Victorian *Adoption of Children Act* 1984 states that provisions are enacted "in recognition of the principle of Aboriginal self-management and self-determination and that adoption is absent in customary Aboriginal child care arrangements".[10]

> Should New South Wales legislation make a similar acknowledgment?
>
> Is it symbolically or practically important for legislation to state that Aboriginal law does not recognise adoption and that the adoption of an Aboriginal child involves the imposition of non-Aboriginal child care principles on Aboriginal children?

ABORIGINAL PLACEMENT PRINCIPLE

8.13 The Australian Law Reform Commission, in its report *The Recognition of Aboriginal Customary Laws*, stated that:

> In the Commission's view, legislation should deal expressly with the placement of Aboriginal children. It is not sufficient to rely on the sensitivity of particular welfare officers, authorities or magistrates in ensuring that appropriate principles are applied - and that concealed ethnocentric judgments are not applied - in deciding the future of Aboriginal children.[11]

8.14 The *Adoption of Children Act* 1965 (NSW) currently has no specific provision for the placement of Aboriginal children. The Department of Community Services has a draft policy on the placement of Aboriginal children that stipulates that Aboriginal children are to be placed with Aboriginal families unless no Aboriginal family is available.

8.15 The *Adoption of Children Act* 1965 could deal expressly with the placement of Aboriginal children by including some form of the Aboriginal Child Placement Principle in its sections. The Aboriginal Child Placement Principle, developed in the late 1970s, includes two components:

> First, there is a guideline for the placement of children (in descending order of preference) with members of their own or immediate family; or with members of their community; or with other Aboriginal people. Only if none of these placements can be made should they be placed in the care of non-Aboriginal people. Second, there should be Aboriginal participation in the decision-making process. Opinions differ about what this second component should involve. Aboriginal claims to self-determination or sovereignty suggest that Aboriginal people should have authority to determine placement, while more conservative opinion would merely seek to ensure that Aboriginal views are taken into account when the decision is made.[12]

8.16 This principle has found varied expression in legislation and policy throughout Australia. The following illustrate the differences in State and Commonwealth perceptions of the principle.

Former Department of Aboriginal Affairs Child Care Placement Principle

8.17 The former Commonwealth Department of Aboriginal Affairs drafted a Child Care Placement Principle which continues to be used by the Aboriginal and Torres Strait Islander Commission. It states that:

> When a child is to be placed outside his/her natural family, then the order for priority of placement should be:
>
> a member of the child's extended family;
>
> other members of the child's Aboriginal Community who have the correct relationship with the child in accordance with Aboriginal customary law, and
>
> other Aboriginal families in close proximity.13

Children (Care and Protection) Act* 1987 *(NSW)

8.18 The New South Wales *Children (Care and Protection) Act* 1987, in its provision for children in need of care, stipulates that:

> **87.** An Aboriginal child shall not be placed in the custody or care of another person under this Part unless:
>
> (a) the child is placed in the care of a member of the child's extended family, as recognised by the Aboriginal community to which the child belongs;
>
> (b) if it is not practicable for the child to be placed in accordance with paragraph (a) or it would be detrimental to the welfare of the child to be so placed - the child is placed in the care of a member of the Aboriginal community to which the child belongs;
>
> (c) if it is not practicable for the child to be placed in accordance with paragraph (a) or (b) or it would be detrimental to the welfare of the child to be so placed - the child is placed in the care of a member of some other Aboriginal family residing in the vicinity of the child's usual place of residence; or

(d) if it is not practicable for the child to be placed in accordance with paragraph (a), (b) or (c) or it would be detrimental to the welfare of the child to be so placed - the child is placed in the care of a suitable person approved by the Director-General after consultation with:

(i) members of the child's extended family, as recognised by the Aboriginal community to which the child belongs; and

(ii) such Aboriginal welfare organisations as are appropriate in relation to the child.[14]

Adoption of Children Act* 1964 *(Qld)

8.19 In Queensland the *Adoption of Children Act* 1964, s 18A provides a general guideline for the placement of children with an "indigenous or ethnic background".

> In making arrangements with a view to the adoption of a child in respect of whom a general consent has been given or dispensed with and, in particular, in determining which prospective adopter or prospective adopters he will approve in the case of such a child the Director shall have regard to the indigenous or ethnic background and cultural background of the child and shall approve a prospective adopter who, or prospective adopters one of whom, has a similar indigenous or ethnic background and cultural background, unless -
>
> (a) it appears to the Director that such a prospective adopter or prospective adopters is not or are not available and cannot reasonably be expected to become available promptly; or
>
> (b) in the Director's opinion, the welfare and interests of the child would not be best served by so doing.

Adoption of Children Act* 1984 *(Vic)

8.20 The *Adoption of Children Act* 1984 (Vic), s 50 provides that:

> (2) Where -
>
> (a) consent is given to the adoption of a child by a parent -
>
> (i) who is an Aborigine; or
>
> (ii) who is not an Aborigine but, in the instrument of consent, states the belief that the other parent is an Aborigine -
>
> and who, in the instrument of consent, expresses the wish that the child be adopted within the Aboriginal community; or
>
> (b) the Court has dispensed with the consent of the parents and the Director-General or principal officer of an approved agency believes on reasonable grounds that the child has been accepted by an Aboriginal community as an Aborigine and so informs the Court -
>
> the Court shall not make an order for the adoption of the child unless the Court is satisfied as to the matters referred to in section 15 and, where a parent has given consent, is satisfied that the parent has received, or has in writing expressed the wish not to receive, counselling from an Aboriginal agency and -
>
> (c) that the proposed adoptive parents are members, or at least one of the proposed adoptive parents is a member, of the Aboriginal community to which a parent who gave consent belongs;

(d) that a person of a class referred to in paragraph (c) is not reasonably available as an adoptive parent and that the proposed adoptive parents, or at least one of the proposed adoptive parents, is a member of an Aboriginal community; or

(e) that a person of a class referred to in paragraph (c) or (d) is not reasonably available as an adoptive parent and that the proposed adoptive parents are persons approved by or on behalf of the Director-General or the principal officer of an approved agency and by an Aboriginal agency as suitable persons to adopt an Aboriginal child.

8.21 These provisions illustrate the great variety of legislative and policy statements incorporating the Aboriginal Child Placement Principle. Each provides for a different process by which the decision to place a child is reached. Each gives a different party the ultimate power to make the placement. The *Children (Care and Protection) Act* 1987 (NSW) designates the child's extended family as the first placement choice and gives the Director-General the ultimate power to place a child, only requiring that he or she must "consult" with the child's extended family or an appropriate Aboriginal organisation. The Queensland legislation does not require the child to be placed with his or her family or community at all and the Director of the relevant government department does not need to consult with Aboriginal organisations; he or she simply must consider the child's indigenous or ethnic background when making a placement. The Victorian Act allows the relinquishing parent power to determine if the child is to be placed in an Aboriginal community or if consent has been dispensed with, the child may be placed with non-Aboriginal adoptive parents on the joint approval of the Director General/principal officer of an adoption agency and a suitable Aboriginal agency.

8.22 All of these legislative schemes allow for the possibility of placing a child in a non-Aboriginal family and none of them gives the ultimate power of placement to the Aboriginal community.

A legislative alternative - Aboriginal placement power

8.23 The Aboriginal Children's Service recommended a system that would put the power of placement in its hands.

> ...no adoption of an Aboriginal child shall take place unless approved by the New South Wales Aboriginal Children's Service Ltd. If approval is given for the placement of an Aboriginal child, then the following conditions will apply;
>
> 1. Provision is to be made for information and/or access by recognised members of that child's kinship network and/or continuance of the legal relationship with the natural parents.
>
> 2. Placement of that child can be given to any person, irrespective of marital status or relationship, who is approved by the New South Wales Aboriginal Children's Service and that regular and on-going contact be maintained by the New South Wales Aboriginal Children's Service.
>
> 3. That formal recognition of a child's Aboriginality be established in conjunction with a representative body of the Aboriginal Community and a register be maintained and distributed throughout the Aboriginal Organisations in the respective areas.
>
> 4. That all persons on this register be notified of their Aboriginal ancestry throughout their lives and informed of the consequent rights which flow to them.
>
> 5. That the placement principles be incorporated in legislation, giving the New South Wales Aboriginal Children's Service the determining role of placements and that this priority be:
>
> a) extended family
>
> b) other members of the kinship network
>
> c) other Aboriginal families.

6. That the New South Wales Aboriginal Children's Service be involved in all placement arrangements in adoption.[15]

8.24 Such a legislative scheme would involve a significant change in current adoption practice in relation to Aboriginal children. It would be compatible with the principles of Aboriginal self-determination and self-management.[16] The scheme would involve the transfer of placement power in relation to Aboriginal children from the Department of Community Services to the Aboriginal Children Service. It would result in a completely separate adoption service for Aboriginal children.

Questions to consider

8.25 In enacting an Aboriginal child placement principle several questions need to be addressed.

What preferences should be listed for the placement of Aboriginal children relinquished for adoption? The child's immediate family, extended family, kinship network, the child's own community or a nearby community or whoever would have been required to care for the child according to traditional law?

Who should have the ultimate power to decide where to place a child? The Director-General of the Department of Community Services, an Aboriginal organisation such as the New South Wales Aboriginal Children's Service, the relinquishing parent, the child's extended family and kinship network or a combination of any of these?

Should relinquishing parents be able to prevent the placement of their child with an Aboriginal family or do the interests of Aboriginal people as a group demand that this not be the case?

Should there be a blanket prohibition on the adoption of Aboriginal children into non-Aboriginal families or should there be provision made for adoption by non-Aboriginal families if no Aboriginal family is available or if it is in the best interests of the child?

Should there be a prohibition on the adoption of Aboriginal children by any family on the grounds that adoption is incompatible with customary law?

WHO IS AN ABORIGINAL CHILD?

8.26 Non-Aboriginal definitions of Aboriginality have been the source of much resentment in the Aboriginal community over the years, with each State having its own definition of Aboriginality prior to 1967.[17] In the early 1970s the Federal government generated a definition that most Aboriginal people accept today. This defines an Aborigine as a person of Aboriginal descent, who identifies as an Aborigine and who is accepted as such by the community in which he or she lives.[18] In the Issues Paper, the Commission noted that this definition has been embodied in New South Wales legislation such as the *Aboriginal Land Rights Act* 1983.[19]

8.27 The definition presents particular problems for Aboriginal children. First and most obviously, a baby relinquished for adoption cannot 'identify as an Aborigine' and if his or her community is not aware that he or she has been born, it cannot accept him or her as an Aborigine. Birth parents may declare their child's Aboriginality, but this does not always happen. Aboriginal and non-Aboriginal birth mothers may not declare their child's Aboriginality intentionally, or because they do not know their child is Aboriginal. They may not know because they are unaware of the father's Aboriginality or because they are unaware of their own Aboriginality. Many people removed or relinquished from their families in the past were never informed of their Aboriginality and may not discover it until they access information under adoption information legislation. Some may never discover their Aboriginality at all.

8.28 Older children who are wards of the State and are subsequently adopted may also be unaware of their Aboriginality. Alternatively, the children may know they are Aboriginal but it has never been marked on their files by the Department of Community Services. The Aboriginal Children's Project discovered in 1982 that 40.7% of Aboriginal children in institutional care were not identified as Aboriginal on Department files.[20] The Project noted that "one factor behind the degree of under-identification is that departmental staff involved with state wards

are...inclined to see the children in an assimilationist perspective".[21] That is, there was still a tendency to draw children away from their Aboriginal community when workers assumed they were acting in the best interests of the child.

8.29 The problem of identifying Aboriginal children needs to be addressed in adoption legislation. There is little point in providing for an Aboriginal child placement principle if children are going to be denied the benefit of it by not being recognised as Aboriginal. Perhaps the accepted definition of Aboriginality needs to be modified for children so that it simply states that an Aboriginal child is a child of Aboriginal descent.[22] This would avoid the difficulty of children not being able to actively identify as Aboriginal because they are too young or have not been informed of their racial identity.

FINDING ABORIGINAL ADOPTIVE PARENTS

8.30 Under the current system the Department of Community Services actively seeks Aboriginal adoptive parents for Aboriginal children. In the Department's view, the provision of the *Adoption of Children Act* allowing people married by Aboriginal tradition to adopt has been helpful in approving Aboriginal couples as adoptive parents.[23]

8.31 In most cases it seems that Aboriginal children are placed with Aboriginal families. However, the Department has difficulty finding Aboriginal families for special needs children with particular disabilities and these children are sometimes placed with non-Aboriginal families.

8.32 The Commission would appreciate submissions on the question of whether more needs to be done to recruit Aboriginal adoptive parents. In particular, is it sufficient to recruit adoptive parents from any Aboriginal community or should the Department be seeking adoptive parents from the child's extended family and/or kinship network?

ADOPTION AND TORRES STRAIT ISLANDER LAW

8.33 Unlike Aboriginal law, Torres Strait Islander law recognises adoption in a form that is not totally dissimilar to New South Wales adoption law. Adoption in Torres Strait Islander communities involves the permanent transfer of parental rights to adoptive parents and there is a reluctance to tell children of their adoptive status.[24] In contrast to Australian adoption law however, adoptive parents are never strangers to the biological parents, but members of the extended family or close friends. Adoptive parents may be single or married, and may already have children of their own. Adoption provides stability to Islander society by developing bonds between families.[25]

8.34 Torres Strait Islanders have been involved in formal discussions with the Queensland State Government since 1990 with the aim of having Islander adoptions recognised by Queensland adoption legislation.

> Islanders perceive that in white society 'adoption' provides adopters with legal security to raise a child as though that child were born to the adoptive family. They consider that their concept of permanence in traditional adoption also means that the adopted child becomes fully a member of the adoptive family; therefore they consider white adoption legislation is the most appropriate avenue by which to apply for recognition of their traditional practice.[26]

8.35 The Queensland government has been reluctant to recognise Islander adoptions within existing legislative framework because workers in the Department of Family Services believe that Islanders would be disadvantaged by applying closed Queensland adoption legislation to open Islander adoption practice.

8.36 The Commission is interested to explore these issues in relation to New South Wales. In particular, the Commission would welcome information on the extent to which New South Wales adoption law affects Torres Strait Islander children. If it is found that Torres Strait Islander children are being adopted under New South Wales law, the Commission will need to consider the same issue that is being addressed in Queensland; in particular should New South Wales law recognise Torres Strait Islander adoption practice? If so, should legislation treat Islander adoption in the same way as it treats all other adoption or should legislation be enacted

to accurately reflect existing adoption practice in the Torres Strait Islands? Alternatively, should Torres Strait Islander children be afforded the same protection as Aboriginal children with a placement principle that requires any Torres Strait Islander child surrendered for adoption to be placed with a Torres Strait Islander family?

INTERNATIONAL LAW

8.37 The *Convention on the Rights of the Child* grants specific rights to indigenous children and must be respected by adoption legislation.

8.38 Article 30 stipulates that:

> In those States in which...persons of indigenous origin exist, a child...who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her culture, to profess and practice his or her own religion, or to use his or her own language.

8.39 Put another way, Aboriginal and Torres Strait Islander children have a right to enjoy their culture with members of the Aboriginal and Torres Strait Islander communities. Adoption legislation must not effectively deny children this right by placing them where they will have no opportunity to exercise their right.

8.40 Article 5 requires State Parties to respect:

> the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom...to provide...appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

8.41 This recognises the right of Aboriginal and Torres Strait Islander families and communities to play a part in the process whereby a child benefits from the rights granted to him or her by the Convention. This includes the right to enjoy one's culture in article 30 above. It would also include the right to "alternative care" that the State must provide for the child according to article 20, if the child is permanently or temporarily deprived of his or her family.[27] In other words, Aboriginal and Torres Strait Islander families and communities have the *right* to provide direction and guidance when children are benefiting from *their* right to alternative care.

8.42 Interestingly, article 20(3) of the Convention, cited by the Commission in the Issues Paper,[28] makes no reference to indigenous children. The article requires "due regard [to] be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" when making an adoption, foster or institutional placement. The Convention makes explicit reference to indigenous children elsewhere[29] so it would seem surprising that they were inadvertently omitted from this section. It could be argued that they were intentionally omitted on the grounds that continuity of indigenous background is not simply desirable, it is essential. Perhaps the article is implying that indigenous children should never be placed outside their communities.

8.43 Such a contention is born out by operative paragraph 6 of the *Draft Declaration on the Rights of Indigenous People*. This states that:

> Indigenous peoples have the collective and individual right to be protected against ethnocide and cultural genocide, including *the prevention* and redress for:
>
> (a) Removal of indigenous children from their families and communities *under any pretext* (emphasis added).

8.44 This article expressly states that indigenous children should not be removed from their families and communities under any pretext, presumably including adoption. While this article is not legally binding in relation to Australia, it should be recalled when considering alternative care options for Aboriginal and Torres Strait Islander children. When the Convention is finalised, Australia, as a country with an indigenous population, is likely to sign and ratify the Convention.

Conclusion

8.45 The placement of Aboriginal children for adoption is a difficult and contentious issue. The damaging impact that welfare laws have had on Aboriginal children and their communities in the past leads Aboriginal people to justifiably question the wisdom of adoption legislation.

8.46 Despite these concerns, Aboriginal children are still placed for adoption. As a result, the following four main questions need to be addressed.

> Should Aboriginal children ever be placed for adoption?
>
> If they are to be placed, should there be an Aboriginal placement principle incorporated in legislation?
>
> If so, in what form? What preferences should be made for placement and who should have the ultimate power of placement?
>
> Who is an Aboriginal child? Should the definition of Aboriginality be simplified for children so that an Aboriginal child is defined as a child of Aboriginal descent?

8.47 In answering these questions it should be remembered that a significant proportion of Aboriginal children that the Department currently places are children with special needs, who may have physical and mental disabilities of varying severity.

8.48 The adoption of Torres Strait Islander children raises different questions, namely:

> To what extent does New South Wales adoption law affect Torres Strait Islander children?
>
> Should provision be made for traditional Torres Strait Islander adoption to be recognised by New South Wales law?
>
> Alternatively, should Torres Strait Islander children be afforded the same protection as Aboriginal children by the enactment of a Torres Strait Islander placement principle?

8.49 The Commission would appreciate responses to these issues, especially from members of the Aboriginal and Torres Strait Islander community.

FOOTNOTES

1. This is on the advice of the Aboriginal and Torres Strait Islander Commission (ATSIC) who recommended the Commission include Torres Strait Islander Children in its deliberations, given the number of Torres Strait Islanders in New South Wales: Aboriginal and Torres Strait Islander Commission *Submission* (6 October 1993) at 9.

2. C Edwards and P Read *The Lost Children* (Doubleday, Sydney, 1992); B Cummings *Take This Child*... (Aborigines Studies Press, Canberra, 1990); R Chisholm “Aboriginal Children: Political Pawns or Paramount Consideration” in J Jarred *Child Welfare: Current Issues and Future Direction*s (No 34, Social Welfare Reports and Proceedings, 1983) at 43; R Chisholm *Black Children: White Welfare* (Social Welfare Research Centre Proceedings, no 52, 1985) at 10-32.

3. Article II(e).

4. Unfortunately, it would be impossible to argue Australia was actually in breach of the Convention prior to 1961 as the Convention did not come into force until that year.

5. C D Rowley *The Remote Aborigines* (Penguin, Harmondsworth, 1972) at 115.

6. Aborigines Protection Board Report, 1914 cited in R Chisholm “Aboriginal Children: Political Pawns or Paramount Consideration” at 49.

7. P Read *The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883 to 1969* (New South Wales Ministry of Aboriginal Affairs, Occasional Paper (no 1)).

8. Aboriginal Children's Service *Submission* (12 July 1993) at 2, 6.

9. Y Walker "Aboriginal Concepts of the Family" (1993) 18(1) *Children Australia* 26 at 26.

10. Section 50(1).

11. Australia. Law Reform Commission *The Recognition of Aboriginal Customary Laws* (Report 31, vol 1, 1986) at para 366.

12. R Chisholm "Aboriginal Children and the Placement Principle" (1988) 31(2) *Aboriginal Law Bulletin* 4 at 4.

13. Aboriginal and Torres Strait Islander Commission *Submission* (6 October 1993) at 7.

14. See R Chisholm "Aboriginal Children and the Placement Principle" (1988) 31(2) *Aboriginal Law Bulletin* 4 for a discussion of s 87.

15. Aboriginal Children's Service *Submission* (12 July, 1993).

16. There may be resistance to such a scheme on the grounds that it does not give sufficient weight to the birth mother's view in the placement of her child. For example, a birth mother may not want her child placed in the child's extended family or kinship network or even with an Aboriginal family. She may wish to relinquish her child and maintain her privacy without members of her community becoming aware of her decision. Serious legal disputes between birth mothers and Indian tribes have arisen in the United States where the *Indian Child Welfare Act* 1978 (USA) has been used to try and prevent placements with non-Indian adoptive parents of the birth mother's choice: D DeBenedictis "Custody Controversy" (1990) 76 *American Bar Association Journa*l 22.

17. R Sykes *Black Majority* (Hudson Hawthorn, Melbourne, 1989) at 10; Aboriginal Children's Research Project *Identifying Aboriginal children in non-Aboriginal substitute care* (Discussion Paper 5, 1982) at 6-7.

18. Sykes at 25.

19. New South Wales. Law Reform Commission, (Issues Paper 9, May 1993) at para 9.3.

20. Aboriginal Children's Research Project *Identifying Aboriginal children in non-Aboriginal substitute care* at 29.

21. Aboriginal Children's Research Project at 30.

22. This definition was used in the report *Black Children: White Welfare* on the grounds that it "seemed to be the definition adopted, or taken for granted, by all Aboriginal people with whom [the author] spoke" at 6.

23. Section 19(1**a**)(c).

24. P Ban "The Quest for Legal Recognition of Torres Strait Islander Customary Adoption Practice" (1993) 60(2) *Aboriginal Law Bulletin* 4 at 4.

25. P Ban at 4.

26. P Ban at 4.

27. "1. A child temporarily or permanently deprived of his or her family environment...shall be entitled to special protection and assistance provided by the State.

2. State Parties shall in accordance with their national laws ensure alternative care for such a child": art 20.

28. New South Wales. Law Reform Commission, (Issues Paper 9, May 1993) at para 9.7.

29. Article 29(d), 30.

9. Ethnic and Racial Heritage

POINTS FOR FURTHER DISCUSSION

Inter-racial adoption

1. Should inter-racial adoption be prohibited?

2. If not, should a preference be made for intra-racial placement?

3. If so, how strict should this preference be? Should a child be placed inter-racially if there are no adoptive parents of the same race in the current "pool" of adoptive parents?

4. Alternatively, should the Department and private adoption agencies make special efforts to locate same-race parents for children, through recruitment programs in communities that do not traditionally adopt?

Ethnic heritage

5. What degree of importance should be placed on ethnic continuity in adoption?

6. Is ethnic similarity to a child simply one of the many desirable qualities that adoption workers look for in adoptive parents or is it an indispensable quality?

7. Can the need to be placed in an ethnically similar family be said to override all of a child's other needs?

8. What lengths should the Department go to to find ethnically similar adoptive parents? If there are no ethnically similar parents in the pool of approved applicants should the Department workers have to search further afield in the way that they might for a special needs child?

9. Should birth parents be allowed to request that their child is *not* placed with an ethnically similar family?

GENERAL ISSUES

9.1 As noted in the previous chapter, the *Convention on the Rights of the Child* provides that when considering alternative placements for children, including adoption, "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background".[2] On one interpretation this article means that ideally, children should be placed with adoptive parents of the same racial, ethnic, cultural and/or linguistic background as the child's birth family.

9.2 The Department of Community Services currently aims to provide this continuity to all children they place. The Adoptions Branch tries to maintain a pool of adoptive parents with similar ethnic, cultural, religious and racial heritage to the children who are being relinquished for adoption. If the Department has a number of Greek babies relinquished it will take steps to ensure that there is a number of adoptive parents with Greek heritage waiting in the pool.

9.3 Unfortunately it is not always possible to predict the ethnic, cultural, religious or racial background of children who will be placed for adoption, so that at times there may be not be adoptive parents available of the same background as children needing parents. Further, birth mothers may expressly request that the child not be placed with adoptive parents of the same heritage as the child. Under the *Adoption of Children Act* 1965 (NSW), a birth parent can express his or her wishes in respect of the religious upbringing of the child[3] and he or she, for example, may choose to do this by requesting that the child not be placed with Protestant adoptive parents, although the child's birth family is Protestant.

9.4 The shortage of adoptive parents of particular backgrounds and birth parents' wishes in relation to the placement of their children may lead to children being adopted by people of a different ethnic, cultural, religious or racial background.

Definitions

9.5 The distinction between ethnic and racial heritage can sometimes be blurred. For example, ethnic has been defined as "pertaining to or peculiar to a population, especially to a speech group, *loosely also to a race*".[4] Race and ethnicity overlap in the sense that people who are racially different from one another will invariably be ethnically different as well. For example, the Italian and Maori communities in Australia are racially and ethnically distinct. People who are racially similar however, may be ethnically different, for example Sri Lankans and Indians or Irish and Danes. Race could be said to be a broader term than ethnicity, encompassing many ethnic groups. It has been said that:

> 'ethnic group' is a term used more loosely to describe distinctions *within* races. An ethnic group could be defined in an objective sense as people who share a particular national origin, language, culture and/or religion...[or in a subjective sense as]...'a sense of peoplehood'.[5]

9.6 In the following discussion, racial and ethnic heritage will be dealt with separately. The discussion of racial heritage will cover children who are racially (and usually ethnically) different from a group of prospective adoptive parents. The discussion of ethnic heritage will deal with children who may be the same race as a group of adoptive parents, but whose ethnicity is different.

9.7 Another approach would have been to focus on cultural differences rather than racial or ethnic differences. The Commission's terms of reference specifically require it to consider the relevance of 'ethnic and racial heritage' for the purposes of adoption and this Paper therefore uses this terminology. The Commission would appreciate comment on which terminology is the most appropriate.

RACIAL HERITAGE

Overseas research

9.8 There has been considerable research and writing on inter-racial placements of children in Britain[6] and North America.[7] In the late 1960s and early 1970s inter-racial adoption in both Britain and North America was steadily increasing as a result of concerted efforts by social workers to find permanent homes for black children in care. In the early 1970s however, Black social workers began to oppose inter-racial adoptions on the grounds that they were damaging to children and were tantamount to genocide. The National Association of Black Social Workers (NABSW) in the United States stated that:

> Black children belong, physically, psychologically and culturally in black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are products of their environment and develop their sense of values, attitudes and self-concept within their family structures. Black children in white homes are cut off from the healthy development of themselves as black people.[8]

9.9 Similarly, in Britain, social workers like John Small[9] began to argue that the black community had become the 'donor' group for white society now that there were fewer white children in need of care. Further, he argued that inter-racial adoption encourages racial-identity confusion and leads black children to "deny the reality of their skin colour and reject people of similar race and colour".[10]

9.10 As a result of these new perceptions of inter-racial adoption, the placement of black children in white homes virtually ceased in Britain and North America. Social workers began to actively recruit black families, acknowledging that at least to a certain extent, the perceived shortage of black adoptive families was more a result of existing adoptive parent assessment procedures than an unwillingness on the part of black families to adopt. Social work practice began to recognise that white, middle class, well-off couples were not necessarily the best adoptive parents that could be found for any child and that a black, single, woman of a lower socio-economic background may be a better adoptive parent for some children.

9.11 Not all adoption workers or members of the adoption community accept that inter-racial adoption is inappropriate. There is research that reveals that inter-racial placements can be successful. One American study

on self-esteem of inter-racially adopted children found that "there were no differences in overall self-esteem between the sampled inter-racially and intra-racially adopted children".[11] Other studies have found that inter-racially adopted children develop just as well as intra-racially adopted children and do not necessarily experience the identity problems that those opposing inter-racial adoption predict.[12] Further, proponents of inter-racial adoption argue that a prohibition on inter-racial adoption discriminates against non-white children. They claim that children will be forced to stay in institutions or foster care while a same race family is found for them, even though there may be white families wanting to care for them.[13]

Inter-racial adoption in New South Wales

9.12 The North American and British research is relevant to Australia insofar as Australia, like Britain and North America, is a country with a dominant white culture where racism is still a significant problem.[14] As a result, placing a non-white child with a white family may have negative consequences for a child. It may prevent the child from developing a coherent and positive sense of self, it may alienate the child from his or her birth community and it may prevent the child developing skills to deal with racism if he or she encounters it.[15]

9.13 Social workers in Australia have, to a certain extent, accepted the validity of overseas research on the placement of children with racially different families. As stated above, the Department of Community Services will give preference to adoptive parents of the same racial background of the child the Department is seeking to place. Department social workers have indicated to the Commission however that it is not always possible to place children with racially similar parents. In particular, the Department has difficulty placing Maori and Islander children with Maori and Islander adoptive parents.

9.14 It would be possible for the Department to actively recruit more non-Anglo Celtic adoptive parents and insist that children are only placed with families of similar racial backgrounds. These efforts have been made in Britain through organisations such as New Black Families, a special Unit established in 1980 to find Black families for children in London.[16] Such a scheme, however, would make it increasingly difficult for couples applying to adopt. The number of children available for adoption would be reduced even further by removing the possibility that some children may be placed inter-racially. On the other hand, if it is accepted that adoption is not a service for infertile couples, then this should not present a problem. If the purpose of adoption is to find the best possible homes for children, then perhaps the principle of placing children with families of the same racial background should be adhered to in all circumstances.

Questions to consider

Should inter-racial adoption be prohibited?

If not, should a preference be made for intra-racial placement?

If so, how strict should this preference be? Should a child be placed inter-racially if there are no adoptive parents of the same race in the current "pool" of adoptive parents?

Alternatively, should the Department and private adoption agencies make special efforts to locate same-race parents for children, through recruitment programs in communities that do not traditionally adopt?

ETHNIC HERITAGE

9.15 Less research has been done specifically on ethnic heritage of adopted children. Research on racial heritage is relevant to ethnic heritage as the distinction between racial and ethnic heritage can be blurred. As has been discussed in the definition section above, people who are racially different are usually ethnically different as well. Further, the experience racial minorities have of dominant cultures may be similar to the experience of ethnic minorities within those cultures. As a result, inter-ethnically adopted children may experience some of the same difficulties as inter-racially adopted children.

9.16 Discussions of ethnicity in adoption are complicated by the fact that many children and parents in Australia are ethnically mixed. A child may have Greek, Italian and Malaysian heritage because his or her birth

mother is Greek and Italian and his or her birth father is Malaysian. Similarly, prospective adoptive parents may have a mixed ethnic heritage with the husband coming from an Egyptian family and the wife from Thailand. "Matching" couples with children could be extremely difficult.

9.17 Rather than approach ethnic heritage on the assumption that children must be placed with families who have precisely the same ethnic heritage as the child, perhaps the issue could be dealt with by identifying the reasons why children should experience continuity in their ethnic upbringing and then use these reasons as a placement guide. This may be preferable to setting hard and fast rules.

9.18 Perhaps the strongest argument in favour of ethnic continuity in adoption is that ethnic heritage is a valuable part of every person that needs to be recognised and fostered. At birth, each child has the opportunity to participate in the culture of the ethnic group in which he or she has been born. This opportunity is something positive and valuable and it should not be effectively denied by removing the child from his or her ethnic community. A child's ethnicity should be protected by adoption and a good placement is one that will foster a child's understanding and appreciation of his or her ethnicity. This understanding and appreciation is likely to be attained in an ethnically similar family, that would expose a child to his or her ethnic group's culture, religion, language and way of life in the same way as the child's birth family would.

9.19 A subsidiary argument in favour of ethnic continuity arises in relation to the *Adoption Information Act* 1990 (NSW). This Act opens up the possibility that children may meet their birth families when they are adults and form relationships with them. With this in mind, it may be desirable to place children with ethnically similar families so that they do not feel alienated from their birth families in later life. Aboriginal people placed with non-Aboriginal families as children sometimes comment on the difficulty and stress they experienced relating to birth families who are culturally different from themselves.[17] Similarly, children whose birth family is Turkish, for example, may face cultural and language barriers when attempting to relate to birth family as adults, if they were placed with an Anglo-Australian family as children.

9.20 The moves in favour of open adoption provide a justification for placing children with families of similar ethnic heritage. If adoptive parents are likely to have contact with birth parents during the adoptee's childhood, it may help if birth parents and adoptive parents have similar ethnic backgrounds so that they better understand each other and their attitudes to child-rearing and adoption.

> The difficult question in relation to ethnic continuity in adoption is what degree of importance should be placed on it?
>
> Is ethnic similarity to a child simply one of the many desirable qualities that adoption workers look for in adoptive parents or is it an indispensable quality?
>
> Can the need to be placed in an ethnically similar family be said to override all of a child's other needs?
>
> To what lengths should the Department go to find ethnically similar adoptive parents? If there are no ethnically similar parents in the pool of approved applicants should the Department workers have to search further afield in the way that they might for a special needs child?
>
> Should birth parents be allowed to request that their child is not placed with an ethnically similar family?

9.21 All of these questions need to be addressed and weighed against each other before legislative guidelines could be drafted.

CONCLUSION

9.22 Continuity of racial and ethnic heritage in adoption is generally accepted to be important. Indeed, continuity of racial heritage has been deemed so important in Britain and America that children are rarely inter-racially adopted. In Australia, a preference principle is usually applied in practice so that where possible, children will not be adopted inter-racially or inter-ethnically. The effectiveness of this preference principle may be questioned. The Commission would appreciate any comments on the issues and questions raised above with a view to recommending legislative guidelines in relation to ethnic and racial heritage.

FOOTNOTES

1. The literature also uses the terminology transracial and inracial. The Commission in this Discussion Paper has preferred to use the inter-racial and intra-racial.

2. Article 20(3).

3. Section 21(1)(c)(i)(b).

4. *The Macquarie Dictionary* (The Macquarie Library Pty Ltd, Sydney 1982).

5. A Parkin and J Summers "Ethnic Groups and Aborigines" in D Woodward, A Parkin and J Summers *Government, Politics and Power in Australia* (3rd ed, 1985) at 283.

6. L Raynor *Adoption of Non-White Children in Britain* (Allen and Unwin, London, 1970); J Small "Ethnic and racial identity in adoption within the United Kingdom" (1991) 15(4) *Adoption and Fostering* 61; J Small "New Black Families" (1982) 6(3) *Adoption and Fostering* 35; O Gill and B Jackson "Transracial Adoption in Britain" (1982) 6(3) *Adoption and Fostering* 30; C Hammond "BAAF and the placement needs of children from minority ethnic groups" (1990) 14(1) *Adoption and Fostering* 52.

7. R J Simon and H Altstein *Transracial Adoption* (John Wiley & Sons, Sydney, 1977); R J Simon and H Altstein *Transracial Adoption: A Follow Up* (Lexington Books, Massachusetts, 1981); R J Simon and H Altstein *Transracial Adoptees and their Families: Study of Identity and Commitment* (Praeger, New York, 1987); R McRoy, L Zurcher, M Lauderdale and R Anderson "Self-Esteem and racial identity in transracial and inracial adoptees" (1982) 27(6) *Social Work* 522; J Rosenthal, V Groze and H Curiel "Race, Social Class and Special Needs Adoption" (1990) 35(6) *Social Work* 532; T Glynn "The Role of Race in Adoption Proceedings: a Constitutional Critique of the Minnesota Preference Statute" (1993) 77(4) *Minnesota Law Review* 925; T Perry "Race and Child Placement: The Best Interests Test and the Cost of Discretion" (1991) 29(1) *Journal of Family Law* 51.

8. National Association of Black Social Workers *Position Pape*r (1972) cited in T Perry "Race and Child Placement: The Best Interests Test and the Cost of Discretion" (1991) 29(1) *Journal of Family Law* 51 at 112, note 209.

9. Former Project Director of *New Black Families*, a unit established in South London in 1980 to find Black families for Black children in care.

10. J Small "Transracial Placements: conflicts and contradictions" in S Ahmed, J Cheetman and J Small *Social Work with Black Children and their Families* (Batsford, London, 1986) at 83, 84.

11. R McRoy, L Zurcher, M Lauderdale and R Anderson "Self-Esteem and racial identity in transracial and inracial adoptees" (1982) 27(6) *Social Work* 522 at 525.

12. Shireman and Johnson "A Longitudinal Study of Black Adoptions: Single Parent, Transracial and Traditional" (1986) 31 Social Work 172 cited in J Mahoney "The Black Baby Doll: Transracial Adoption and Cultural Preservation" (1991) 59(3) *University of Missouri-Kansas City Law Review* 487 at 492; Simon and Altstein (1977), (1981), (1987).

13. Mahoney at 498.

14. Australia. Human Rights and Equal Opportunity Commission *State of the Nation: A Report on People of Non-English Speaking Background* (Canberra, 1993) at 252-256. See generally Australia. Human Rights and Equal Opportunity Commission *Racist Violence: Report of the National Inquiry into Racist Violence In Australia* (AGPS, Canberra, 1991).

15. In relation to this last point, see C Edwards and P Read *The Lost Children* (Doubleday, Sydney, 1989) at 34.

16. J Small “New Black Families” (1982) 6(3) *Adoption and Fostering* 35.

17. See C Edwards and P Read at xxi-xxii.

10. Reproduction Technology, Surrogacy and Adoption

PROVISIONAL PROPOSALS FOR REFORM

1. ***Private surrogacy arrangements***

The Department of Community Services should only facilitate adoptions in these situations where the following circumstances exist:

an order for guardianship or custody would not make adequate provision for the child and an order for adoption would be in his or her best interests;

the child has an established relationship with the social parents;

the child is aware of his or her genetic relationships with the birth mother, the social parents and any gamete or embryo donors;

the child has access to information about the birth mother and the birth family;

the child understands the reasons why the adoption might take place;

the child is able to participate in the adoption proceedings by expressing a view on the adoption;

the birth mother has access to the relevant information, consents to the adoption and receives ongoing information about the child's health, progress and well being; and

the birth mother had a period of time in which to revoke her consent after the birth of the child.

2. ***Donor reproduction technology***

It is the Commission's provisional proposal that the issues of genetic identity and access to information for children born with the aid of donor reproduction technology should not be dealt with in adoption legislation. These issues are a matter for specialised legislation on that subject.

POINTS FOR FURTHER DISCUSSION

Should adoption legislation regulate embryo donation?

INTRODUCTION

The scope and purpose of the review

10.1 The Commission has been asked to assess the relevance of donor reproduction technology[1] and surrogacy for adoption legislation. The implications of donor reproduction technology and surrogacy for our society go much wider than their relevance to adoption. This Discussion Paper is limited to a discussion of aspects that are relevant to the review of adoption legislation. There are six key issues that underpin discussion about the relationship between donor reproduction technology, surrogacy and adoption.

All three involve a split between biological parenting and social[2] parenting. In each case, children are not genetically related to one or both of their social parents.

The major difference between adoption, donor reproduction technology and surrogacy is that adoption is controlled and regulated by a legislative system which focuses on the physical and emotional needs of children and aims to secure information for them concerning their genetic relationship with at least one of their birth parents. This securing of information is now considered to be a fundamental part of providing for the welfare of these children. Children born as a result of donor reproduction technology or surrogacy arrangements have no such system by which they can access this type of information.

> Donor reproduction technology continues to promote deception and secrecy in the same way in which it was promoted by adoption in the past. The potential for secrecy in donor reproduction technology is the most persuasive argument in favour of regulation, especially in light of the development of openness in adoption.
>
> An important aspect of adoption law is the principle that the best interests of the child should be the paramount consideration when making adoption orders. Reproduction technology and surrogacy arrangements focus on meeting the desires of infertile people and analyse success in terms of the number of live births.
>
> Adoption law was developed to facilitate the split between genetic and social parenting and reflects the importance of the birth process to the determination of motherhood. Donor reproduction technology has introduced a further split between genetic and gestational motherhood that has not previously been contemplated by adoption legislation.
>
> Adoption deals with children who already exist, whereas donor reproduction technology and surrogacy are, at least initially, concerned with potential children. Adoption, under the current legislation, can only begin in earnest after the birth of the child and involves counselling of the birth mother and careful assessment of the adoptive parents. Adoptive parents are counselled about the emotional ramifications of parenting *someone else's* child. Donor reproduction technology and surrogacy begin well before the child is born and often involve little or no counselling of birth parents and social parents. Social parents are assured that their relationship with the child will be the same as if it were *their own* genetic child. Despite these differences, the end result of all three processes is identical. Children live with non-genetic social parents and may desire or need information about their genetic parent(s).

10.2 In Chapter 8 of the Issues Paper, we defined reproduction technology and surrogacy and set out some initial issues for discussion. Very few submissions were received on the issues raised. The main questions to be considered in this chapter are:

> Should adoption legislation deal with children born as a result of surrogacy arrangements, that is, should adoption legislation be used to resolve the legal status of children born as a result of surrogacy?
>
> Should adoption legislation refer to children who have been born with the aid of donor reproduction technology? To what extent does the relationship between donor reproduction technology and adoption require adoption legislation to make reference to the recording of and access to accurate records of an individual's genetic history?

The best interests of the child as paramount

10.3 Given the developments in laws relating to children and children's rights discussed throughout this Paper, the focus of this review is on the *children* who are the products of the donated gametes,[3] and their needs at all stages of their lives[4] (as adults as well as children). Much of the focus of reproduction technology and surrogacy is on fulfilling the desires of infertile couples and on analysing the rates of live births achieved by using the various technologies.

> Given that the major purpose of reproductive technology is to create a child who would not otherwise have been conceived, it seems clear that the community has a particular responsibility to promote and protect the interests, needs and welfare of that child. (Indeed, the question may well be asked - is it in the interests of a child to be created in this way to satisfy the needs of adults?).[5]

10.4 Many of the submissions agreed that there is a need for a legal framework to protect the rights and meet the needs of children who have already been born as the result of reproduction technology and/or surrogacy arrangements, irrespective of the current legal status of these practices.

The language of reproduction technology and surrogacy

10.5 The discussion of reproduction technology naturally involves some reference to technological processes. This Chapter includes some technical terms because they provide the most succinct and accurate description of the techniques involved. This technical language may be unfamiliar to some people and for this reason definitions have been set out in footnotes.

10.6 The term "donor reproduction technology" is used in this chapter. It refers to the birth of a child with the aid of technology and donated genetic material (ie one or both of the child's social parents are not his or her genetic parents). If a couple uses their own gametes and technology merely assists the combining of the sperm[6] and ovum[7] or the implantation of the embryo in the genetic mother, this has nothing to do with adoption legislation and is not referred to in the discussion about the use of reproduction technology in this Paper.

10.7 It is important to understand that donor reproduction technology includes the process of sperm donation. Sperm donation has been likened to blood donation but it is completely different in that sperm is donated with the intention of creating a new and autonomous individual who has his or her own needs and rights in relation to identity. This new individual continues to have a genetic relationship with the donor.

10.8 Technology has made it possible to divide the processes of parenthood, so that genetic input, fertilisation, gestation and birth can be separated, and each performed by different people. These divisions make it difficult to characterise the participants as "father" and (especially) "mother". The following terms are used throughout this chapter:

Biological parents - to describe the people whose sperm and ovum are used to create the child;

Birth mother - the woman who carries the child and gives birth, whether or not she has used her own ova or donor ova; and

Social parents - to describe the parents who raise the child and have the care of and responsibility for the child.

10.9 The woman who gives birth to a child as the result of a surrogacy arrangement is often referred to as the child's surrogate mother. The term "surrogate mother" creates definitional difficulties. It is really a misnomer. In many cases the woman giving birth actually donates one of her own ova as well as gestating the child and is thus the child's biological mother. The real difference between a birth mother in a surrogacy arrangement and the birth mother of an adopted child it that the former mother has undertaken pregnancy with the *intention* of placing the child with another couple after the birth. Even if the birth mother uses both donor ova and donor sperm or a donated embryo to achieve the pregnancy, she is still the woman who gives birth to the child. Many of our laws reflect the importance of the birth process to the determination of motherhood. It is only technology that has recently allowed us to separate genetic and gestational mothering.

10.10 The term "birth mother" is used in this Paper to describe the woman who caries the child and gives birth to it.

10.11 Throughout this Paper the Commission has made reference to "identifying information" and "non-identifying information". In this chapter, identifying information means the donor's name. Non-identifying information means biological data, information about the donor's health, education, interests, appearance and other information that does not allow the donor to be traced.

SURROGACY ARRANGEMENTS

Surrogacy in New South Wales

10.12 Although there is no legislation in New South Wales allowing either commercial or altruistic surrogacy, private surrogacy arrangements are taking place in this State. The Commission has also heard anecdotal evidence about Australian couples travelling to the United States to have their sperm and ova implanted in American surrogates. Alternatively, they are flying to the United States with frozen embryos from IVF units in Australia where American clinics are arranging the implantation of the embryos in birth mothers. The couple then fly back to America in nine months and pick up their child. If birth certificates are issued in the name of the

commissioning parents, there is no need for that couple to adopt the child. Couples may also use donated gametes from either Australia or America. These examples are given to illustrate the extent to which surrogacy may be taking place, both within New South Wales and across State boundaries.

10.13 Surrogacy contracts are clearly in conflict with the principles of adoption under the current legislation. The *Adoption of Children Act* 1965 (NSW) prohibits the making of private adoption arrangements and the facilitation of adoption in exchange for money. The power to make adoption arrangements lies only with the Department of Community Services and the authorised adoption agencies. Adoption practice now requires a new level of openness and honesty about the reality of genetic and social relationships. A court has responsibility for the making of adoption orders and related orders. The provisional proposals made by the Commission in Chapter 4 of this Paper suggest that individuals closely involved in the child's life should have adequate opportunity to express their views during the decision-making process. All available alternatives to adoption should be considered in relation to each particular child. Surrogacy contracts represent the aims and objectives of the adults involved and do not incorporate these principles.

10.14 The Department of Community Services has been approached to facilitate adoption applications in cases where the child has come to live with the prospective adoptive parents as the result of private surrogacy arrangements. Usually the child has been living with the social parents for some period of time and has developed a relationship with them. The social parents are usually seeking adoption to make themselves the child's legal parents. In the cases where it is clear that a surrogacy arrangement has taken place, the Department has refused to assist with an adoption and has referred the parties to the range of orders available from the Family Court. There has only been one adoption application supported by the Department in these circumstances. In that case it was not confirmed that a private surrogacy arrangement had taken place.

Criticisms of surrogacy

10.15 Many submissions criticised surrogacy contracts and arrangements on the basis that they involve the buying and selling of children and women.

> Infertility, like blindness or any physical incapacity, is sad. But just as the blind have no moral or legal right to be cured with another's eyes, the infertile have no right to cure their physical incapacity with another's child. No child should be created as a product to be sold or traded.[8]

> Research indicates that surrendering mothers in adoption suffer detrimental, often devastating, consequences throughout their lives as a result of the surrender. There is no reason to believe parents separated from their children as a result of contracts for non traditional reproduction will suffer any less.[9]

10.16 Surrogacy arrangements were perceived to be against the best interests of the child. The intention of all parties that the child be transferred from the birth mother to the social parents was seen to prevent the child from experiencing a normal life and to be in opposition to the aims and objectives of adoption.

> It is clear that these arrangements are neither intended nor designed to serve the best interests of children or society, but to supply a desirable product to consuming couples.[10]

10.17 Other submissions felt that surrogacy arrangements involved all of the most painful aspects of adoption but contained none of the safeguards and supports that currently exist in the practice of adoption.

> Whilst acknowledging that there may be circumstances in which, in the interests of the child, legal adoption should be an option, the law and the adoption system should not in any way be used to encourage practices in which women and children are made use of, and which all our knowledge and experience suggest have the potential to inflict greater losses and pain than those recognised as an inescapable part of adoption.[11]

10.18 After his visit to Australia, the Special Rapporteur to Australia from the United Nations Commission on Human Rights, Mr Vitit Muntarbhorn commented in his Report on the tenuous line between surrogacy and adoption.[12] His recommendation to the Commission on States/Human Rights was that States should pass anti-surrogacy legislation.

> They should liaise with the federal authorities to prevent Australians from entering into surrogacy arrangements overseas. This is an area where extra-terrestrial application of laws may be recognised in the context of Australians seeking to bypass local jurisdiction.[13]

10.19 Some submissions felt that although surrogacy should remain illegal, there should be an opportunity for commissioning parents to adopt a child born as the result of surrogacy arrangements.

> Without detailing all the problems in this area, WAA believes that surrogacy should remain illegal. In these circumstances, any separate category of adoption for reproductive technology would amount to tacit approval and should not be considered.
>
> WAA believes instead that the circumstances of surrogacy bring it fairly neatly into the area of special case adoptions, as in most cases the adoptive father will also be the biological father. This means that the adoption is similar to that by a step-parent.
>
> In these cases, as in all cases, the welfare of the child should be the primary concern.[14]

Adoption legislation and surrogacy

10.20 There is still conflict within the community regarding the ethics of surrogacy arrangements and there has been no development of policy by the New South Wales government. There have also been criticisms of surrogacy on an international human rights level. It would therefore be inappropriate for adoption legislation to make special arrangements to validate surrogacy contracts.

10.21 However, in certain circumstances, adoption may be in the best interests of a child already born as the result of a surrogacy agreement. In these cases, the Department of Community Services should be able to facilitate an adoption application. The decision to file an adoption application must be based on protecting the rights and needs of the child without any reference to a contract between the adults involved in the arrangement. Such a use of the legislation would not encourage people to undertake private surrogacy arrangements as the social parents would have no inherent right to adopt the child if the birth mother wishes to place her child for adoption.

10.22 The Western Australian Adoption Legislative Review Committee made the following recommendations in their 1991 Report. They began by stating that an arrangement made for a child born as the result of surrogacy should always be in the best interests of the child.[15] The Report recommended that the child be legally the child of the birth mother unless she consents to the child's adoption in the usual manner stated in the adoption legislation.[16] No specific provision was made to legally recognise the right of the commissioning parents to adopt the child.[17] If they are not genetically related to the child, they should be considered equally with all other adoption applicants. If there is a genetic relationship between the child and one or both of the commissioning parents, then the commissioning parents may adopt when they have obtained custody of the child and have established social parenthood so as to make them eligible to adopt under that category.[18] It was recommended that the children born as the result of a surrogacy arrangement who became the subject of an adoption, should have the same information rights as any other adopted person.[19]

10.23 These recommendations were driven, not only by the desire to bring the information rights of these children in line with other adoptees, but also to protect the interests of birth mothers who may be considering placing their children with others as part of a surrogacy arrangement.

10.24 The Commission restates and supports the recommendation contained in its 1988 Report that:

> An adoption order should only be available to the commissioning parents if orders for guardianship and custody under the *Family Law Act* 1975 (Cth) would not make adequate provision for the welfare of the child.[20]

10.25 The Commission supports the notion that the process of adoption protects public interests by requiring voluntary informed consent from the biological parent(s), prohibiting baby-selling and requiring an investigation of the adoptive parents to ensure that they are fit parents and to protect the welfare of the child.[21] Private surrogacy arrangements should not be supported in ways that diminish these provisions. The Department of Community Services should only facilitate adoptions where the following circumstances exist:

> an order for guardianship or custody would not make adequate provision for the child and an order for adoption would be in his or her best interests;
>
> the child has an established relationship with the social parents;
>
> the child is aware of his or her genetic relationships with the birth mother, the social parents and any gamete or embryo donors;
>
> the child has access to information about the birth mother and the birth family;22
>
> the child understands the reasons why the adoption might take place;23
>
> the child is able to participate in the adoption proceedings by expressing a view on the adoption;
>
> the birth mother has access to the relevant information, consents to the adoption and receives ongoing information about the child's health, progress and well being; and
>
> the birth mother had a period of time in which to revoke her consent after the birth of the child.

10.26 These proposals seek to bring this form of adoption within the normal process of adoption but maintain enough flexibility to allow adoption to take place if this will promote the best interests of the child. The proposals do not diminish the policy that private arrangements for the adoption of children are unacceptable because no adoption will be facilitated unless all the general requirements for adoption have been fulfilled. If a birth mother approached the Department and wished to place her child for adoption in circumstances where the above conditions were not fulfilled, she would be able to do so but only using the normal form of local adoption. She would be unable to nominate adoptive parents outside the Department's pool unless the adoption was to be intra-family.[24] The Commission proposes that social parents who have no genetic link to the child should be considered equally with all other adoption applicants. This is consistent with the approach recommended in Western Australia. Any other conclusion may encourage people to circumvent the efforts of the legislation to preclude private adoption arrangements and would not be in the best interests of the children involved. The Commission invites comments on these provisional proposals.

REPRODUCTION TECHNOLOGY

10.27 In 1991, assisted conception by in vitro fertilisation (IVF)[25] and gamete intrafallopian transfer (GIFT)[26] was used to treat infertile couples at 21 units in Australia and resulted in 1,064 live births after IVF and 945 after GIFT. The few submissions that responded to these issues raised a series of problems surrounding the use of donor reproduction technologies and explored ways in which adoption legislation may be able to resolve them.

Genetic identity and access to information

10.28 The similarities between children who have been adopted and children born with the aid of donor reproduction technology are that the children are not genetically related to one or both of their social parents and have a genetic relationship with a third party or parties. It can be argued that children born with the aid of donor reproduction technology should have the same access to information about their genetic heritage that is currently available to adopted children. Submissions to the Commission drew on the parallels between adoption and donor reproduction technology to argue that children born as a result of these methods need to have in place similar

legislative mechanisms to create an atmosphere of openness and to acknowledge the reality of genetic relationships. There is no clear argument made that adoption legislation is the best way to achieve this but the suggestion has been made because it provides a system which is already in place and has already learned the dangers of secrecy and other types of practice.

> However one important lesson gained from adoption practice may be relevant - in that full and open information is essential to the child. Any child born as a result of reproduction technology or by surrogacy, must have entitlement to information about the circumstances and all aspects of their conception, birth and genealogy.[27]

10.29 In the past, the practice of adoption involved secrecy and the alteration of birth records. This traditional approach has been subject to major review in recent years and the result has been greater openness and acceptance of the reality of adoption.

10.30 Donor reproduction technology, involving the use of donated gametes or embryos is currently carried out in a similar atmosphere of secrecy and restricted information. Research in the United States suggests that children born with the aid of reproduction technology are likely to experience the same feelings of "genetic bewilderment"[28] as adopted children and need the same information that adoptees require. There is also likely to be the same pressure on a family that is trying to keep such an issue a secret and the same level of resentment present when the secret finally comes to light.

10.31 The view taken by some submissions was that adoption legislation could be used to ensure that children born with the aid of reproduction technology have access to information about their genetic heritage.

10.32 A strong argument can be made in favour of giving these children access to such information. Support for such an argument comes from:

international law;29

legal and social work theory in the field of adoption;30

research of the psychological concept of the need to define one's own identity;31

the need for accurate records of genetic relationships32; and

current research on the psychological consequences of donations for donors of genetic material33.

10.33 Many submissions suggested that the donors made a gift of their gametes and did not require nor have the right to require information about any children born as a result. Several studies have suggested that there is a far more complex relationship between the donor and their genetic material and that altruistic desires to help infertile couples may only be a part of the reason why donors make donations.[34] The most recent of these studies did acknowledge that there were conflicting results between studies made on the attitudes and motivations of sperm donors but felt that the differences reflected the recruitment methods and attitudes of the clinics involved. The author concluded that:

> The results of the studies strongly suggest that most donors in the studies need to be acknowledged and responded to for the largely altruistic motivation that prompts their involvement as a donor. Such a position challenges the traditional view that donors should be seen as a means to an end and that they have little investment/interest in the outcome of their actions. The belief that donors will not come forward unless they are guaranteed secrecy and anonymity is also challenged and the implications of this for the policy and practice of programs needs to be considered.[35]

10.34 Despite the analogies between adoption and donor reproduction technology, there are many difficulties in applying the adoption model to children born with the aid of donor reproduction technology. The current process of adoption begins with an assessment of the needs of the child and proceeds by trying to meet those needs

through the provision of parental care. Donor reproduction technology begins without an assessment of the needs of the child. It is often assumed that the needs of the child will be fulfilled because the desires of the infertile social parents have been fulfilled. An order for adoption granted after conception or birth would go against the provisions of the adoption legislation. This would mean that the Adoption of Children Act could be used to consolidate private arrangements that may not be in the best interests of the child. Once the child has been born, it would be impossible to apply the rigorous measures for the taking of consents and the assessment of adoptive parents that are the core of present adoption practice. It was also the conclusion of the Western Australian Adoption Legislative Review Committee that it would be inappropriate for adoption legislation to deal with the rights and needs of a child, born with the aid of reproduction technology, to access accurate biological information. This issue was felt to be outside the scope of the adoption legislation and better dealt with in its own right.

10.35 It would be possible, of course, for donor reproduction technology to incorporate the lessons that have already been learned in the adoption field. Social parents could enter into undertakings to tell their children of their genetic status and exchange information with genetic parents in a similar manner. Identifying and non-identifying information about donors and children could be stored on a central register.

> We are quite open to the idea of a Federal or State registry of donors and children, it is probably the only way that information can be kept properly and be available to children when and if they desire to find out information about their donors. I think that his should contain non-identifying information about the donor such as; education, career, interests etc, and only identifying information if that is what the donor wishes.[36]

10.36 Children could have access to this information at different stages of their lives. Each of the participants in the register could up-date the information about themselves. All of these possibilities would be better dealt with by specialist legislation. Such an Act could also take into account the myriad of other issues surrounding donor reproduction technology that are not relevant or analogous to adoption.

Embryo donation and adoption

10.37 It was suggested that adoption legislation may be able to resolve some of the problems currently surrounding the donation of frozen embryos by one couple to another[37]. Australia has led the world in the freezing of human embryos. Developments in technology have meant that the use of frozen embryos now offers just as good a chance of achieving pregnancy as the use of fresh embryos.[38] Use of this technology to reduce the amount of ovarian hyper-stimulation and surgical intervention has led to a growing population of frozen embryos, some of which may turn out to be in excess of the requirements of the couple that have created them. People may donate embryos when they have fulfilled their own reproductive needs and wish to help other couples in the program or when they find the alternatives of destruction or indefinite storage of the embryos unacceptable.

10.38 In Australia, it has not yet been clearly established in law who constitutes the legal parents of a child born as the result of a donated embryo. The *Artificial Conception Act* 1984 (NSW) sets up a presumption of fatherhood in the situation where a woman has undergone a fertilisation procedure.[39] It is not clear how this presumption relates to ova donors or the donors of embryos. The suggestion has been that people should be required to formally relinquish and adopt embryos in order that all parties are protected in the same manner as they are currently protected when a child is adopted. One argument is that there is such a vast difference between embryos and children that the adoption legislation would be unable to deal with the relinquishment of embryos. There is a continuing debate about whether or not an embryo constitutes a human life.[40] There is currently no consensus on this issue. Despite this, the technology continues to be used. However, it is worthwhile remembering that every donated embryo that succeeds to the stage of a live birth becomes a child whose rights need to be protected whether or not they have been so protected at any stage prior to birth.

10.39 Some of the submissions to the Commission argued that the donation of excess frozen embryos to other people constitutes the adoption of a child born as a result, the only difference being that the child is only a potential child at the time of the donation and is much earlier in its developmental process. In this view, the

adoption of embryos should be controlled by the adoption law in order to protect the best interests of that child and to preserve information and records regarding that child's genetic history.

10.40 Some feel that people may be pressured into donating excess embryos and that using the concept of adoption would mean that they would have to be properly counselled about the action they were taking.

> Parents with IVF children need to be counselled that any spare embryos being donated are the full biological brothers and sisters of their children. The small potential risk of subsequent consanguinity[41] may dissuade some from donation, but a bigger impediment lies in the absence of protective legislation for the donors.[42]

10.41 Donor embryos caused the most concern for participants in the Review in terms of the danger of consanguineous relationships. Such relationships may have devastating psychological effects on the participants as well as the associated health risks for any children of that relationship. Incest is a strong cultural taboo amongst all societies. Some participants felt that legislation controlling the transfer of embryos by adoption and attaching information rights to the resultant child would be the most effective way of preventing such an occurrence and of protecting couples and clinics from potential legal liability.

10.42 Of all the different types of donor reproduction technology, embryo donation is the most analogous to adoption. As stated above, most people participating in assisted fertility programs create embryos with the intention of using them themselves. Their intention to transfer the embryos to someone else may only have arisen when they were unable to continue with the plan to conceive or had given birth to as many children as they wished to have the care of. Children born as a result of an embryo donation and children who have been adopted after birth are similar in that they are genetically unrelated to their social parents. They may have full-blood sisters or brothers growing up in other families. They may be curious about their genetic identity and they may have an emotional or a practical need to access up-dated information concerning their genetic background.

10.43 It would be straightforward to apply the principles of adoption in these cases. It would be possible to provide counselling and information to the donating parents, assess the needs of the child and make an assessment of the receiving couple prior to the donation taking place. Donating parents could place their embryos for adoption and take part in the selection of receiving parents from a pool of people who have been assessed as suitable adoptive parents. The focus would then be on meeting the needs of the potential children involved rather than justifying the actions of individuals. Social parents could be required to enter into an open adoption arrangement with genetic parents so that updated information could be exchanged. One argument against the use of the adoption legislation in these cases is that adoption operates to confirm the legal status of the social parents because they have not given birth to the child. In the case of embryo adoption, the social parent gives birth to the child and is thus already the child's legal parent. Although it is the case that adoption assigns the status of legal parent to adoptive parents, this is a secondary response to the aims and objectives of adoption. The real starting point in adoption is to provide for the welfare of children who cannot be raised by their birth parents. It may be that, from the point of view of the interests of the children, the analogies between adoption and embryo donation are more crucial than the differences. **The Commission invites comments on the use of adoption legislation to regulate the process of embryo donation.**

FOOTNOTES

1. The term "donor reproduction technology" has been used in order to avoid any ambiguity when discussing the relationship between reproduction technology and adoption legislation. The cases where reproduction technology has been used by the genetic parents, birth parents and social parents are one in the same are not analogous to adoption and are not the subject of this review.

2. The term "social parent" describes the parent who raises the child and has the day to day care of and responsibility for the child.

3. A *gamete* is any germ cell, whether ovum or sperm. Sperm and ova donors may be known or unknown to the recipients. They are often relatives or may be other women on IVF programs who have collected surplus gametes during the course of the program.

4. The Commission's attitude is supported by current trends in legal theory regarding the development of children's rights and legislation to protect children. Australia's ratification in 1990 of the *Convention on the Rights of the Child* is evidence of our commitment to the new way of thinking about children.

5. T Harper "Reproductive Technology - The Issues" *Institute of Family Studies Newsletter*, No. 11 December 1984 at 7.

6. *Sperm* or *spermatozoon* is the mature male sex cell, produced in the testicle.

7. An *ovum* is the mature female sex cell, produced in the ovary. When fertilised by a spermatozoon, it is capable of developing into a new individual. The plural form is *ova.*

8. Mothers for Contact in Adoption. *Submission* made to the 1989 review of surrogacy undertaken by the National Bioethics Consultative Committee, at 3.

9. Mothers for Contact in Adoption, *Submission* at 5.

10. Mothers for Contact in Adoption, *Submission* at 6.

11. New South Wales Committee on Adoption, *Submission* (9 September, 1993) at 54-55.

12. V Muntarbhorn *Report Submitted by the Special Rapporteur appointed in accordance with Commission on Human Rights resolution 1992/76, Addendum, Visit by Special Rapporteur to Australia* Commission on Human Rights Forty-ninth session, Agenda item 24, 9 February 1993 at 11.

13. V Muntarbhorn, at 23.

14. Women's Action Alliance (NSW), *Submission* (1 September, 1993) at 4.

15. Western Australia. Adoption Legislative Review Committee *A New Approach to Adoption: Final Report* (February 1991), Recommendation 117.

16. Recommendation 118.

17. Recommendation 119.

18. Recommendation 120.

19. Recommendation 121.

20. New South Wales. Law Reform Commission *Artificial Conception: Surrogate Motherhood* (Report 60, 1988), at xix and paragraphs 4.45-4.49.

21. B Atwell "Surrogacy and Adoption: A Case of Incompatibility" *Colombia Human Rights Law Review* Vol 20(1) Fall 1988 at 16-31.

22. The New South Wales Committee on Adoption, *Submission* (9 September, 1993).

23. The New South Wales Committee on Adoption, *Submission* (9 September, 1993).

24. This was the proposal of the Australian Capital Territory's Attorney General's Department in *Surrogacy Arrangements in the ACT* (Discussion Paper, October 1993) at 4. This Discussion Paper goes further than the Commission and suggests that adoption should be prohibited in circumstances where there has been a surrogacy agreement unless all the requirements of the *Adoption Act* 1993 (ACT) are fulfilled and relatives, as defined in the Act, are involved.

25. In Vitro Fertilisation (IVF) is an assisted fertility procedure using the woman's own ovum or donor ova and the husband/partner's sperm (AIH) or donor sperm (AID). The procedure involves collection of oocytes (ova) from the ovaries. The ova are then fertilised outside the body.

26. Gamete intra-fallopian transfer (GIFT) is the process whereby ova and sperm are threaded into a catheter with an air bubble between them. They are then placed into the fallopian tube where hopefully they fertilise and move down the fallopian tube to the uterus.

27. Centacare Catholic Community Services (Adoption Services) *Submission* (31 August, 1993), at 22.

28. It is claimed that this phrase was first used by E Wellish, a worker in an English child guidance clinic, in 1952. It has come to refer to a state of confusion or uncertainty about oneself that stems from little or no knowledge about one's birth parents and genetic history. See R Scott "Who am I ? :Children With Problems of Identification Including Adoption, IVF and AID" in I Fraser and others (eds) *Obstetrics, Gynaecology, Psychiatry and Family Planning 1984,* Proceedings of the combined annual congress of the Australian Society for Psychosomatic Obstetrics and Gynaecology, and the Biological Sciences Committee of the Australian Federation of Family Planning Associations, (1-4 March, Canberra 1984) at 33.

29. The *Convention on the Rights of the Child* includes a number of provisions that seek to protect the rights of parents, or rather, the rights of children to protection of their relationship with their parents. See especially Arts 5, 7(1), 8, 9, 16(1) and 18(1). For Example, Article 7 provides that the child shall have, among other things, "as far as possible, the right to know and be cared for by his or her parents." Article 8 commits States to respect the right of the child to "preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference." These provisions do not specifically deal with adoption and do not seem to have been intended to interfere with the adoption practices of individual States. The Commission, at this stage, supports the notion that rights and protection afforded by the Convention should be regarded as a statement of the minimum standards to be applied and should not act to limit the protection.

30. "After many years of unnecessary secrecy, evasiveness and often falsification, studies have now shown how important it is for all children, whether adopted, fostered or brought up in step-parent relationships, to know the truth about their parentage and origin. This applies equally to children born by AID": J Triseliotis, *Recent Developments in Adoption* Mimeo 17 April 1980. See also R Winkler and S Midford "Biological Identity in Adoption, Artificial Insemination by Donor (AID) and the New Birth Technologies" *Journal of Early Childhood* Vol 11(4) November 1986 at 43-48. According to visiting academic, Professor Dieter Giesen, Germany's constitution enshrines the right of children to know their genetic origins. It is his view that every child has the right to know of their biological parentage and that to fail to provide for such a right was unethical. See C Milburn "IVF Law Seen as Unethical" *The Age* 9 July 1993 at 5. Some behavioural theorists also promote openness in this situation, in order to preserve the psychological health and well being of the entire family unit. See P Mahlstedt and D Greenfeld "Assisted Reproductive Technology with Donor Gametes: the Need for Patient Preparation" *Fertility and Sterility* Vol 52 No 6 December 1989, The American Fertility Society, at 910.

31. Many studies refer to the importance of identity for the growing child and the young adult. The concerns experienced by adoptees may be the same for children born with the aid of reproduction technology. The Commission spoke to a child of ten years who was aware that she was a donor insemination child. She had thoughts about the donor and was curious about how he looked and what he did with his life. She was not looking for another father, having established a loving and open relationship with her social father. What she wanted was information to satisfy her own curiosity. The concerns expressed by AID child, now adult, Suzanne Rubin have been widely discussed. See for example, E Learner "Social Issues Common to Adoption and the New Reproductive Technologies" *Australian Journal of Early Childhood* Vol 11 (4) November 1986 at 40.

32. Previous sections of this paper have dealt with the issue of birth certificates and what information they should contain. In the course of our discussions with the Registry of Births Deaths and Marriages it has become obvious that birth certificates only offer a record of the legal parentage of an individual and do not

represent an accurate biological record of that person's genetic background or birth. For many people, this is of no real concern because their legal parents are, in fact, their biological parents. However, for growing numbers of children, this is no longer the case.

33. A child's need for information to alleviate possible genetic bewilderment can be kept entirely separate from parental responsibility attaching to the donor. Arguments against allowing children to have information about the donor have focussed on protecting the donor's privacy and protecting (usually) him (although it is equally relevant now to say her) from any responsibility in relation to the child. Recent Australian research has indicated that donors, recipients and children born with the aid of donated gametes have a remarkably positive attitude to each other's needs and the provision of information in order to meet these needs. See S Midford and others, *The Donation and use of Human Gametes: Psychological Implications for Donors, Recipients and Offspring* Paper presented at the Fertility Society Conference, Sydney 2-5 November 1993.

34. See for example R Rowland "Attitudes and Opinions of Donors on an Artificial Insemination by Donor (AID) Program" *Clinical Reproduction and Fertility* December 1983, at 249-59 and K Daniels "The Psychosocial needs of Semen Donors" in K Wijma and B Von Schoultz (Eds) *Reproductive Life: Advances in Research in Psychosomatic Obstetrics and Gynaecology* (Carnforth, Parthenon 1992).

35. K Daniels, at 569.

36. Caroline and Patrice Lorbach, *Submission* (16 August, 1993) at 2.

37. There are several different aspects of technology involved in embryo donation. One of these is embryo donation by uterine flushing. This is a reproductive intervention involving natural ovulation, insemination with donor semen, and natural *in vivo* fertilisation. During the time before the fertilised ovum (the blastocyst) attaches itself to the wall of the uterus, the uterus is flushed out and the blastocyst is transferred to a recipient's uterus, where implantation occurs and the foetus develops. It is now possible to freeze embryos for certain periods. This technique was developed to minimise the number of surgical interventions so that more than the required number of ova could be obtained and fertilised, the extra embryos then stored until required. A couple may end up with embryos in frozen storage that are in excess of that couple's reproductive requirements. Some couple decide to donate their excess embryos rather than pay to leave them in storage or destroy them.

38. D M Saunders and P Lancaster Frozen Embryos: another population explosion? *The Medical Journal of Australia* Vol 157 August 3, 1992 at 148.

39. Sections 5 and 6.

40. This debate is argued in terms of the "moral status" of the embryo.

41. *Consanguinity* means a blood relationship and therefore kinship due to a common ancestry.

42. D M Saunders and P Lancaster, at 148.

11. Current Practices in Inter-Country Adoption

INTRODUCTION

11.1 Inter-country adoption is arguably the most sensitive and complex aspect of adoption in Australia today. It involves all the issues relating to domestic adoptions together with a range of additional issues. It involves immigration law and policy, as well as international law. Because it involves the removal of the children from their country of origin, questions of foreign law and policy also arise. Children are being placed transnationally and often inter-racially so that questions relating to racial, ethnic, cultural and linguistic heritage need to be addressed. Understanding and balancing all of these issues can be a complex task.

11.2 Inter-country adoption has been associated with often intense controversy. Some see it as a form of exploitation in which wealthy couples from First World countries, unable to adopt children there, seek to satisfy their own needs by treating Third World countries as a resource to which they can turn. Others see inter-country adoption as a humanitarian act, both towards individual children and towards the other countries involved, and as a form of overseas aid. There are numerous intermediate positions. Another special feature of inter-country adoption is the important role played by organisations specially formed for the purpose of supporting Australian adoptive parents of overseas children and the relatively limited role played by authorised adoption agencies in the work associated with these adoptions.

11.3 The discussion of inter-country adoption is divided into three chapters. This chapter deals with current practices in inter-country adoption, focusing on the parent support groups. Chapter 12 views inter-country adoption from an international perspective, looking at some of the international concerns that have arisen in relation to the practice and describing the international conventions that have been drafted to combat these concerns. Chapter 13 examines how New South Wales practice complies with international standards and addresses specific problems of which the Commission has become aware in the course of its review.

CURRENT PRACTICES IN INTER-COUNTRY ADOPTION

11.4 Inter-country adoption in New South Wales is organised by the combined efforts of the New South Wales Department of Community Services and eight adoptive parent support groups. The Commonwealth Department of Immigration and Ethnic Affairs also plays a role but this is limited to determining whether a child will be allowed to migrate to Australia. This section will describe the work of the various players in the adoption process, focusing in particular on the parent support groups .

11.5 The Commission undertook a specific research project to investigate the nature and role of parent support groups in New South Wales. The Commission sent a survey to all parent support groups requesting information on the legal status of their organisation, its financial accountability, the services provided to members and the nature of the overseas adoption program the group supports. All parent groups but one replied with details of their group and its programs. In addition to information supplied by the survey, the Commission received separate submissions from some parent support groups and inter-country adoptive parents. The Commission also liaised with the Department of Community Services and some of their independent social workers involved in inter-country adoption. Both the Department and the independent social workers provided detailed information on the practice of inter-country adoption within New South Wales.

11.6 Most of the information gathered has been included in the Discussion Paper in order to stimulate informed discussion on support groups. Existing groups in New South Wales all operate in different ways depending on the overseas program they support and their own convictions on adoption practice. There is minimal accountability in relation to these groups - they are not licensed, they do not report to the Department and their practice is not governed by legislation. Little is known about the methods of each group except by those who are active participants in them. The Commission considers it important to document its research so that people can respond to the Discussion Paper with a better understanding of the role support groups play.

THE DEPARTMENT OF COMMUNITY SERVICES

11.7 The role of the Department of Community Services is central to all adoptions in New South Wales, including inter-country adoption. Couples must be approved by the Department before they can adopt a child

from overseas in an inter-country program. Private adoption agencies such as Centacare, Barnardos and the Anglican Adoption Agency are not involved in inter-country adoption.

11.8 The Department produces information newsletters and runs information meetings where they advise applicants for inter-country adoption to join a parent support group. Applicants complete an "Expression of Interest" which is then evaluated by the Department for inclusion in the inter-country program. Couples who are accepted attend a two day seminar followed by a formal application for adoption. If the application is successful, a series of interviews with a social worker begins, taking three to nine months. The social workers are not employed full-time by the Department but work on contract and are funded by the fees paid by the applicants. The social worker forwards his or her report to the Department for the Adoptions Section Leader to make the final decision on whether a couple should be approved. If a couple is approved their assessment is sent to the overseas country, usually directly, but sometimes through a parent organisation. It is a matter for the sending country to allocate a child to the couple. This may take many months and may depend on the number of earlier applicants in the parent group. Once the allocation has been made, the overseas agency will notify the Department directly or via a parent group of the allocation of a child to a couple. Couples are informed of the allocation either by the Department or the parent group and an allocation interview occurs. If the couple are happy with the allocation, they sign an "Agreement and Undertaking" to accept and support the child. They then travel to the relinquishing country and pick up the child.

11.9 The Department is contacted by the couple on their return to Australia, and a series of quarterly post-placement interview begins. Usually four visits over a year are needed before an Australian Order of Adoption can be obtained through the Supreme Court of New South Wales. The Department will do the legal work in relation to the Australian adoption order if the couple so requests. Usually couples engage a private solicitor to arrange the Australian adoption.

11.10 Once an Australian adoption order is obtained the Department may have no further involvement with adoptive families. However, if the child came from a country such as Sri Lanka, India or Bolivia, which require post-placement reports for a number of years after the adoption, the Department will seek undertakings from the adoptive parents that they will forward reports and photographs to the Department at particular intervals.

DEPARTMENT OF IMMIGRATION AND ETHNIC AFFAIRS

11.11 The Department of Immigration and Ethnic Affairs is responsible for determining whether a child will be allowed to enter Australia and in some circumstances whether he or she will be granted Australian citizenship.

11.12 Before travelling overseas to pick up their child, applicants apply to the Department of Immigration and Ethnic Affairs for a visa for their child. Applicants apply for a *Class 102 (Adoption) Visa and Entry Permit*[1] which will grant their child permanent residence in Australia. Class 102 visas will only be granted if: the child is under 18; the prospective adoptive parents, one of whom is an Australia citizen or permanent resident, have undertaken in writing to adopt the child; the Department of Community Services has approved the adoptive parents; and the overseas authorities have approved the departure of the child for adoption in Australia in the custody of the adoptive parents.[2]

11.13 If these primary eligibility criteria are met, the child's application will be referred to the Migration Medical Clearances Unit in the Department of Human Services and Health. Inter-country adoptees must meet the health criteria set out in the *Migration (1993) Regulations* 1992 (Cth) before they can be granted a visa. These criteria include that the adoptee is not suffering from tuberculosis or any other serious communicable disease or condition that would be a threat to public health[3] or a danger to members of the Australian community.[4] Further, the child must not have any disease or condition that would require significant care or treatment, that would involve community resources in short supply or would result in the child being a significant charge on public funds.[5] These last three criteria may be waived if a Commonwealth medical officer is of the opinion that the child "is unlikely, as a result of a disease or condition, to prejudice the access to health care of any Australian citizen or Australian permanent resident" and the Minister is satisfied that undue harm or undue cost would be unlikely to result to the Australian community if the visa were granted.[6] If a child is refused a visa on health grounds the adoptive parents may appeal to the Migration Internal Review Office for an internal review, the Immigration Review Tribunal for an external review and in the event both these appeals fail, to the Minister.

11.14 Once all the requirements of a *Class 102 (Adoption) Visa and Entry Permit* have been satisfied, the child will be granted a visa through the Department of Immigration's offices in the child's country of origin. As mentioned above, the visa confers permanent residency on the child and allows the adoptive parents to bring the child into Australia. In order to obtain Australian citizenship however, the adoptive parents must adopt the child under New South Wales law. In accordance with the *Australian Citizenship Act* 1948, a child adopted under Australian law automatically acquires citizenship if he or she is in Australia as a permanent resident at the time of the adoption and if one of the adoptive parents is an Australian citizen.[7]

11.15 A declaration of the validity of an overseas adoption order can be obtained through the Supreme Court,[8] thus obviating the need to re-adopt the child in Australia. This option is available in limited circumstances where the adoptive parents were resident in the overseas country for 12 months or more or were domiciled there, and the overseas order puts them in the position of parents and gives them a superior right than the natural parents in respect of custody of the adopted child.[9] A declaration of validity of an overseas adoption order does not automatically confer Australian citizenship on a child and the adoptive parents must request a grant of citizenship from the Department of Immigration. The Department of Immigration's submission to the Commission indicates that as a matter of policy, citizenship will be granted after presentation of evidence that the overseas order has been declared valid in an Australian court.[10] As the majority of adoptive parents are not domiciled in or have not lived in their child's country of origin for a year, the option of having the overseas adoption order validated is available to only a small number of adoptive parents.

PARENT SUPPORT GROUPS

11.16 While the Department of Community Services exercises considerable control over inter-country adoption, the parent groups also play a significant role. Some parent groups have been operating longer than the Department in inter-country adoption and their members have many years of experience. In relation to specific programs, it is only the parent groups that really understand the overseas process and this knowledge is a source of considerable power in the interplay between the Department, adoptive parents and parent groups.

Background

11.17 Most parent support groups were established by couples who had adopted children from overseas and who wanted to share their knowledge of the adoption process with prospective inter-country adoptive parents. The groups were also intended to provide a forum for the adoptees and adoptive parents to remain in contact with one another. This role remains the consistent theme in the parent support groups although some groups are now also committed to aid programs through which children remaining in the sending countries receive assistance.

11.18 There are currently eight active parent support groups for inter-country adoption. They are:-

Aid for the Children of Brazil (ACOB) - Brazil

Australian Families for Children (AFC) (Administration of adoption assistance program)

Australians Caring for Children (ACC) (Parent Support Group) - Colombia, Bolivia, Chile, Peru, Costa Rica, India

Australian Society for Inter-country Aid Children (NSW) (ASIAC) - Korea, India

Chilean Adoption Support Association (CASA) - Chile

Friends of FANA - Colombia

Illawarra Adoptive Parents Association (IAPA) - Taiwan, Thailand, Korea, Sri Lanka

International Childrens Aid Ltd (ICA) - India, Sri Lanka, Fiji.

Organisation and accountability

11.19 The parent groups have varying degrees of financial and organisational accountability. Some are registered charities, incorporated organisations or registered companies. Others are simply voluntary groups. The latter are not audited, nor are annual accounts prepared and available to members or to the Department.

11.20 While the status of registered charity, registered company or incorporated organisation imposes financial accountability on some parent groups, none of the groups are accountable in relation to the work they actually perform. They are not private adoption agencies like Centacare, Barnardos and the Anglican Adoption Agency who are accountable to the Director-General.[11] The parent support groups are not required to report to any higher authority and the Director-General of the Department of Community Services has no formal control over their practices.

11.21 This lack of accountability is a result of the absence of legislative recognition of the parent support groups. That is, the *Adoption of Children Act* 1965 (NSW) makes no mention of parent support groups in the framework it establishes for the organisation of adoptions. Accountability is usually achieved through legislation. That is, an act either establishes an organisation or acknowledges existing organisations, and provides for a hierarchy that renders the organisations accountable. The *Adoption of Children Act* 1965 (NSW) has not done this in relation to parent support groups.

11.22 The absence of legislation in relation to parent support groups also means that their functions are not spelled out or enumerated in a clear fashion. This is in marked contrast to private adoption agencies whose functions are governed by Regulations under the *Adoption of Children Act* 1965. The way in which the parent support groups work and the programs in which they are involved are determined by the members themselves. They are not required to be staffed by trained adoption workers, they have no particular standard of service which they must provide and they have no code of ethics with which they must comply. As a result, there are few guides to the tasks the parent groups are entitled to perform and the manner in which they must perform them.

11.23 The Department is, however, in a position to impose some general conditions on the operation all parent support groups. These include an obligation to notify the Department of all allocations for the Department's approval, confidentiality of all adoption documents and provision of program details to applicants and the Department. These conditions are not legal requirements. They are merely conditions that the Department has developed in the course of its working relationship with adoptive parents who are bringing children from overseas countries.

Departmental endorsement of parent support groups

11.24 When applicants approach the Department seeking to adopt a child from overseas it is the practice of the Department to direct applicants to one of the parent support groups. Before being accepted into the inter-country adoption program, applicants are required to obtain a written statement from a parent support group to the effect that there is a reasonable chance that a child will be placed with them within the following two year period.

11.25 Many applicants see this procedure as a de facto endorsement of the parent support groups by the Department. The Commission has been advised that applicants believe that the groups are in some way vetted by the Department. In fact the Department has little knowledge of the organisational character of the parent support groups, does not receive annual reports and has no knowledge of the financial integrity of any of the groups.

11.26 In recommending that applicants join parent support groups the Department is attempting to encourage applicants to mix with other families who have adopted children from overseas. It appears to be widely accepted that inter-country adoptees should be encouraged to mix with one another so that they are aware that inter-country adoption was an experience they shared with others from their country of origin. It is also through such groups that the cultural heritage of the children is preserved to some degree.

11.27 The problem of the Department requiring applicants to join a parent support group without really being aware of the true nature of the groups, is typical of the anomalies in inter-country adoption. The Department and parent support groups have devised a working relationship over the years to fill a legislative void. The parent support groups need the Department to approve their programs and the Department needs the support groups to provide much of the organisational backup. Difficulties arise, however, owing to the lack of a legislative

framework for the support groups to work within. The Department must in effect endorse the parent support groups without having any real knowledge of, much less control over, their function.

Interaction of parent support groups, the applicants, the overseas agency and the Department

11.28 Inter-country adoption is not a process for which there is a simple description that covers all programs and countries. The interaction of the parent support group, applicants, overseas agency and the Department varies according to which parent support group is involved and the country to which the application is being made. It is difficult for applicants coming to the system to understand who is responsible for each step in the application process.

11.29 The variations among all the programs are too complicated to detail here. It is sufficient to state the basic framework and provide a few examples of the programs to illustrate their differences.

11.30 Briefly, the adoption process involves the transmission of three sets of documents:

the Department's documents (including the social worker's assessment of the applicants);

the applicants' personal documents (for example, copies of birth and marriage certificates, letters from bank managers and employers); and

the notice of allocation of a child to particular applicants issued by the sending country.

11.31 The differences in the programs lie in who has the power or responsibility to transfer these documents to another party to the proceedings.

Example 1

The Department sends its own documents to the overseas agency directly. The applicants also send their personal documents to the overseas agency directly. The overseas agency then notifies the Department of the allocation of a child and the Department passes this information on to the applicants.[12]

Example 2

The Department sends its own documents to the overseas agency directly. The applicants also send their personal documents to the overseas agency directly. The allocation notification is sent by the overseas agency to the parent support group which then notifies the Department and the applicants.[13]

Example 3

The Department and the applicants send their respective documents to the parent support group. The parent support group checks them and sends them on to the overseas agency. The overseas agency notifies the parent support group of the allocation and the parent support group passes this on to the Department and the applicants.[14]

Example 4

The Department and the applicants send their respective documents to the overseas agency. The allocation notification is sent from the overseas agency to the parent support group via the parent group's agent in the donor country. The parent support group notifies the Department who then notifies the applicant.[15]

11.32 Example 2, 3 and 4 demonstrate the way in which parent support groups can play a significant role in the adoption process. In all of these examples it is the parent group that receives the allocation information from the overseas agency or government department. This is illustrative of the fact that in most instances the parent groups, not the Department, are known to the sending country's adoption authorities. This is a result of the contacts that individuals in parent groups have made through the adoption of their own children and through the assistance they have given to other couples in adopting. While these contacts are invaluable for the organisation

of adoptions, they are also a source of power for the parent support groups. The Department is restricted in its supervision of the adoption process by this parent group power. In some instances the Department has had difficulty securing all of the relevant information about the allocation from the parent support group so that it is in a position to give an informed approval of the allocation.

11.33 Example 3 is the standard practice of only one parent support group. It is atypical in that it allows the Department no direct contact with the overseas agencies. It also gives the parent support group power to check and vet Department documents. The appropriateness of this practice will be discussed in Chapter 12.

Fees charged by parent support groups

11.34 Applicants in inter-country adoption pay a considerable amount of money in fees to facilitate an adoption. Fees are charged by the Department of Community Services, the overseas agencies and by the parent support group. Fees charged by the parent support group fall into four categories:

annual subscription fees;

sponsorship fees;

communication/administration fees; and

donations to orphanages.

11.35 Annual subscription fees are charged by most groups, either for membership or for newsletter subscription. They are approximately $30.

11.36 Sponsorship fees for children who remain in sending countries are payable to some parent support groups. These fees are voluntary, except in the case of Sri Lankan adoptions. Sri Lankan legislation requires a lump sum payment of approximately $2,000 at the time of the adoption to support a child in a government institution.[16]

11.37 Communication and administration fees are charged by most groups to cover the expense of telephone calls, faxes and courier services required to organise an adoption. This fee varies from $120-$700.

11.38 Donations to orphanages may be made by the applicants directly to the orphanage or through the parent group. Such donations are usually not compulsory.

11.39 Some organisations require that fees are payed in advance of placement - either communication fees, sponsorship fees or orphanage donation. In these situations the refunding of fees can be difficult to achieve, as the following cases described to the Commission indicate.

Case A

> A couple realised that their chances of a child being placed with them through program A were diminishing and they therefore wished to transfer to program B operated by another parent group. They were informed by the parent group of program A that the $5,000 which they had paid to the parent group at the time their papers were sent to Program A was not refundable.

Case B

> A couple who were being assessed for a non-specific child became aware of a child who had some special physical needs available for adoption through a parent support program. They were then assessed for this child and the child allocated to them. At the time of their acceptance of the allocation they were required to forward $15,000 to the overseas agency which recoups from adoptive parents the cost of medical and other care provided to the child. When this child was initially denied a visa to Australia on medical grounds the applicants were told by the parent support group that their $15,000 was non-refundable.

Services provided to members by parent support groups

11.40 The parent support groups provide a variety of services to their members ranging from preparation of documents to post-adoption support. Each group has developed in an individual way according to the needs of the members and the energy of its committee. There is no prescribed formula.

Pre-adoption services

11.41 *Information meetings*. Most parent support groups provide an information meeting for new members to orient them to the nature of the organisation and to the procedures which they utilise for the adoption of children. Parent support groups vary in the amount of information provided to new members regarding the structure of the organisation and its operations.

11.42 The Commission is aware that new applicants are sometimes concerned by certain groups' information meetings. Applicants frequently comment that some parent groups are not willing to discuss with them the number of applicants who are waiting for children via the parent support group programs. There is the perceived assumption that if applicants really want a child they will be prepared to pay their membership fees and fund raise for an indefinite period in the hope they might have a child placed with them. The Commission has received evidence that some parent groups give applicants the impression that they can use their influence to help them obtain a child earlier than other applicants - if they, the applicants, are committed fund raisers.

11.43 *Language lessons*. Only one parent support group, Australian Families For Children (AFC), provides language lessons for persons wishing to adopt through their program. AFC have made familiarity with the Spanish language mandatory for applicants wishing to adopt from Colombia. IAPA provide a Thai language cassette tapes for applicants wishing to adopt older Thai children. ASIAC (NSW) and IAPA are both associated with Saturday Korean language schools for children adopted from Korea.[17]

11.44 *Adoption seminars*. Some of the parent support groups provide adoption seminars for applicants of their programs. These seminars, in addition to those conducted by the Department, utilise professional adoption workers and adoptive parents as speakers.

Documentation assistance

11.45 *Preparation of personal documents*. Apart from obtaining an authorised home study from the Department of Community Services and their approval as suitable adoptive parents for an overseas child, applicants must also prepare an array of other documents specified by the overseas country from which they wish to adopt.

11.46 Personal documents usually include a copy of police records, certified copies of birth and marriage certificates, letters from bank managers and employers. Some countries also require a report from a registered psychologist. In these instances the parent support groups usually can recommend a psychologist with whom they have previously had contact.

11.47 The parent support groups vary in the intensity with which they are involved in the preparation of personal documents. Some groups simply provide applicants with a list of documents which are required and have no further involvement. Others require that all of the documents be submitted to them for checking before they are forwarded by the parent group to the overseas agency. Some applicants question the privacy implications of handing over their tax file numbers, drivers licence numbers, personal certificates and even copies of their very personal life stories to a volunteer group of people without all of the safeguards of an adoption agency. They frequently want to know what happens to the information.

11.48 *The checking of departmental documents.* Under the agreement between the Department and AFC, AFC has access to the Department home study with the applicants written permission and is permitted to forward the home study and any other Departmental documents to the overseas agencies with whom AFC deals.

11.49 After receiving the home study (assessment), AFC checks all Departmental documents for errors of fact, spelling and issues which, in AFC's opinion, are likely to cause offence or concern in the agency to whom the papers are sent.

11.50 Undoubtedly this process assists the acceptance of the documents in the foreign country. However, it raises the question of whether this vetting of the home studies by an intermediary is appropriate.

11.51 AFC has issued guidelines for the home studies stating that they cannot explore the consequences for a child being raised in a racist area or any reference to future contact by the adoptee with birth families. The accredited social workers who work for the Department have often been asked to revise their reports to comply with AFC guidelines. Given that both of the identified issues would be of definite interest to a placement adoption worker in the overseas country. Failure of assessment reports in this way may not be in the best interests of the child.

11.52 Another concern of the Commission is that children and birth parents separated by inter-country adoption should be in a position, as much as is possible, to benefit from the provisions of the *Adoption Information Act* 1990. In this regard the overseas adoption agencies should be made aware of the provisions of the *Adoption Information Act* 1990 and be informed that applicant adoptive parents have been required to consider the implications of this Act.

11.53 *Forwarding of documents to the overseas country.* A number of parent groups assist applicants by forwarding the personal documents to the overseas agency with a covering letter of introduction from the parent support group. This assistance is appreciated by applicants without a knowledge of international couriers and bureaucracy.

Adoption assistance - the allocation of a child

11.54 The process by which children available for adoption are located and then adopted by members of parent support groups is complex and varies from one group to another. Many of the links between overseas agencies and parent support groups have been developed through personal contact over many years. The overseas agencies have thus developed some personal confidence in the parent support groups. The Department does not have the same personal links. It is, therefore, understandable that many of the overseas agencies make allocations direct to the parent support group although it may be questioned as to why the parent support groups do not use their personal relationships to encourage the overseas agency adoption workers to make direct contact with the Department. This then would reinforce the “support” nature of the parent support groups and not present an “active” role in the adoption process.

11.55 *Advocating to agencies for the placement of children with parent support group member.* At a minimum all of the parent support groups lobby and advocate to particular overseas agencies for the placement of children with members of the parent support group. Such advocating is often, but not always, accompanied by financial assistance to the overseas agency or a related agency.

11.56 *Suggesting the “most suitable” and “next on the list” applicants.* Although none of the parent support groups have any qualified adoption workers available to them, most are in some way involved in the allocation of children from foreign agencies. This may simply be the parent support group advising the overseas agency which member applicants are the “next on the list”. However, it is not uncommon for a parent support group to be approached by an overseas agency to determine who are the most suitable applicants for a child. The Commission is concerned about whether parent support groups, lacking knowledge and experience of adoption practice, and with only a social knowledge of the applicants, are in a position to make acceptable decisions on “matching” a child with suitable adoptive parents.

11.57 It is at this point, of either nominating the “next on the list” or the “most suitable” applicants, that some applicants believe that the parent support groups, who operate this type of program, have unreasonable power to manipulate the allocation of children - to either ensure that some applicants receive children ahead of other applicants or to delay the allocation of a child to others. Most applicants, with applications in programs conducted in this way, believe they cannot “rock the boat” in any way or their chances of getting a child will be jeopardised - they simply assist in fund-raising and comply with the requests of the parent support group.

11.58 The alternate view put by some of the parent support groups is that their organisations are co-operative in nature. They are not simply service providers. The organisations were established to cooperatively assist members to adopt children and provide for children who remained in institutions. It is a matter of considerable

concern to some of the parent support groups that new applicants join the groups and expect that a child will be provided to them without them participating in any of the voluntary activities of the group. To older group members the participation in the activities of the group is an integral aspect of belonging to the group and they resent the attitude of some applicants that they "deserve" a child simply because they are "next on the list". From their perspective it is not fair for applicants who have done nothing for the group to be allocated a child through the group's programs ahead of applicants who have worked hard on group projects.

11.59 *Distribution of allocation information.* Frequently it is the parent support group which receives the allocation details of a child and then passes this information on, sometimes unaltered and sometimes in abbreviated form, to the Department for confirmation of the allocation.

Case 1

> A child from a difficult social situation was allocated by an overseas agency to a couple in New South Wales. The initial information was conveyed from the overseas agency, via telephone, in English, to the parent support group who then provided abbreviated information to the Department and more extensive information to the potential adoptive parents. Written information from the agency would not be provided until the couple had agreed to accept the child. A preferable procedure, perhaps, would have been for the initial information to have been sent from the overseas agency to the Department who could then have explored with them whether the allocated couple was in fact a suitable "match" for the particular child. The Department would then have been in a position to explore the consequences of accepting the child with the applicants and to seek more information if it was required. As it was, the parent support group assumed the role of "adoption broker", a role for which they were unqualified. The parent support group rejected all suggestions that the Department have direct contact with the overseas agency.

Case 2

> A newborn child was offered to a couple directly by the parent group, without first having the allocation confirmed by the Department. If they had accepted the child a written allocation information would have been faxed to the Department. The child was showing evidence of developmental difficulty which the applicant parents were informed by their paediatrician was serious in nature. The applicants were told by the parent support group that if they did not accept this child they would not be allocated any of the other children who were being placed by the parent group at that time. The applicants were asked by the parent group to say nothing to the Department otherwise they would lose their chance of adopting a child. The parent support group was annoyed when the Department intervened, having been advised of the distressing situation by the applicants. In this instance the parent group again attempted to act as an "adoption broker" without the applicants being given the opportunity to explore the consequences of the proposed adoption for the child or for themselves.

11.60 In both of the above scenarios the Department was to receive the "official" allocation material after an "unofficial" allocation had been arranged by the parent support group. The Department officers suspect this process happens regularly with applicants being told not to alert the Department. This does not occur with the programs through which the Department receives allocation material directly from the overseas agencies.

11.61 Another practice that can lead to the "unofficial" allocation of a child to adoptive parents is the use of photographs of "unadoptable" children. Some parent groups show prospective parents profiles of children in need of parents and applicants can indicate if they would like to adopt one of the children. The Department uses a similar method for children with special needs born in New South Wales. The problem with parent groups engaging in this activity is that the parent group is not necessarily aware of the applicants' parenting capacity; members of the parent group have no training to assess whether the people they are encouraging to adopt a particular child can in any way meet the needs of that child. The Department and its independent social workers are placed in a difficult situation when they are faced with applicants who have "fixed" on a child but who the Department is not confident would make good adoptive parents for the child in question.

11.62 Solutions to the problems raised in relation to the distribution of allocation information and parent groups indicating the "most suitable" applicants or those "next on the list" are discussed in Chapter 12.

11.63 *The use of adoption agents in overseas countries.* The term "agent" has many meanings in inter-country adoption. It may be the director of an authorised adoption agency or it may be a lawyer or adoption broker who is recommended to adoption applicants by a parent support group.

11.64 A number of parent support groups speak of "people on the ground." These are agents of the parent support group who learn of a child available for adoption, approach an authorised adoption organisation with details of a member of the parent support group and attempt to secure endorsement for the placement of the child with that member family. There is the assumption in this form of placement that any family will love any child. There is little or no form of matching of the child's needs to the adoptive parents' parenting capacity and resources. The recording of the child's social and medical history is rarely undertaken.

11.65 In two recent cases the Department is aware that a lawyer, recommended by a parent support group, acted on behalf of hopeful adoptive parents in Court proceedings considering the removal of children from the care of their birth parents. On both occasions the lawyer/agent is believed to have advocated for the placement of the children with his "clients".

11.66 In cases where an individual agent/lawyer is involved it is hard to ascertain that children are freely available for adoption. It is difficult not to see such cases as private adoptions which do not comply with international law.[18] These situations would be avoided if all allocations were made by authorised adoption agencies/orphanages directly to the Department of Community Services. All such allocations would be for children in the care of the agencies - either in institutions or foster care. Allocations made on behalf of agents or directly from agents would not be acceptable.

11.67 In their response to the Commission's survey some parent groups indicated that they had "representatives" in a number of countries and that these representatives liaised with the government adoption authorities and transmitted the allocation information to the parent group. It is not known who these "representatives" are, to whom they are responsible or what qualifications they possess to enable them to undertake duties on behalf of the parent group.

Placement assistance

11.68 Once the allocation of a child is made, applicants must prepare documents for the overseas adoption process and make travel and accommodation arrangements. Parent groups often help applicants with these tasks, as well as organising familiarisation tours of the overseas country and providing an "agent" to assist the applicants when they arrive. All of these roles are regarded by applicants as very helpful.

11.69 Problems have arisen with one parent support group that requires adoptive parents to purchase their tickets through a nominated travel agency. The Commission is aware of one couple who wished to use travel vouchers they had won in a competition to pay their airfares. They were not permitted to do so by the parent group, which had already booked travel and accommodation for the applicants without first consulting them, with the nominated travel agent. The travel agent provides the parent group with a number of free fares according to how many tickets they purchase as a group. These free fares are used by committee members of the parent group to travel to the donor country and maintain personal contacts with the adoption agencies.

Post-placement assistance

11.70 *Adoption support.* All of the parent support groups provide ongoing support to applicants after the placement of a child with them. The nature of this support varies from group to group. It includes adoptive parent and child playgroups, language schools for the children, social events to facilitate parents and children staying in touch with one another and telephone advice when adoptive parents experience difficulty with their children.

11.71 *Documentation of the adoption.* AFC requests that adoptive parents send it copies of all of the documentation received from the overseas country in relation to the child. This includes the final court order made in the overseas country. The Commission is aware that some applicants privately express concerns about

the need for a parent support group to have and retain this information about their children. On occasions the court documents detail the distressing reasons why a child was removed from the care of the birth parents. The applicants do not question the right of the Department to be provided with these documents and to retain them for the child but they do question the appropriateness of the documents being provided to the parent support group and retained by them.

11.72 *Post-placement reports.* Usually the Department forwards three post-placement reports to the overseas agency in the 12 months following the child's arrival in Australia. Some countries require more frequent reports and for a longer period of time.[19]

11.73 As with the home study assessment reports, AFC has an arrangement with the Department that the post placement reports will be forwarded through that parent group to the overseas organisation through which the child was adopted.

The processes in the sending countries

11.74 The processes in sending countries are an area of concern in inter-country adoption. This is not to suggest that sending countries are inherently likely to engage in questionable adoption practices; it is simply to say that New South Wales can have no control over or even real knowledge of the adoption process overseas.

11.75 Lack of knowledge and control over the adoption process raises two main difficulties. The first is that other country's adoption practice may differ from our adoption practice. This presents a dilemma when New South Wales' participation in inter-country adoption effectively condones adoption practice that has been deemed unacceptable here. Adoption of children in the United States and Chile can present this difficulty. Some states in America allow consent to be given within 48 hours of the child's birth. Chile allows lawyers of adoptive parents to appear in court to argue for the placement of the child with the adoptive parents when the child is not necessarily free for adoption. Both of these practices are deemed unacceptable by New South Wales adoption legislation so that approving them through inter-country adoption is anomalous.

11.76 The second difficulty arises from lack of knowledge of the overseas process. At the simplest level the Department of Community Services has no detailed understanding of overseas adoption legislation or practice. In many cases the Department must accept at face value what the parent support groups claim is standard overseas practice. In addition to this, the Department has no way of knowing if irregularities have occurred in the arrangement of the adoption. The Department is too removed by distance and time from the overseas adoption process to be in a position to discover if the child was genuinely relinquished, orphaned or abandoned.

Procedures of current concern

11.77 In some countries that relinquish children to Australian couples, it is possible that the central authority is so poorly staffed that it would not be in a position to allocate identified children to specific adoptive parents. Consequently, the Department believes that agents of the parent groups identify children living in institutions, born in homes for unmarried mothers or whose birth parents are considering adoption and by an unknown process of matching the child to applicants from a list supplied by the parent group, the possible adoption is brought to the attention of the central authorities. It is only at this point that the home study (the official assessment of the applicants), is considered. Neither the agent nor the administrators of the "unmarried mothers homes" in which the children and their mothers usually reside have access to the home study.

11.78 Once the authorisation of the central adoption authority in the particular country is obtained, the details of the child are faxed to the parent support group. The faxes are then forwarded to the Department of Community Services for approval of the allocation. The faxes are often of poor quality and no originals of the central authority authorisation are received by the Department. It is doubtful if a "child study" has been prepared in the consideration of the adoption and only minimal information is supplied to the Department and adoptive parents at the time of allocation.

11.79 With this type of allocation there are concerns about the "matching" process being undertaken in an *ad hoc* manner. Consideration may not have been given to alternative care options for the child, nor may

consideration have been given to the interests of the child in not being permanently separated from his or her birth parents.

11.80 The Department is also concerned with countries such as Chile where independent adoption agents, who are aware of children who may have been separated from their natural parents for a variety of reasons, approach a court for a care order for the children in favour of adoptive parents. The agent faxes a copy of the care order to Australian prospective adoptive parents and requests that they travel to Chile for the adoption hearing. The adoption may be opposed by the natural parents and the government authority ordinarily responsible for adoption, and yet the court may still make an order in favour of the adoptive parents.

11.81 In these circumstances the fundamental, internationally agreed principles on inter-country adoption are being violated.[20] Inter-country adoption is not intended to be a contest between the natural and adoptive parents in order to determine who should have the child. It is a last option for care of children who cannot be suitably cared for in their own country.

Ex-national adoptions

11.82 This form of adoption involves an Australian resident who is a national of another country adopting a child from the country of his or her nationality. From a cultural perspective it is desirable for a child who cannot be raised within a family in his or her country of birth to be raised with a family from that culture. Very often it is suspected by the Department that there would be families in the country of origin who would have adopted the child. The most notable example is children adopted from America.

11.83 Ex-national adoptions in these situations are more of a service to adoptive couples than provision of care for a child who would not have the opportunity to be raised in a family in the country of origin. With ex-national adoption the Department frequently does not know whether children have been obtained through procedures which safeguard the interests of the child and birth parent, although the Department always writes to the responsible welfare authority in the foreign country to confirm its procedures. The Department also requires some form of allocation information about the child prior to notifying the Department of Immigration and Ethnic Affairs of the Department of Community Services' approval of the adoption.

11.84 The Department is also aware that some of these applicants in all probability will not tell the child of his or her origins. If the child retains the nationality of his or her country of origin there is no need for the adoptive parents to obtain an Australian order of adoption and the child is denied any rights to knowledge of his or her adoption under the provisions of the *Adoption Information Act* 1990.

FOOTNOTES

1. *Migration (1993) Regulations* 1992, Schedule 2, Part 102.

2. *Migration (1993) Regulations* 1992, Schedule 2, reg 102.321(3).

3. *Migration (1993) Regulations* 1992, Schedule 4, reg 4007(1)(a).

4. Regulation 4007(1)(b).

5. Regulation 4007(1)(c).

6. Regulation 4007(2).

7. *Australian Citizenship Act* 1948 (Cth), s 10a.

8. *Adoption of Children Ac*t 1965 (NSW), s 47.

9. Section 46. See *Re M and the Adoption of Children Act* (1989) 13 Fam L R 333 and *Lowe and Others v Minister for Immigration, Local Government and Ethnic Affairs and Another* (1988) 12 Fam LR 513 for a discussion of s 46 and 47.

10. Department of Immigration and Ethnic Affairs *Submission* (6 September 1993) at 2.

11. *Adoption of Children Act* 1965 (NSW), s 13.

12. This is the process used for adoptions from Thailand and Korea.

13. This is the process used for adoptions from Taiwan.

14. This is the process used for AFC's Colombian program.

15. This is the process used for ICA's Sri Lankan program.

16. *Sri Lankan Adoption of Children (Amendment) Act* 1992, s 5(A)(b).

17. The Saet Byol Korean School in Sydney and the K-Club in Wollongong.

18. The *International Convention on the Rights of the Child* only condones inter-country adoption as a final option *after* care with the child's birth family and care within the child's country have been ruled out: article 21(b). Further, the *Hague Convention on International Co-operation and Protection of Children in Respect of Inter-country Adoption* (which is not yet in force) expressly prohibits contact between adoptive parents and birth parents before it has been established that the child is free for adoption, "due consideration" has been given to in-country placement, free and informed consent to adoption has been given and the adoptive parents have be judged as eligible and suitable: Art 29.

19. For example, Sri Lankan Adoption of Children Ordinance 1941, as amended by *Adoption of Children (Amendment) Act*, s 10**c**, requires quarter-yearly reports until the adoption is "legally confirmed" in the receiving country, half-yearly reports with photographs for the following three years and yearly reports until the child is ten.

20. See discussion of international law in Chapter 12.

12. Inter-Country Adoption in an International Perspective

INTRODUCTION

12.1 Children, as powerless members of most societies, are vulnerable to abuse in many circumstances - in their homes, in the education system and in welfare systems. The process of inter-country adoption is no exception to this general rule and children have suffered abuses of their rights in the name of inter-country adoption. Abuses may occur intentionally, where a child is abducted for the purposes of adoption or inadvertently, when people mistakenly believe they are acting in the best interests of a child.

12.2 The international community attempts to prevent abuses of children's rights by formulating conventions which set standards for States' treatment of children. These include the International *Convention on the Rights of the Child* (ICROC) and the *Hague Convention on International Co-operation and Protection of Children in Respect of Inter-country Adoption*. The United Nations and some of its constituent parts,[1] along with non-government organisations,[2] monitor the treatment of children around the world.

12.3 The first part of this chapter will examine some of the problems that the international community has to combat in order to safeguard children. In the context of inter-country adoption, trafficking and sale of children and endemic poverty are two of the most significant problems that arise. The second part of the chapter will examine some of the international conventions that have been drawn up to try and deal with these problems. Particular attention will be paid to the sections of ICROC that relate to adoption and to the *Hague Convention* as a whole.

TRAFFIC AND SALE OF CHILDREN

12.4 Prevention of the trafficking and sale of children is now high on the international agenda. The United Nations Commission on Human Rights appointed a Special Rapporteur to investigate the problem in 1990.[3] It is relevant to the practice of inter-country adoption because there is a risk that some children who are adopted by foreign nationals may have been abducted and sold. This risk is considerably higher for couples who proceed through lawyers or other intermediaries and who pay large sums of money to facilitate the adoption. Even if couples act in good faith, they may be unwittingly contributing to the trafficking of children. For example, if they find a child through a lawyer, which some Australian couples do, the child may have been bought by the lawyer from a child abductor. In a study on the trafficking of children in Bolivia, evidence emerged of a woman who had abducted five babies in three months and sold all to a lawyer for an average of $US5 each.[4] Forged relinquishment or abandonment papers can be arranged for such children and Western couples offered the children, oblivious to the circumstances in which they were obtained.

12.5 Inter-country adoption provides incentive and opportunity for child trafficking to occur.[5] Some South American and Asian countries that have high rates of legitimate inter-country adoptions also have high rates of child abduction and sale. The combination of poverty, ineffective legislation and bureaucracy in donor countries, with money and desperation for children in receiving countries, provides the perfect climate for trafficking and sale to flourish.

POVERTY

12.6 Poverty is the single greatest problem affecting children in the world today. Two hundred and fifty thousand children die every week from malnutrition and disease.[6] Many of these deaths could be prevented if communities were provided with the means to feed, immunise and medically treat their children. Poverty is not only responsible for the deaths of children, it is responsible for children's lack of adequate housing, access to education and basic opportunities in life.

12.7 Many children are relinquished for inter-country adoption because of poverty. Families may want to care for their children but they do not have the means to do so because of the endemic poverty that affects their country or region of the world.

12.8 Poverty and adoption are often closely connected. In Australia, thousands of women relinquished their children because of poverty. Prior to the introduction of the single mothers' pension in 1973, women without

family support often had no choice but to relinquish their children for adoption. After 1973, the number of children relinquished for adoption steadily decreased from 9,798 in 1972 to 3,337 in 1980.[7]

12.9 The connection between poverty and adoption is a cause for concern in the international community, especially amongst non-government organisations. Damien Ngabonziza, of the International Social Service argues that inter-country adoption can be a bandaid solution for a small number of children and that it may ignore the real problems that children face. He states that "the response to hunger is food, not ICA [inter-country adoption]. Likewise, poverty, lack of adequate health care and such do not require ICA as a remedy".[8]

12.10 Other commentators support this statement arguing that inter-country adoption is an inappropriate way to care for poor children because it does not address their real needs. They argue that the majority of poor children are not orphaned or abandoned. They have a family but that family cannot provide for them. Instead of providing the existing family with the means to support their children, inter-country adoption provides the child with a new family. Maria Josefina Becker of the Brazilian Federal Child Welfare Agency states that:

> the great majority of poor children in Latin America, whether they are found in the streets of our cities or in public or private children's institutions, whose numbers are in the millions, are not abandoned. These children, together with their families, are victims of the serious economic conditions affecting our part of the world...To the extent that they actively undertake the search for children to be adopted, couples and agencies involved in international adoption, their generous and humane motives notwithstanding, increase the pressures favouring a rupture between the poor child and his or her family rather than strengthening the ties between them...In this way conditions encouraging the "production" of abandonment are created, apparently motivated by the assistance and protection of the child, which in reality serve the interests of adoptive parents.[9]

12.11 There is concern in the international community that the real problem that children face - poverty - is forgotten because of the demand for children in the West. That is, some Western couples and organisations have a vested interest in believing that children need adoption rather than aid, because it satisfies their desire for children. Some Western couples want to believe that there are "thousands of children in need of families" in poorer nations because this seemingly increases their chances of being allocated a child and also legitimises their desire to adopt from overseas.

12.12 The Regional Expert Meeting on *Protecting Children's Rights in Inter-country Adoptions and Preventing Trafficking and Sale of Children* organised by Defence for Children International in co-operation with the Philippine Government recommended that:

> a reassessment of the need for ICA is clearly essential. There is a widespread misconception about the numbers of children in need of ICA. The "demand" for such children in the US, Europe and Australia is much larger than their "availability".[10]

12.13 There is an inherent danger in the "demand" for children in Western nations. By virtue of their relative wealth, Western nations and their citizens are placed in a powerful situation in relation to poorer nations and their people. This power may be used to secure what Western couples desire - adoption - and this may sometimes be at the expense of children. One commentator illustrates this problem by describing three kinds of inter-country adoption:

> The first type is that which places the needs of the child as a priority. This means those needs are identified and the appropriate adoptive parents located and evaluated by a responsible, professional and legally recognised agency...The second type is relative adoption...[and the] third type is that of couples, childless or not, who want to adopt and, because adoptive children are not readily available in their own country, travel overseas or turn to overseas resources, usually to deprived areas where there is a surplus of needy children, in the hope of locating a child to meet their own criteria. It is not in every case that the child's needs are the motivating factor, but rather the desires of the adoptive parents.[11]

12.14 This third form of adoption is the kind that has caused the most concern in the international community. It is the kind that makes poor children and their families most vulnerable to abuse.

INTERNATIONAL LAW

12.15 As a result of concerns similar to those raised above, the international community sought to regulate inter-country adoption. In 1986 the General Assembly of the United Nations adopted by consensus the *Declaration on the Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*. This laid down the principle that inter-country adoption was only to be considered as a placement option if a child could "not be placed in a foster or an adoptive family or [could] not in any suitable manner be cared for in the country of origin".[12]

12.16 In 1990, the *Convention on the Rights of the Child* (ICROC) came into force. This is a general document on the rights of children, but it includes an article on national and international adoption.[13] A more specialised convention, the *Hague Convention on International Co-operation and Protection of Children in Respect of Inter-country Adoption*, was finalised in 1993 at the Hague Conference on Private International Law. This convention will be the focus of much of the following discussion.

12.17 The role of international law is sometimes ambiguous owing to the lack of international enforcement mechanisms. There is no international court with automatic jurisdiction to ensure compliance with international conventions, so that if a breach occurs it will not necessarily be litigated in the way a breach of domestic law might be. The absence of such a court also means that there is no body of case law interpreting the articles of conventions.[14] This can make it difficult to state definitively the precise meaning of an article, particularly as they are often couched in broad, non-specific terms. Despite these reservations about international law, the obligations that Australia has undertaken in signing conventions are ones that must be taken seriously.

International Convention on the Rights of the Child (ICROC)

12.18 Under the ICROC, Australia must 'respect and ensure' the rights in the Convention[15] and it must provide periodic reports to the Committee on the Rights of the Child detailing the measures it has taken to give effect to the rights.[16] The Committee is made up of ten independent experts[17] who can make 'suggestions and general recommendations' on Australia's progress, which will be reported in the General Assembly of the United Nations.[18] Other State Parties can also comment on Australia's report.

12.19 The ICROC enshrines the principle that the best interests of the child is the paramount consideration in making adoption arrangements. Article 21 states that

> State Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
>
> (a) ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
>
> (b) recognise that inter-country adoption may be considered as an alternative means of a child's care, if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
>
> (c) ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
>
> (d) take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved;

(e) promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs.[19]

12.20 This article raises a number of issues in relation to our current practice of inter-country adoption.

Institutional care as 'unsuitable' care

12.21 As the Commission pointed out in its Issues Paper, the article clearly treats inter-country adoption as part of general adoption policy and practice. It is a service for children, not an overseas aid program nor a service for infertile couples. However, the article also treats inter-country adoption as a last option, *after* foster care, adoption or care *'in any suitable manner'* in the child's country of origin. This article demands that institutional care is accepted as 'unsuitable' if inter-country adoption is to be permitted for children housed in institutions. While current Australian child welfare policy promotes the belief that family care is preferable to institutional care, this may not be accepted in all countries.[20] Further, while the principle that children should be cared for in families may have the optimum desirability when considering in-country placement, this may not be the case when family care can only be achieved by sending a child overseas.

Inter-country adoption safeguards and standards to be equivalent to those existing for local adoptions

12.22 Article 21(c) requires inter-country adoption safeguards and standards to be equivalent to those existing for local adoptions. This means that lesser standards cannot be applied to children from other countries. It does not mean that provisions for inter-country and local adoption need to be identical. Standards and safeguards need to have the same *effect*, but they do not have to be exactly the same.[21]

Sale and trafficking of children

12.23 Article 21(d) is obviously designed to prevent the sale and trafficking of children.[22] It is an area of specific concern for the international community and the United Nations has appointed a Special Rapporteur, Mr Vitit Muntarbhorn, to investigate the issue. He recently visited Australia and made a report to the United Nations' Commission on Human Rights on Australia's actions to combat the problem.[23]

Improper financial gain

12.24 Article 21(d) raises questions about what constitutes 'improper financial gain' for those involved in adoption. Under New South Wales law a lawyer who finds a child, arranges for his or her adoption and receives payment for this, would be making improper financial gain. That is, he or she would be receiving money for an illegal adoption.[24] In contrast, in most states in America, this would be perfectly acceptable as private adoptions are permitted. This difference in adoption law presents a dilemma for inter-country adoption - namely, how does Australia interpret its obligation under article 21(d)? If Australian nationals pay a lawyer to find them a child overseas, a practice unacceptable in Australia, do we say that there has been 'improper financial gain' and seek to prevent the adoption being finalised? Or do we say that it is not 'improper' if it is legal in the donor country and disregard our own convictions on good adoption practice? Further, what are 'all appropriate measures' in ensuring improper financial gain does not result? Refusing the child entry to Australia? Refusing an Australian adoption order? Allowing the child to stay in its placement with an Australian adoption order but making it clear to the adoptive parents that any other child they adopt in this manner will be refused entry?

Bilateral or multilateral arrangements or agreements to promote the objectives of article 21

12.25 Article 21(e) requires Australia to conclude bilateral or multilateral arrangements or agreements to promote the objectives of article 21. We are in the process of doing this by attempting to ratify the *Hague Convention*, a multilateral agreement which would regulate inter-country adoption between State Parties. However, article 21(e) may be suggesting that government-to-government arrangements are the best way to conduct inter-country adoption. That is, States should conclude bilateral agreements with one another in relation to the passage of children between their countries. At the moment Australia has no such bilateral agreements

and adoption is predominantly practised by private groups. There is some communication between the Department of Community Services and overseas welfare departments, but it is of an *ad hoc* nature. The organised programs are privately run.

Involvement of private groups

12.26 The involvement of private groups in adoption arrangements is relevant to the second part of article 21(e). State Parties must ensure that placements of children are carried out by 'competent authorities or organs'. The parent groups in New South Wales play a significant part in the process of inter-country adoption as the previous chapter has shown. The parent groups are run by private citizens with no adoption training and little, if any, social work experience. By allowing unqualified people such power in the process of inter-country adoption, is Australia breaching its obligations under article 21(e)? Do we need a system of licensing, such as that in Sweden,[25] to ensure that the parent groups operating in New South Wales are 'competent' within the meaning of the ICROC? This licensing system has been suggested by some parent groups themselves in their submissions to the Commission.[26] If we introduced a licensing system, however, would this make parent groups more 'competent', that is, better trained, or would it simply legitimise their current practice?

Other articles of relevance

12.27 There are other articles of the ICROC which are relevant to inter-country adoption. Article 7(1) grants children 'as far as possible' the right to 'know and be cared for by his or her parents'. This ties in with article 21 which treats inter-country adoption as a last resort when there is no possibility for the child being cared for by natural parents. It may also be relevant to efforts made, or not made as the case may be, to gather social information about a child. If a child has a right to know his or her parents, countries that withhold information about the identity of a child's natural parents may be violating the Convention. They are denying children the right to ever know their natural parents.

12.28 Article 12 states that:

> (1) State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, whether directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

12.29 This article is relevant to children who are old enough to be consulted about their adoption. From the Commission's research, it seems that older children coming to Australia generally are consulted, and the Commission is aware of some who have refused to be adopted. There are concerns however, in relation to some children who may be considered too young to be consulted. In a video made by the Inter-country Adoptive Parents Working Party[27] an Indian inter-country adoptee recounted his experience as a young child when he was brought to Australia without even being told where he was going or why. While young children cannot be given the entire responsibility of deciding whether they should be adopted, this kind of disregard for children's opinions would seem to be the kind of action that article 12 seeks to prevent.

12.30 To conclude the discussion on the ICROC it should be noted that most, but not all, countries with whom Australia is involved in inter-country adoptions, have ratified the Convention. Taiwan and Fiji have not signed the Convention and are consequently not formally bound by any of the provisions discussed above.[28]

Hague Convention on International Co-operation and Protection of Children in Respect of Inter-country Adoption

12.31 The *Hague Convention*, once Australia has ratified it,[29] will have a more direct impact on inter-country adoption than the ICROC. The Convention was drafted at the Seventeenth Session of the Hague Conference on

Private International Law which was attended by representatives of Australia, Chile, Bolivia, Brazil, Colombia, Costa Rica, the Republic of Korea, Sri Lanka, Thailand and Peru, along with 59 other countries. Australia is expected to ratify the Convention some time in 1994 and once this occurs inter-country adoption will have to take place essentially within the framework set out by the Convention. For this reason, it is important to consider the implications of it in some detail.

"Due consideration" to in-country placement

12.32 Article 4(b) of the Convention states that inter-country adoption shall only take place if the competent authorities:

> have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an inter-country adoption is in the child's best interest.

12.33 Article 4(b) only requires authorities to give "due consideration" to in-country placement, as opposed to being satisfied that in-country placement is not possible. It seems to the Commission that this approach leans further in favour of inter-country adoption than the ICROC. This may be considered a good development in that, if inter-country adoption is accepted as a positive option for children, it should not be pushed to the bottom of the list of options. It should not necessarily be the case that all other options are deemed totally unacceptable before inter-country adoption is considered. Alternatively, this may be a dangerous development if we consider the possibility that countries may give "due consideration" to foster or adoptive parents in their own country, but decide in favour of overseas adoptive parents who have more financial resources and can offer the child a "better" life in the West. Such an interpretation would signal a marked change in international policy on inter-country adoption.

Central Authorities

12.34 The Convention requires the State Parties to conduct inter-country adoption under the auspices of Central Authorities.[30] Federal States, such as Australia, may have more than one Central Authority, but they must designate a single Central Authority to which communication may be addressed for transmission to the other Central Authorities.[31] Such a system will mean that adoption does not need to become an area of federal power[32], but that the Commonwealth may have to play some co-ordinating role in inter-country adoptions. This role could be minimal.

12.35 Central authorities may be public authorities or accredited agencies.[33] Accreditation will only be granted to bodies "demonstrating their competence to carry out properly the tasks with which they may be entrusted".[34] They must be non-profit organisations, directed and staffed by "persons qualified by their ethical standards and by training or experience to work in the field of inter-country adoption".[35] Australia, as a highly developed welfare state, is unlikely to designate a private agency to act as a Central Authority. It is more likely that the Department of Community Services, which now has the responsibility for local and inter-country adoptions, will be designated as a Central Authority. However, it has been suggested to the Commission in submissions that inter-country adoption could be run by a specialised, private agency.[36] If such an agency were created, it may be appropriate for it to be the Central Authority.

Accredited agencies

12.36 The Convention allows for private agencies to operate other than as the Central Authority. In this capacity, they would facilitate inter-country adoptions, but be under the supervision of the Central Authority in relation to their composition, operation and financial situation.[37] As stated above, accredited agencies need to be competent and staffed by experienced and qualified persons. According to article 9, accredited agencies and/or the Central Authority, may:

> (a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as necessary to complete the adoption;
>
> (b) facilitate, follow and expedite proceedings with a view to obtaining the adoption;

(c) promote the development of adoption counselling and post-adoption services in their States;

(d) provide each other with general evaluation reports about experience with inter-country adoption;

(e) reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

12.37 As mentioned above, it has been suggested to the Commission that existing parent groups should be accredited to help conduct inter-country adoptions. An accreditation system exists in Sweden and the *Hague Convention* obviously envisages such a system. However, existing parent groups seem to be considerably different in form from the accredited agencies proposed by the *Hague Convention*. The suitability of existing parent support groups for the role of accredited agencies will be considered in the following chapter.

Automatic recognition of overseas adoption orders

12.38 As well as providing for Central Authorities and accredited bodies, the Convention postulates a system of automatic recognition of overseas adoption orders.[38] Currently, adoptive parents who have not lived in their child's country of origin for more than a year prior to the adoption, need to obtain an Australian adoption order, even if they have an overseas order. If the Convention is ratified by Australia and a child is adopted in another State Party's jurisdiction, then that adoption order must be recognised by Australia, unless the adoption is "manifestly contrary to [Australia's] public policy, taking into account the best interests of the child".[39]

12.39 The Commission has heard many criticisms of the need to 're-adopt' children in Australia. If the Convention is ratified by Australia and an adoption occurs in another State Party jurisdiction, then this problem will be avoided. However, if the country in which the adoption occurs is not a party to the Convention, then an Australian adoption order will still be needed. It may be that countries that are not party to the Convention have not necessarily made a commitment to ensuring inter-country adoption is abuse-free and that in relation to those countries, the need to obtain an Australian Order of Adoption may be appropriate.

Adoption process

12.40 A significant feature of the Convention that needs to be considered is the form of adoption that it envisages. Article 4 establishes a process whereby adoption will only take place when competent authorities of donor states have complied with certain requirements.

> An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin -
>
> (a) have established that the child is adoptable;
>
> (b) have determined, after possibilities for placement within the State of origin have been given due consideration, that inter-country adoption is in the child's best interests;
>
> (c) have ensured that
>
> (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,
>
> (2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,
>
> (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and

(4) consent of the mother, where required, has been given only after the birth of the child; and

(d) have ensured, having regard to the age and degree of maturity of the child, that

(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,

(2) consideration has been given to the child's wishes and opinions,

(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and

(4) such consent has not been induced by payment or compensation of any kind.

12.41 Article 5 stipulates the duties of the receiving countries.

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State -

(a) determine if adoptive parents are eligible and suitable to adopt;

(b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and

(c) have determined that the child is or will be authorised to enter and reside permanently in that State;

12.42 The Convention requires both the sending State and the receiving State to compile reports on the child and the adoptive parents respectively.[40] The reports must include some detail and must be transferred to the other country's Central Authority. Central Authorities must take direct and appropriate measures to "provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms".[41] Central Authorities must also "keep each other informed about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required".[42]

12.43 The process envisaged by the Convention is one in which competent, accountable organisations take responsibility for adoption arrangements. These competent authorities are required to communicate with one another directly and regularly to ensure that the safeguards created by the Convention are being met and that all parties are working in a co-operative and informed manner. The Convention makes no provision for the operation of unaccountable interest groups in the adoption process.

Adoption Information

12.44 The Convention requires competent authorities of State Parties to ensure that "information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as medical history, is preserved".[43] States must also ensure that the child or his or her representative has access to this information, in so far as is permitted by the law of the State.[44] This provision will require certain countries to alter their practices in relation to the recording of adoption information. Some countries do not maintain a central record of adoptions and information is left to be preserved by individual orphanages and welfare groups. Some of these organisations destroy records after a limited period of time.

12.45 While New South Wales maintains detailed records for local adoption, the information the Department of Community Services can maintain for inter-country adoptions is limited by the information provided by donor countries, parent support groups and individual adoptive parents. It could be argued that adoptive parents and support groups should provide the Department with all the social and medical history of adopted children that

they have been able to acquire so that the information can be recorded and then accessed by adoptees once they reach 18, under the provisions of the *Adoption Information Act*. This would seem appropriate for two reasons. First, the information belongs to the child, not the adoptive parents or organisations involved in the child's adoption, so it should be recorded in a manner that will allow the child access to it. Second, social and medical history is available to local adoptees so that it would seem unjust that inter-country adoptees are denied the same information. Failing to provide inter-country adoptees with information may also be a violation of the obligation under the ICROC to afford inter-country adoptees the same safeguards and standards as local adoptees.[45]

Prohibition on contact between person(s) consenting to the adoption and adoptive parents before certain requirements have been satisfied

12.46 A final point that should be noted about the process of adoption that the Convention envisages is that article 29 prohibits any contact with the birth parents/person who is caring for the child, and the prospective adoptive parents, before certain requirements have been met. These requirements are that it has been established that the child is adoptable, "due consideration" has been given to in-country placement, the child has actually been born, free and informed consent to adoption has been given and the adoptive parents have been judged as eligible and suitable.[46] This article is clearly attempting to prevent adoptive parents travelling overseas and searching for a child for adoption.[47] Australian couples have been known to engage in this practice and their subsequent adoptions have been reluctantly approved. Once Australia has ratified the Convention, searching for a child with a view to adoption would put Australia in violation of its obligations under the Convention.

FOOTNOTES

1. For example the Committee on the Rights of the Child, established by article 43 of ICROC.

2. For example Defence for Children International, an independent non-government organisation based in Geneva.

3. The mandate of the Special Rapporteur was created by the Commission on Human Rights by resolution 190/68 for one year in 1990. The mandate was extended to two years and then again for three years from 1992. The Special Rapporteur furnishes annual reports to the Commission updating his progress.

4. Defence for Children International *Protecting children's rights in international adoptions: Selected Documents on the problem of sale and trafficking of children* (Geneva, 1989) at 6.

5. See M Jimenez "Trafficking in Central America: The case of Honduras" (1993) 10(1-2) *International Children's Rights Monitor* 6.

6. United Nations Children's Fund *The State of the World's Children 1993* (Oxford University Press, Oxford, 1993) at 57.

7. R Winkler and M van Keppel *Relinquishing Mothers in Adoption: Their long-term adjustment* (Institute of Family Studies, Melbourne, 1984) at 5. The availability of abortion and the change in society's attitude to single motherhood also played a role in the decrease in relinquishments.

8. D Ngabonziza "Inter-country adoption: in whose best interests?" (1988) 12 (1) *Adoption and Fostering* 35 at 40.

9. "The pressure to abandon" (1988) 5 (2/3) *International Children's Rights Monitor* cited in Defence for Children International *Protecting children's rights in international adoptions: Selected Documents on the problem of sale and trafficking of children* (Geneva, 1989) at 24-5.

10. The Regional expert meeting on *Protecting Children's Rights in Inter-country Adoptions and Preventing Trafficking and Sale of Children* organised by Defence for Children International in cooperation with the Department of Social Welfare and Development of the Government of the Republic of the Philippines (April 1992, Manilla, Philippines) at 6.

11. Ngabonziza at 35

12. Article 17.

13. Article 21.

14. Breaches of conventions and treaties can be brought before the International Court of Justice but only if both States submit to the Court's jurisdiction. Further, individuals have no standing before the Court so that it can only adjudicate inter-State disputes. As a result, the Court does not often have the opportunity to comment on conventions and treaties which relate to human rights. There are however various United Nations committees, established under covenants and conventions, which interpret the articles of their parent document. These committees can develop a body of case law in relation to specific articles, for example the Human Rights Committee's case law in relation to the International Covenant on Civil and Political Rights.

15. Article 2.

16. Article 44. Australia was due to report in January 1993 but has not yet done so at the time of writing (January 1994).

17. Article 43(2).

18. Article 45(d).

19. Article 21(b)-(e).

20. For example for some countries that have traditionally provided no State care for children, church or State-run homes may look ideal in contrast to life on the streets, where children without families formerly would have lived.

21. New South Wales changed its age criteria for inter-country and local adoption to bring them into line with each other, after Australia signed the ICROC. Difference in age criteria for inter-country adoptive parents and local adoptive parents cannot be justified as being in the best interests of the child. There are however other differences in legislation affecting inter-country adoption which it is considered can be justified, eg *Adoption of Children Regulations* reg 20(2**B**) which gives the Director-General a discretion to assess and approve couples who do not meet all the gazetted criteria for inter-country adoption.

22. Also see Art 11 on illicit transfer and non-return of children abroad and Art 35 on the abduction, sale and traffic of children.

23. Sale of Children: Report submitted by Mr Vitit Muntarbhorn, Special Rapporteur appointed in accordance with Commission on Human Rights resolution 1992/76, Addendum, Visit by the Special Rapporteur to Australia, Commission on Human Rights, 49th Session, 9 February 1993.

24. *Adoption of Children Act* 1965 (NSW), s 50, 51.

25. See R A C Hoksbergen (ed) *Adoption in a Worldwide Perspective* (Swets North America Inc/Berwyn Swets & Zeitlinger B V/Lisse, 1986) at 25-6.

26. Australian Families for Children *Submission* (17 September 1993).

27. *Aussie Kids Adopted from Overseas*, Inter-country Adoptive Parents Working Party, 1989.

28. It is interesting to note that Argentina, like most South American countries, has ratified the Convention, but has placed a reservation on article 21. The sub-sections on inter-country adoption "do not apply in areas within [its] jurisdiction because, in its view, before they can be applied a strict mechanism must exist for

the legal protection of children in matters of inter-country adoption, in order to prevent trafficking in and the sale of children."

29. Australia is in the process of signing and ratifying the Convention. Consultation must take place with the States as adoption is almost exclusively within their jurisdiction. Ratification will probably take place in the first half of 1994.

30. Article 6(1).

31. Article 6(2.).

32. Under the Australian Constitution the Commonwealth Government has power to make laws in relation to "external affairs": s 51 (xxix). This allows the government to conclude international agreements with other States. International conventions and treaties do not automatically become law in Australia, but must be enacted in domestic legislation. Problems can sometimes arise when the Commonwealth Government has entered an agreement with other countries thereby creating an obligation on Australia to enact legislation, but the subject matter of the agreement is one for which only the States have power to legislate. Adoption raises this problem - the Hague Convention was negotiated by the Commonwealth Government under the external affairs power but the Commonwealth Government does not have the requisite domestic power to enact legislation in relation to adoption, as adoption falls within the States' legislative sphere. The Commonwealth Government must then negotiate with the States in order to ensure that State legislation complies with Australia's international obligations. Alternatively, it could be argued that the external affairs power not only allows the Commonwealth to enter international agreements but also allows it to enact any domestic legislation relating to that agreement; that is, once the Commonwealth has ratified the Hague Convention it could simply enact its own inter-country adoption legislation. However, Mason J in *The Commonwealth v Tasmania* [1983] 158 CLR 1 at 131 stated that by entering a treaty the Commonwealth did not then have power to "legislate with respect to the subject-matter of the treaty as if that subject-matter were a new and independent head of Commonwealth legislative power".

33. Article 22.

34. Article 10.

35. Article 11(a), (b).

36. Australian Society for Inter-country Aid for Children (NSW) Inc *Submission* (16 September, 1993) at 10-12.

37. Article 11(c).

38. Article 23.

39. Article 24.

40. Article 16, 15.

41. Article 7(2)(a).

42. Article 20.

43. Article 30(1).

44. Article 30(2).

45. ICROC, Art 21(c).

46. Article 4(a)-(c), Art 5(a).

47. Contact in compliance with conditions established by the competent authority in the State of origin is permissible.

13. Problems in Current Inter-Country Adoption Practice

PROVISIONAL PROPOSALS FOR REFORM

1. Children adopted through an inter-country adoption program should enjoy safeguards and standards equivalent to those that exist for children adopted within New South Wales.

2. The Department of Community Services should control all aspects of inter-country adoption in New South Wales in accordance with Australia's international obligations.

3. The general discretion to assess applicants who do not meet all the gazetted criteria (*Adoption of Children Regulations*, reg 20(2**b**)) should be removed in favour of a discretion to assess and approve a couple who meet the specific needs of an identified child.

4. The *Adoption of Children Act* should be more explicit in its stipulation that adoptive parents understand the issues arising from raising an inter-country adopted child. The selection criteria for inter-country adoption should include the parents' ability to:

   understand and be sensitive to the issues involved in adopting a child from a different culture and/or race;

   foster a positive perception in the child of his or her culture, racial identity and heritage; and

   help the child should he or she encounter racism or discrimination in school or the wider community.

5. Children should not be placed in families if they are in between the ages of children already in the family, as the risk of breakdown is too high.

6. The changing of first names of inter-country adoptees should be discouraged.

7. Possibilities for care, other than adoption, should be considered for older children from other countries.

8. The Department of Community Services should cease charging a fee for extra post-placement assistance.

9. The gathering of adoption information should become an immediate priority for all those involved in inter-country adoption. Adoptive parents and support groups should collect as much information as possible about children, including identifying information, at the time of allocation and pick-up. Adoptive parents and support groups should be aware that the information belongs to the children and that it must be gathered so that children can exercise their rights under the *Adoption Information Act* 1990 when they are adults.

POINTS FOR FURTHER DISCUSSION

To what extent should mental illness preclude a person from being a suitable applicant for adoption?

INTRODUCTION

13.1 In the previous chapters the practice of inter-country adoption in New South Wales has been discussed, followed by a description of the international conventions that govern inter-country adoption. The first part of this chapter will draw the previous discussions together and appraise how far New South Wales' inter-country adoption conforms with international standards. The second part of the chapter will focus on particular areas of concern which do not necessarily pertain to New South Wales' compliance with international law, but which have come to the Commission's attention in the course of the review.

NEW SOUTH WALES COMPLIANCE WITH INTERNATIONAL LAW

13.2 The *Hague Convention on International Co-operation and Protection of Children in Respect of Inter-country Adoption* (the *Hague Convention*) was designed to prevent abuses in inter-country adoption. It

would be a mistake to assume that this Convention was primarily aimed at regulating sending countries which, often by virtue of poverty, lack the bureaucracy and administrative procedures to ensure that adoptions are abuse free. The Convention was just as much designed to improve procedures in receiving countries where inter-country adoption has often developed in an *ad hoc* and largely unregulated manner.

13.3 From the discussion of the Department of Community Services and the parent support groups in Chapter 11 it is clear that New South Wales is currently not complying with all the standards set by the *Hague Convention*. The most fundamental problem is that the functions of the Department and the parent support groups do not correlate with the structure envisaged by the Convention.

The Department of Community Services

13.4 The Department of Community Services is the most likely body to be nominated as New South Wales' Central Authority. As previously discussed, in a developed welfare state like Australia, it is unlikely that a private body would be entrusted with this task. As a Central Authority the Department is unlikely to have to change the substance of its adoption practice, which is currently in compliance with the Convention. It will however have to take on considerably more responsibility for inter-country adoption and play a more active role.

13.5 Central Authorities are required to "co-operate with each other and promote co-operation amongst the competent authorities in their States" and "take directly all appropriate measures to" provide other States with information about local adoption law, statistics and standard forms.[1] In essence this means that there must be direct contact between the responsible bodies in sending and receiving countries. The Department is required to communicate directly and frequently with overseas authorities to ensure that all adoptions comply with international standards. The Department must inform sending countries of the details of New South Wales adoption law, including the *Adoption Information Act* 1990. As a Central Authority, the Department may not arrange adoptions substantially via a third party such as a parent support group.

13.6 Central Authorities in receiving States must assess applicants' suitability to adopt and prepare a report for the sending State's Central Authority.[2] They must also keep each other informed of the adoption process, as well as about the progress of a placement.[3] The Department's practices are wholly in compliance with these requirements in all but one matter. The Department has an agreement with one parent support group to send applicants' assessments, post-placement reports and other Department documents via the parent support group for checking and vetting. Article 15(2) of the *Hague Convention* requires Central Authorities to transmit assessment reports directly to the overseas Central Authority. Similarly, article 20 requires Central Authorities to "keep each other informed" directly, not via a third party. There is no provision for the involvement of an organisation such as a parent support group in this process and as a result, New South Wales current practice does not comply with the proposed Hague system. Once Australia has ratified the Convention and incorporated it into domestic law, this practice will put Australia in breach of international law. Accordingly, the Commission proposes that the sending of any Department documents via a parent support groups should cease immediately.

Parent support groups

13.7 The operation of parent support groups raises a number of serious questions about New South Wales' compliance with international law. As we have seen in the previous chapters, the parent support groups are unaccountable organisations run by private citizens who do not necessarily have specialised adoption training. The groups' functions are not set out in legislation but were developed in an *ad hoc* manner to fill a legislative void. The *Hague Convention* makes no provision for the operation of such organisations and to the extent that parent groups have power over the inter-country adoption process, New South Wales is currently not complying with the proposed Hague system.

13.8 The *Hague Convention* provides for accredited bodies which may carry out some of the functions of the Central Authority and which may facilitate inter-country adoptions generally. However, these bodies must be "directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of inter-country adoption" and they must be supervised by the State in relation to their "composition, operation and financial situation".[4] If they are to carry out any of the functions of the Central Authority they must also "meet the requirements of integrity, professional competence, experience and accountability" of the State.[5]

13.9 The parent support groups do not meet these requirements in two fundamental ways. First, they are not supervised by the State in relation to their composition, operation and financial situations. As discussed in Chapter 11, they have minimal accountability in relation to the work they perform. Second, they are not necessarily staffed by people who are qualified to facilitate adoptions. Some of the members of parent support groups have extensive experience in organising adoptions but this varies from group to group. Further, while "experience" is sufficient to perform some functions under the Convention, "professional competence" is required for others.

13.10 Some parent support groups currently carry out functions that under the *Hague Convention* would need to be performed by accredited bodies. These include informing overseas agencies of the "most suitable" applicants or those who are "next on the list"[6] and displaying photos of hard to place children.[7]

13.11 Informing overseas agencies of the "most suitable" applicants or those who are "next on the list" is the task of a qualified adoption worker. It is an important part of "matching" and allocation and should be performed by a member of the Department's staff. It is these important parts of the adoption process that the *Hague Convention* requires an accountable organisation to perform. As shown above, the parent support groups do not meet the Hague Convention's requirements. In addition to the *Hague Convention*, there are good arguments, which were raised in Chapter 11, for the parent support groups not performing these tasks. The Department often has difficulty approving allocations when the parent support group and the applicants have fuller allocation information than it does. Further, there is a feeling amongst some applicants that parent support groups use their power to indicate who is "next on the list" to manipulate the allocation of children. There is a distinct feeling in some groups that applicants should not "rock the boat" in any way or their chances of being allocated a child will be jeopardised. These problems are precisely the kind that the *Hague Convention* seeks to prevent by requiring only qualified and accountable bodies to operate inter-country adoption.

13.12 The Commission proposes that parent support groups cease indicating the "next on the list" and "most suitable" applicants to overseas agencies. Parent support groups should request all overseas agencies to contact the Department directly with allocation information and questions. The overseas agencies and the Department could then clarify the allocation and the Department could inform the applicants. The applicants would discuss any of their concerns with the Department and then the Department would inform the overseas agency if the applicants were happy to accept the allocation. There would be no need for the parent support group to be involved in what is essentially a matter for the Department, the applicants and the overseas agency. This is in fact the way that many programs already operate.

13.13 Parent groups who display photographs of hard to place children are also performing the work of qualified adoption professionals. As has been noted in Chapter 11, members of parent support groups cannot know if the people they are encouraging to adopt a particular child have the abilities to care for that child.[8] Showing applicants photos can lead them to become attached to a child and Department officers are placed in a difficult situation if they believe that the applicants would not be the best possible parents for the child. The Commission recommends that parent support groups who have photos of hard to place children, pass these photos on to the Department. The Department could maintain a "children in need of a family" book similar to the books it already maintains for special needs children.

13.14 The consistent theme in the comparison of New South Wales inter-country adoption practice and international standards is that some parent groups have too much control over the adoption process, especially when compared to their involvement in local adoption. They have most of the direct contact with the overseas authorities and some even have the determining role in allocating children. If New South Wales is to comply with international standards, there needs to be a shift in power from the parent support groups to the Department so that the Department can take full responsibility for the arrangement of adoptions. The international conventions intend inter-country adoption to be organised by accountable, professionally staffed bodies, not by voluntary, unaccountable groups. In New South Wales, the appropriate accountable body to organise inter-country adoptions is the Department of Community Services and it must begin to take full responsibility for that role.

ASSESSMENT OF INTER-COUNTRY ADOPTIVE PARENTS

13.15 In its discussions with the Commission, the Department of Community Services indicated that the assessment procedure for inter-country adoption is slightly different from that for local adoption. Department

workers characterised the inter-country assessment procedure as linear, with couples applying to adopt and simply moving through the necessary steps one at a time. After completing the various requirements couples are usually approved to adopt. The gazetted criteria for couples are so general that the Department workers consider it difficult to withhold approval, even when they are not completely confident that couples have the necessary skills to raise an adopted child. The Department indicated that as a result of this perceived inability to reject applicants, there is a perception amongst adoptive parents that it is easier to be approved as an inter-country adoptive parent than as a local adoptive parent. Such a perception raises serious questions about New South Wales' compliance with the Convention on the Rights of the Child, which stipulates that States must ensure that "the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoptions".[9]

Age criteria

13.16 Age criteria for inter-country adoption is the same as the age criteria for local adoption, so that points raised earlier in this Discussion Paper are equally relevant here. However, the Commission has become aware that age criteria is more contentious in inter-country adoption so specific issues need to be addressed.

13.17 The contention surrounding age criteria in inter-country adoption is a result of a twofold discretion given to the Director-General: the discretion to assess applicants who do not satisfy one or more of the gazetted criteria; and the discretion to then approve them.[10] The first discretion - to assess applicants who do not satisfy one or more of the gazetted criteria - has lead to many prospective applicants insisting that they be assessed, although they do not meet the age criteria.

13.18 Applicants' insistence on being assessed when they do not meet the gazetted age criteria is a source of concern. If it is accepted that age criteria is in the best interests of the child, then it is difficult to argue that people who do not meet this criteria should be considered as adoptive parents. It was put to the Commission that age criteria is even more important in inter-country adoption than local because inter-country children have to cope with cultural and/or racial difference already and they should not be forced to cope with having parents who are significantly different from the Australian norm as well. It was argued that if there are other suitable parents within the age limit willing to adopt, why should children be placed with parents who are outside the limit?

13.19 The Commission takes this argument seriously. During the Commission's review of the *Adoption Information Act* 1990 (NSW),[11] a significant number of adoptees wrote to the Commission querying why they had been placed with older adoptive parents who did not have the abilities to relate to a young child. Some were actively searching for their birth families because their adoptive parents were now dead and the adoptees had been left with very little family at a relatively young age.

13.20 A counter argument to the strict application of age criteria is that there may be couples who, although outside the age limit, would be ideal parents for particular children. They may have special skills that render them more suitable than any other couples and it would be unfortunate if they could not be approved because of a single criterion. It is important that legislation designed to promote the best interests of children does not become ineffective through lack of flexibility.

13.21 A possible solution to this problem is that the legislation be altered so the general discretion is removed in favour of a specific discretion for an identified child. That is, the discretion should not be to give unqualified approval for a particular couple, but to give approval for a particular couple who, while they do not meet the gazetted criteria, have special capabilities that suit the specific needs of an identified child. This way the Director-General's power would only be called upon in the interests of a child, not simply because particular couples disagree with the policy of setting an upper age limit for adoptive parents.

Understanding of cultural and racial issues

13.22 Understanding of cultural and racial issues in inter-country adoption is now generally accepted as essential for prospective adoptive parents. Research overwhelmingly reveals that families who openly acknowledge the importance of a child's first country, culture and language, are much more likely to have successful adoption placements.[12]

13.23 Overseas research has revealed that there are many difficulties that inter-country adoptees face growing up in white Western countries. While children pick up languages quickly, the initial experience of being in a strange home where no one understands you can be traumatising. Children often react with rage and tears when they cannot communicate with their new parents.[13] A Norwegian study revealed that while children may speak their new language fluently without a trace of an accent, they often lacked a deeper semantic understanding that parents and teachers fail to recognise is causing them problems at school.[14]

13.24 Inter-country adoptees often have ambivalent feelings to their cultural duality. Overseas studies show that while they do not deny their adoptive status and ethnic origin, they often play down its significance. They feel Danish, German or Norwegian in their attitudes, beliefs and values and may find this difficult to reconcile with their non-ethnically Danish, German or Norwegian looks.[15] They find it distressing when people assume they are refugees or cannot speak the country's language. A Norwegian parent of a Vietnamese adoptee described the children as having "a Norwegian soul in a Vietnamese body".[16]

13.25 Many inter-country adoptees face racism at some stage of their lives. Of the children interviewed in the Inter-country Adoptive Parents Working Party video "Aussie Kids", the majority said that they had experienced some form of racism or teasing at school. Again, overseas research supports the contention that racism is a problem that inter-country adoptees confront.[17]

13.26 Adoptive parents and adoptees react to this research in different ways. Some dismiss concerns about cultural heritage and race because they see them as an implicit criticism of inter-country adoption. They associate these criticisms with arguments that inter-country adoption should not happen at all. Further, adoptive parents tire of people pointing out the 'down-side' of inter-country adoption and seemingly ignoring the good. They believe that their children should not be forced to be interested in their cultural heritage and that it is not constructive to continually point to their child's 'difference'. These parents feel that their children should just be allowed to get on with the job of growing up and not be burdened with issues in which they do not appear to be interested.

13.27 In contrast, the opinions of other adoptive parents, adoptees and social workers back-up the research that claims cultural and racial heritage are issues to be taken seriously. That is, these people believe that acknowledging the significance of a child's first culture and his or her race is necessary if inter-country adoption is going to function to the maximum benefit of children and their families.

13.28 Amongst New South Wales adoptive parents there seems to be a relatively high awareness of the issues of cultural identity. Adoptive parents of Korean children in Sydney and Wollongong organise language schools for their children which include lessons on Korean culture.[18] Representatives from the Commission attended a picnic organised by the Sydney Korean language school where Korean food had been prepared and many of the girls were dressed in the Korean national costume. AFC requires members who adopt from Colombia and Chile to have some knowledge of Spanish and other parent groups provide language tapes.

13.29 The Department is adamant that sensitivity to cultural and racial issues is an indispensable quality in adoptive parents. Department officers expressed grave concern about one couple wanting to turn their children into "little Aussies" as fast as possible and another not even intending to tell their Colombian children they were adopted. Department officers felt that some prospective adoptive parents simply did not have the ability to understand issues of culture, language and race when it was raised in adoption seminars or interviews.

13.30 The Department believes that current adoption guidelines are not specific enough to reject prospective adoptive parents on the grounds that they do not have the ability to meet the cultural and racial needs of the child. Adoptive parents must have "the capacity to...meet the social, cultural and special needs" of the child and "the capacity and willingness to...ensure the child is fully aware of his or her...culture and origin from the time of placement"[19] but the Department's officers do not believe that this is sufficient. The guidelines are vague and consequently only two or three applicants are not approved each year even though more may not be ideal adoptive parents. The Department would like to be more rigorous in its approval process but staff do not consider the existing legislation strong enough to back up their decisions to withhold approval. As a result some couples are having children placed with them when the Department is not confident of their ability to meet all of the child's needs. In contrast, in countries such as Germany, adoption authorities reject one third of their applicants on the

grounds that they do not have the ability to "understand the needs of a 'Third-World-Adoptive-Child' or that the family situation and/or motives for the adoption are not adequate".[20]

13.31 The Commission's provisional view is that if we accept that cultural and racial issues are important in adoption placements, then legislation must be more explicit in its stipulation that applicants have an understanding of these issues. Those who do not possess such an understanding should not be approved.

13.32 Selection criteria for inter-country and local adoption should include the parents' ability to:

> understand and be sensitive to the issues involved in adopting a child from a different culture and/or race;
>
> foster a positive perception in the child of his or her culture and racial identity and heritage; and
>
> help the child should he or she encounter racism or discrimination in school or the wider community.

Mental illness

13.33 The Department brought the problem of mental illness to the attention of the Commission. Under existing legislation there is no specific provision for refusing approval to prospective adoptive parents owing to a history of mental illness. Although this seems to be more of an issue in inter-country adoption, it is also equally relevant to applicants in local adoption. Applicants often do not disclose to the Department or their assessing social worker that they suffer from manic depression or some other illness, however, if the illness does come to light, this is not grounds alone to withhold approval. The applicant may have to attend an interview with a Department psychiatrist, but in the short period the psychiatrist has to speak to the applicant, he or she may not be able to reach any definitive conclusion in relation to the applicant's suitability to adopt.

13.34 It seems to the Commission that there are two sides to this problem. On one hand it seems that the existing legislation is again lacking in the power it gives the Department to refuse applicants who would not be adequate adoptive parents. On the other hand, it may be that mental illness does not always preclude a person from being a suitable applicant and that it would be discrimination to reject such an application. The Commission would be interested in further submissions on this issue.

"Slotting" policy

13.35 The Department has a policy of "slotting" for adopting families who already have children. If an adoptee is being "slotted" between two children, there must be at least a five year age gap between these children. The adoptee must be a minimum of three years older than the younger child and a minimum of two years younger than the older.

13.36 The Department would like to see this policy abolished as it causes many problems. Two breakdowns have occurred where children have been "slotted" and Department officers believe it would be preferable for children not to be placed between existing children at all.

13.37 The problem the Department faces is that adoptive parents argue they have a "right" to adopt a child if they have five years in between their children. This attitude should be discouraged - no one has a "right" to a child. In inter-country adoption, like all adoption, the interests of the child are paramount, and no child should be placed in a family if there is evidence that such placements may not be successful. Adoption breakdown must be avoided at all costs in inter-country adoption, particularly with older children, who have travelled thousands of miles to a strange country where nothing and nobody is familiar. For these children, the experience of being without a family in a foreign country, back in the care of the State, is traumatic and highly damaging.[21]

13.38 The Department is reluctant to abolish the "slotting" policy, even though it is its own and not in the gazetted criteria, because of the potential reaction from adoptive parents. This situation is indicative of the whole process of inter-country adoption - adoptive parents and their support groups are often powerful, articulate members of the community. The Department comes under a lot of pressure each time a decision is made that

adoptive parents believe is adverse to their interests. It seems that the Department is forced to compromise parts of its practice in order to minimise conflict with adoptive parents and support groups.

13.39 The Commission finds this most disturbing. Members of the community obviously have the right to contest government decisions and policies that affect their interests but adoption is not about the interests of adoptive parents. Adoption is a service for children and every child that is placed by the Department of Community Services has the right to be placed in the best possible family. They should not to be placed in a situation that the Department is not confident will work.

13.40 It seems to the Commission that "slotting" is not good adoption practice and accordingly should be abolished. Children should only be placed with a family if they are the youngest, oldest or the only child. They should not be placed in between existing children.

Birth names

13.41 Elsewhere in the Discussion Paper the Commission has dealt with the issue of birth names. Birth names, however, have a special significance for inter-country adoptees. First, for all children, their birth name is a connection with their country - they will have a uniquely Korean, Colombian or Sri Lankan name. The name may be significant in the child's first language, for example it may translate as a particular quality that the birth parents had wished for in their child. Second, in inter-country adoption, many of the children are older, so that they have lived five, 10 or even 14 years with their name so that changing it could be extremely confusing.

13.42 Despite this, some adoptive parents change their children's names, even their older children. The Department recommends against this and even though parents assure Department officers that they would never change a child's name, some promptly do so on the child's arrival.

13.43 In relation to older children, it is very difficult to justify a name change. Some people argue that the names are hard to pronounce or may mean something in English or just sound "odd". However, Australia is a multicultural society where thousands of people have non-anglo names. In the past many immigrants anglicised their names but this is a dying practice. If this is the case in the wider community, inter-country adoptees should not be singled out and forced to change their names because anglo-Australia finds them "hard to pronounce". They should not lose such an integral part of their identity just because they have moved countries and joined a new family. The Commission is aware of some name changes where even the "hard to pronounce" justification could not be used, for example, when the child was called Maria or Jamie.

13.44 The *Adoption of Children Act* 1965 (NSW) currently stipulates that a change of first name will not be approved by the Court for a child above the age of 12 unless his or her consent has been given.[22] Consent will only be dispensed with if there are special reasons relating to the welfare and interests of the child. In the Commission's view first name changes should be discouraged. Accordingly, it is proposed that legislative guidelines only permit the Court to approve a change of first name if the child is under two or if there are exceptional circumstances relating to the welfare and interests of the child that would justify a change of name.

Older children

13.45 The Commission has become aware of concerns in relation to the adoption of older children. Some Departmental officers questioned the wisdom of ever bringing children to Australia who have been in long-term institutional care as the risk of breakdown is significant. It is argued that the experience of adoption breakdown is so traumatic for children that placements should not be made where there is a significant possibility of this happening.[23]

13.46 Older children are often adopted because adoptive parents are outside the age criteria for a new-born baby. The age limit does not prevent certain people from adopting a child, it merely restricts them to a first child who is a maximum of 41 years younger than them or second child who is a maximum of 46 years younger.[24] As a result, a 49 year old couple would be ineligible for a new-born first child but would be eligible for an eight year old. Sometimes couples who are within the age criteria prefer to adopt an older child because they feel they could best meet that child's needs. Alternatively, couples may adopt an older child who is part of a sibling group - they would like to adopt the younger children and agree to adopt the older ones so that the siblings are not separated.

13.47 Obviously, the transition to a new country and home is more difficult for older children than for babies. They bring with them life experiences and memories that may make adjustment problematic - in fact, some children may never adjust. Some may never settle into their families and feel at home. For these children, the experience of inter-country adoption is not a positive one. They have been brought thousands of miles from anything they know, removed from their country and any chance of contact with family or friends. They have been placed with people who are strangers to them and they do not have the good life that they may have been promised by welfare workers in their country of origin.

13.48 In addition to potential difficulties at home, older children may suffer insurmountable disadvantages at school. They may not be literate in their own language and they are then expected to become literate in English and perform adequately at school. For many older children the expectation that they will succeed in a foreign school system may be unrealistic. Their self-esteem and confidence may be badly effected by the difficulties they encounter.[25]

13.49 A significant problem in the adoption of older children is that couples are being allowed to adopt children, often in sibling groups, when they have no parenting experience. If these couples were to foster children locally they would be required to undergo a period of training to alert them to the difficulties older children experience when they are placed with a new family. No such training is required for adoptive parents of inter-country children. Further, local foster children are given the opportunity to choose whether to join a family or not. Children brought from overseas are denied this choice. They are placed with a family, often regardless of their wishes.[26]

13.50 Older children are likely to have family ties in their country of origin that may be lost as a result of their adoption. One submission to the Commission stressed that:

> children who have an extended family network in their own country should not be considered for inter-country adoption. Not only is the child deprived of these important contacts. Little thought is given to the sense of loss and powerlessness that can be experienced by the family members at home who had been unable to care for the child themselves for financial or other reasons. If children are adopted from overseas some mechanism should be put in place to ensure that the adopting family helps the child maintain contact with their cultural background and with any close connections the child may have had in their home country.[27]

13.51 The Commission is aware of cases where children have lost contact with siblings, all of whom have been brought to Australia. This may be the result of adoption breakdown between the adoptive parents and some siblings but not others. If some siblings are moved from the adoptive home, children become separated and are denied existing natural family relations for the sake of new adoptive relations. It is difficult to see how this can be in the best interests of children.

13.52 It may be that adoption is not the appropriate solution for older children. It may be unrealistic to say that through adoption an older child becomes the child of a couple “as if born in lawful wedlock”.[28] It may be that there are better ways to care for older children who may still have family in their country of origin and who are at the age when they are beginning to assert their independence. These children may not need “parents” in the conventional sense; they may simply need security and care.[29]

13.53 There are many programs world wide that provide care for orphaned and refugee children.[30] Some programs begin with reception and orientation weeks with others from the children’s country of origin. Here children are taught the language of the receiving country by people who speak their own language and are familiarised with the receiving country’s culture. Children are then sent on to foster care or residential care. They may live with a family of a similar ethnic background or in a group home with other children, supervised by a few adults. Group homes may provide better care for older children or sibling groups who have already learned to care for themselves and who would not feel comfortable with “new parents”. Host families may provide a similar option. Host families establish a family environment, but the children are not expected to be the children of the host family parents. The host family may provide some guidance for the children but they predominantly provide a stable place for the children to live.

13.54 Inter-country adoption programs should explore these possibilities if they would provide better care for children in need. A variety of options for care, in addition to adoption, are available to children in Australia and they should similarly be available to children brought from overseas. Families who wish to adopt older children should be aware of the possibility that some children may not want to be adopted. They may want to come to Australia and live with a family and in time, perhaps develop a loving "parent-child" relationship with a couple. They may not however, wish to come to Australia on the condition that they will be adopted by a couple they have never met and thereby become their children "as if born in lawful wedlock". Inter-country adoption must be able to meet the needs of a variety of children. It must be flexible and participants must be prepared for the possibility that adoption will not always be the best option.

Funding

13.55 Inter-country adoption is predominantly funded by adoptive parents. They pay for seminars, home studies, travel, allocation and post-placement interviews. The Commission has received little comment on this issue and there does not seem to be a feeling that if inter-country adoption is going to be available, it should be available to all couples in New South Wales, not only those who can afford it.

13.56 The Fogarty Report on inter-country adoption in Victoria recommended that the fee for service be discontinued. The Panel argued that a fee for service paid by the adoptive parents led to confusion about who the service was for - the child or adoptive parents? Further, the Panel believed that if inter-country adoption is to exist for the needs of the child, then fees should not present a barrier to placement.[31]

13.57 The Commission agrees with the Fogarty Report in principle. However, as the Department of Community Services is unlikely to be able to fund the full cost of inter-country adoption, it would be unrealistic to recommend that it should.

13.58 The Commission is, however, concerned about the fee for additional post-placement visits by Department social workers. Under the current scheme couples must pay for four post-placement interviews before they can apply for a New South Wales adoption order. All couples do this as a matter of course. However, some families need more than four post-placement visits if their child is having difficulties settling in. The Department charges $50 per hour for these visits and some couples are reluctant to pay. As a result families, in particular children, are missing out on urgently needed help at a crucial period of adjustment.

13.59 It seems to the Commission that once a child has entered Australia and is under the guardianship of a New South Wales government department, or is the adopted child of a New South Wales couple, then that child is entitled to welfare services free of charge. Children should not be denied social services because their parents cannot or will not pay for them. In contrast, post-adoption services for local special needs children or wards, who like older inter-country adoptees may need post-placement support, are provided free of charge. Services to these families prior to an adoption order being made or soon afterwards are considered part of the overall service that the Department aims to provide.

13.60 The Commission suggests that a charge for post-placement services for inter-country adoptees, but not for local adoptees, may amount to a violation of article 21(c) of the *Convention on the Rights of the Child*. As stated above, this article demands that the same safeguards be applied to inter-country adoptions as local adoptions.

ADOPTION INFORMATION ISSUES

13.61 The *Adoption Information Act (NSW)* 1990 gives all adoptees over 18 and their birth parents a statutory right to information about a party separated from them by adoption.[32] The Act applies to overseas adoptees and their birth parents, as well as local adoptees.

13.62 The fight for access to adoption information has existed as long as adoptees have been denied information about their origins. However, it was not until the early 1970's that adoptees' need for information was documented in welfare studies and personal histories.[33] Throughout the 1970s and 1980s adoptees continued to speak out about the importance of adoption information for medical and personal history. Organisations such as

Jigsaw in Australia and ALMA in the United States helped adoptees trace family and continued to put pressure on governments to open up records.

13.63 Birth parents' need for information did not come to public attention until the 1980s with the publication of a number of books and studies on birth mothers' experiences of adoption.[34] While individual birth mothers may have requested information in the past, many did not come forward for fear of disturbing the life of their relinquished child and because they believed they had no right to information, having been told that adoption was secret and final. With the search for origins movement amongst adoptees, however, many birth mothers felt confident they were not the only ones with negative experiences of secret adoption. Organisations such as Mothers for Contact mobilised to help women search for their children and to force legislative change.

13.64 In 1990 that change came with the *Adoption Information Act* 1990 (NSW). From 2 April 1991 to 30 June 1992, 7,358 applications were made for original or amended birth certificates. At 30 June 1992, 15,985 people were registered on the Reunion Information Register.[35] The Commission conducted an extensive review of the operation of the Act and concluded that the principles of the Act were sound and that its operation to date was a success.[36]

13.64 Inter-country adoption poses a certain problem for the operation of the *Adoption Information Act* 1990 (NSW). In local adoption, relatively detailed information about the birth family and adoptive family is collected at the time of adoption. This is recorded on file and much of it may be accessed according to the Regulations of the *Adoption Information Act*.[37] It may include ethnic background, education, occupation, physical appearance, hobbies, interests, medical history and family composition of the birth parents and adoptive parents.

13.65 In inter-country adoption this information would be available to birth parents about adoptive families as a result of the social worker assessments of adoptive parents organised by the Department. If a birth parent from overseas were to apply to the Family Information Service within the Department, he or she would be given details of the adoptive parents and identifying information, once the adoptee reached 18. In relation to information about birth parents, however, very little information is recorded. An inter-country adoptee applying for information under the Act is likely to find extremely limited information on file. His or her overseas certificate of adoption would most likely be held by the Supreme Court in lieu of an original birth certificate, but the Department would not be able to provide details of the birth family in accordance with the Act.

13.66 It seems to the Commission that the reasons for this are three-fold. The first is that inter-country adoptees who have been abandoned as babies or who are war orphans are unlikely to have any documentation when they are placed for adoption. Their parents, medical and social history may be completely unknown.

13.67 Second, other countries do not place as much emphasis on adoption information as Australia. In Korea for example, local adoptive parents are still unlikely to even tell their children that they are adopted.[38] In India, there is no widespread practice of adoption, except for Hindu boys (and sometimes girls) who may be placed with childless relatives of the birth parents.[39] For a country with no tradition of secret adoption, it is unlikely that workers in that country will have an appreciation for the importance of information recording non-relative adoptions.

13.68 Third, and perhaps most importantly, it seems that some Australian groups who are involved in inter-country adoption and who have direct contact with relinquishing countries, do not understand the significance of adoption information or choose to ignore it. Parent support groups speak to the co-ordinators of the overseas programs, contact them by fax and even visit the donor countries on occasions. They are in a prime position to request information about the birth parents and yet often they do not.

13.69 If groups do not collect information about children's birth families and do not encourage their members to do so at the point of adoption, it is effectively denying adoptees their rights. The birth parents will always have access to information through detailed files at the Department of Community Services but the adoptees will find that when they request information, there will be nothing available. In a paper delivered at the Fourth Australian Conference on Adoption, Vicki Osborne stressed the importance of gathering information at the time of adoption or soon afterwards - some institutions destroy records after ten years and other information may only be available through staff at orphanages or convents who may leave or die without passing the information on.[40]

13.70 Parent groups often argue in defence of this lack of information that other countries do not accept the policy of access to records.[41] They claim that it would jeopardise existing programs if information were requested. While the Commission accepts that to some extent this may be true, it also suspects that owing to some adoptive parents' ambivalence to the issue of adoption information, real efforts to secure information have not been made.

13.71 It is the Commission's view that the gathering of information about birth families, including identifying information, must become a priority for those involved in the adoption process. The history of closed adoption in Australia has revealed that denying adoptees information is damaging. Many adoptees as they grow older, want details of their birth family history and even contact. Their need for this information and contact may become as pressing as their need for an adoptive family was when they were a child. If the information is never collected, some adoptees will be forever deprived. They will never discover their roots. It is unjust that inter-country adoptees should go through the same suffering as local adoptees have in the past, when we now understand the importance of recording adoption information.

13.72 In addition to gathering information about birth families for adoptees, inter-country adoption programs and the Department must make overseas agencies aware of the existence of the *Adoption Information Act* 1990 (NSW) so that birth parents can utilise the provisions of the Act if they so wish. The Department officers indicated that they would like to do this but were deterred by the reaction of some parent groups who claimed it would jeopardise programs. The Commission does not accept that New South Wales law should be undermined in this way. Access to adoption information is no longer a policy that those involved in adoption can choose to accept or reject - it is a statutory *right* that is given to all adoptees and their birth parents once the adoptee reaches 18. New South Wales would be in a hypocritical position if it assured this right to our own birth parents but not to those living overseas. To argue that other countries have a different attitude to adoption information in relation to this issue is fallacious. Once children are adopted under New South Wales law, they are subject to the *Adoption Information Act* and their birth parents will have access to identifying information once they reach 18. Another country's policy on adoption information cannot alter this or deny those birth parents their rights under Australian law. As this is the case, birth parents should not *effectively* be denied those rights by never being informed that the *Adoption Information Act* exists. Whenever possible, they should be informed that their child has been adopted by a New South Wales couple and that they have the right to identifying information about their child.

13.73 In addition to the argument just raised, the Department of Community Services must be aware that the *Hague Convention* requires States that become parties to it, to keep each other informed of local adoption law. Central Authorities need to make sending countries aware of all law pertaining to adoption, including laws on access to adoption information. This point was discussed earlier in the Chapter.

FOOTNOTES

1. Article 7.

2. Article 15.

3. Article 20.

4. Article 11.

5. Article 22(2).

6. See Chapter 11.

7. See Chapter 11.

8. See Chapter 11.

9. Article 21(c).

10. *Adoption of Children Regulations*, reg 20(2**b**).

11. New South Wales Law Reform Commission *Review of the Adoption Information Act 1990 (NSW)*, (Report 69, July 1992).

12. R G McRoy, L A Zurcher, M L Lauderdale and R N Anderson "Self-esteem and racial identity in transracial and inracial adoptions" (1982) 27 (6) *Social Work* 552 at 525-6.

13. M Cederblad *Children Adopted from Abroad and Coming to Sweden after Age Three* (The Swedish National Board for Inter-country Adoption, Stockholm, 1982).

14. M Dalen and B Saetersdal "Transracial adoption in Norway" (1987) 11(4) *Adoption and Fostering* 41 at 42.

15. W Kuhl *When adopted children of foreign origin grow up* (Terre des Hommes, Osnabruck, 1985); M Rorbech *Denmark-my country: the conditions of 18-25 year old foreign born adoptees in Denmark* (Booklet 30, The Danish National Institute of Social Research, Copenhagen, 1990); Dalen and Saetersdal "Transracial adoption in Norway".

16. M Dalen and B Saetersdal at 43.

17. See M Rorbech and W Kuhl.

18. Saet Byol Korean School in Sydney and the K-Club in Wollongong.

19. Clause 5.

20. W Kuhl and A Winter-Stettin "Foreign Adoption in the Federal Republic of Germany" in R A C Hoksbergen *Adoption in Worldwide Perspective* (Swets North America Inc/Berwyn Swets & Zeitlinger B V, Lisse, 1986) at 173-4.

21. See J Harper "Love is not enough: breakdown in inter-country adoption", paper presented at the *Inter-Country Adoption Workshop*, New South Wales Committee on Adoption (Sydney, October, 1985).

22. s 38(2**a**).

23. See J Harper "Love is not enough: breakdown in inter-country adoption".

24. Gazetted criteria, cl 6.

25. *Confidential Submission* (14 December, 1993).

26. *Confidential Submission* (14 December, 1993).

27. *Confidential Submission* (14 December, 1993).

28. See the current wording of s 35(1) *Adoption of Children Act* 1965 (NSW).

29. E Ressler, N Boothby and D Steinbock *Unaccompanied Children: Care and Protection in Wars, Natural Disasters and Refugee Movements* (Oxford University Press, Oxford, 1988) at 199.

30. Ressler, Boothby and Steinbock at 187-205.

31. J. Fogarty, K Sanders and M Webster *A Review of the Inter-country Adoption Service in Victoria* (Family and Children's Services Council, October, 1989) at 42.

32. *Adoption Information Act (NSW)* 1990, s 6, 8.

33. J Triseliotis *In Search of Origins* (Routledge & Kegan Paul, London, 1973); F Fisher *The Search for Anna Fisher* (A Fields Books, New York, 1973).

34. J Sawyer *Death by Adoption* (Cicada, Auckland, 1979); K Inglis *Living Mistakes* (George Allen and Unwin, Sydney, 1984); L Harkness *Looking for Lisa* (Century Hutchison, Sydney, 1984); J McHutchison *Relinquishing a Child: The Circumstances and Effects of Loss* (Unpublished thesis, Sydney, 1986); R Winkler and M van Keppel *Relinquishing Mothers in Adoption: Their long-term adjustment* (Institute of Family Studies, Melbourne, 1984); D Howe, P Sawbridge and D Hinings *Half a Million Women: Mothers Who Loose Their Children by Adoption* (Penguin, London, 1992).

35. New South Wales. Law Reform Commission *Review of the Adoption Information Act 1990* (Report 69, July 1992) at 40.

36. New South Wales. Law Reform Commission *Review of the Adoption Information Act 1990* (Report 69, July 1992).

37. Regulations 5, 6, 7.

38. Youn-Taek Tahk “Inter-country Adoption Program in Korea” in Hoksbergen at 83.

39. A J Jungalwalla “Adoption Policies and Experiences in India” in Hoksbergen at 93-4.

40. “Going Back” in *Fourth Australian Conference on Adoption: Working Together in the 90s* (Canberra, October 1990) at 155-60.

41. Penny Brune Withanage (International Children’s Aid) “Access to Origins” in *Fourth Australian Conference on Adoption*: *Working Together in the 90s* (Canberra, October 1990) at 176-8.

14. Technical and Miscellaneous Issues

PROVISIONAL PROPOSALS FOR REFORM

1. The amendments to the *Family Law Act* 1975 (Cth) in relation to step-parent adoption do not appear to be effective. The Commission therefore propose that the New South Wales Government negotiate with the Commonwealth with a view to having them repealed, or rendered inapplicable to New South Wales.

2. The present system of issuing a new birth certificate after adoption should be supplemented by the registration of a separate document, a certificate of adoption, which would include pre-adoption and post-adoption information.

3. The law should continue to reinforce the idea that adoption represents a permanent commitment to the child. Where a less permanent relationship is contemplated, adoption is not the appropriate legal mechanism and orders for custody or guardianship might be more appropriate.

4. Particular effort should be made to ensure that the new legislation is written in "plain English" so that it can be understood by the people it concerns.

5. The provisions of the *Adoption Information Act* 1990 (NSW) should be incorporated in *Adoption of Children Act* 1965 (NSW), so that there will be a single Act relating to adoption. The title "Adoption Act 19xx" is preferable, both because it is shorter than the existing title and because, since adoption of adults is provided for, the words "of children" are not strictly correct.

6. The new legislation should reproduce the substance of the offences in the present Act, except those offences that are designed to prevent members of the birth family from interfering with the adoption process or the adoptive family.

7. The adoption legislation should provide, in substance, that the court should be open to the public, but that publication of names and identifying information should be prevented. It would be appropriate, however, for the Act also to provide that the court could exclude individuals or classes of individuals from the whole or part of the proceedings where this was necessary in order to prevent the disclosure of identifying information contrary to the provisions of the Act.

POINTS FOR FURTHER DISCUSSION

Should the rules of evidence apply to adoption proceedings?

14.1 This Chapter deals with some technical issues, including the relationship between State and Commonwealth legislative power, and some other matters that do not fall within the previous chapters.

STATE AND FEDERAL ISSUES

14.2 The present Review relates to a New South Wales statute, the *Adoption of Children Act* 1965 (NSW), and the Commission's Report will be made to the New South Wales Attorney-General. Nevertheless, the review involves consideration of a number of issues relating to existing and potential Commonwealth laws. The New South Wales Parliament cannot alter Commonwealth laws, but it may request the Commonwealth to consider amendments. This chapter deals with these State-Federal issues.

Legislative power in adoption

The present position

14.3 In Australia, legislation on adoption has always been a matter for state and territory laws, not for federal laws. In New South Wales, adoption is governed by the *Adoption of Children Act* 1965, and jurisdiction is exercised by the Supreme Court of New South Wales. This legislation is based on the general power of the New South Wales Parliament to pass laws for New South Wales. The situation is somewhat complicated, however, by

the constitutional division of powers in Australia, and in particular, by the impact of the *Family Law Act* 1975 (Cth).

14.4 The Commonwealth Parliament does not have a general power to make laws. It can make laws only where there is express power to do so under the Commonwealth Constitution. There is no express constitutional power for the Commonwealth to make laws on the subject of adoption. There is some scope, however, for the Commonwealth to make laws which would have an impact on adoption. For example, it might well be possible for the Commonwealth, under its constitutional power to make laws relating to marriage,[1] to pass legislation dealing with the adoption of children of a marriage, or adoption by married persons. Again, it might be possible for the Commonwealth to make laws about the adoption of Aboriginal children under its powers relating to "the people of any race",[2] or (using the external affairs power[3]) laws which implement the provisions of the *Convention on the Rights of the Child*, which Australia ratified in 1990. The Commonwealth has not in fact passed any such laws. It has, however, amended the *Family Law Act* 1975 (Cth) in a way that affects the operation of the New South Wales adoption laws in relation to step-parent adoptions. Before considering those provisions, it is necessary to say something about the *Family Law Act* 1975 (Cth) and the Family Court of Australia.

The Family Court of Australia

14.5 The Family Court of Australia was created in 1976 with the introduction of the *Family Law Act* 1975 (Cth).[4] Initially it dealt with custody, guardianship and access matters only when they involved children of marriages. In 1988, New South Wales, together with three other states,[5] referred certain power over ex-nuptial children to the Commonwealth and the Act was amended to deal with all children, regardless of the marital status of their parents. These "referred powers" related to child maintenance, and questions of child guardianship, custody and access. They did not include adoption.

14.6 In 1989, there was a further change. Jurisdictional difficulties between the states and the Commonwealth were eased by the introduction of "cross-vesting" jurisdiction.[6] This legislation gave the Supreme Court power to exercise jurisdiction of the Family Court, and gave the Family Court power to exercise jurisdiction of the Supreme Court. It also contained provisions allowing the courts to transfer matters, so that the courts could ensure that each Court would normally continue to exercise jurisdiction in the ordinary way. In general, adoption matters continued to be heard by the Supreme Court and custody, guardianship and access matters continued to be heard by the Family Court. This legislation has proved particularly effective where the proceedings involve several matters, some arising under Commonwealth law and some under State law. The cross-vesting scheme enables one court to deal with all the matters.

14.7 The *Family Law Act* 1975 (Cth) deals with such matters as guardianship, custody and access, but does not create a jurisdiction over adoption. Indeed, it contains a provision, s 60H, to the effect that the Act does not interfere with the exercise by state courts and authorities of their powers under child welfare and adoption legislation. It is clear that the legislation contemplates that matters of guardianship, custody and access will be dealt with under the *Family Law Act*, while matters of adoption will continue to be dealt with under State law, and this is essentially how the legislation operates in practice.

14.8 Although it cannot exercise jurisdiction in adoption, the Family Court can exercise its jurisdiction in guardianship, custody and access over all children *whether or not they have been adopted*. The Act provides, in effect, that any person can apply for an order relating to guardianship, custody or access in respect of any child.[7] It is possible, for example, for the Family Court to make an access order in favour of a birth parent after the New South Wales Supreme Court has made an adoption order in relation to the child.[8] Similarly, the Family Court could make orders relating to the custody and guardianship of adopted children, even if those orders gave rights to birth parents. Whether the Family Court would do so would depend on whether in the circumstances of each case, it considered that such an order would promote the welfare of the child. For this reason, it is not correct to assume that adoption is necessarily final in determining who has guardianship and custody of a child. Adoption orders are "final" in the sense that it is very difficult to revoke them. But they lack "finality" in that it is always possible for someone to apply to the Family Court for an order relating to guardianship, custody or access, even after the child has been adopted. On the other hand, it is reasonable to assume that the Family Court would make such an order in favour of birth relatives only in unusual circumstances, and applications for custody and guardianship by members of an adopted child's birth family appear to be rare.

A reference of power?

14.9 The question whether adoption should also be referred to the Commonwealth, or should be transferred to the Commonwealth by constitutional amendment, has been considered from time to time. There are a number of arguments in favour of such a step. First, especially since the 1988 reference of power, the Family Court of Australia is now the specialist family court in Australia, and it would be appropriate that it should deal with adoption.[9] Second, it may be argued that uniformity is desirable, and that experience shows that lasting uniformity will not be achieved except through Commonwealth legislation. Third, it might be suggested that the independent work of the various states and territories in reviewing their legislation is highly inefficient, and it would be better to concentrate reform energies on the creation and revision of a single national adoption law. Finally, Commonwealth responsibility might be regarded as appropriate in light of the close links between immigration and inter-country adoption and the increasing importance of national legal obligations created by such international instruments as the *Convention on the Rights of the Child* and the *Hague Convention.*

14.10 In the Commission's view these are formidable arguments. Obviously, if such a reference were to be considered, thought would have to be given to the relationship between the legislation and the delivery of services in adoption, now in the hands of the Department of Community Services and private agencies. One possibility might be that licensing of agencies and delivery of adoption services would remain a matter for the State, the main change being the transfer of jurisdiction from the Supreme Court to the Family Court of Australia. Given the close links between adoption and the State's role in the provision of services for children in need of care, this would appear to be the most practicable arrangement. The Commission is presently inclined to recommend that the New South Wales Government give consideration to a possible reference of power over adoption, and that it should discuss this matter with representatives of other states and of the Commonwealth.

The Family Law Act and step-parent adoptions

14.11 The issues arising in step-parent adoptions are considered in Chapter 4. As noted there, it is widely felt that adoption is often used inappropriately in step-parent situations. This view no doubt explains some rather complex amendments to the *Family Law Act* 1975 (Cth), which require consideration here.[10] The general effect of these provisions is that before an application can be made for a step-parent adoption, consent should be obtained from the Family Court. However, perhaps due to constitutional limitations on the Commonwealth's power, the Act's provisions do not actually prevent such applications being made. Instead, they provide in effect that such adoptions, when made without the Family Court's leave, do not succeed in transferring custody and guardianship to the step-parent (although they do have the other effects of adoption). The cross-vesting legislation has complicated the matter further, raising the possibility either that the Family Court, having granted leave, might go on to deal with the adoption application, or that the Supreme Court might itself grant leave, using jurisdiction cross-vested from the Family Court - although an amendment appears to close off this possibility.[11] Commentators have drawn attention to the complexity of these provisions and the apparent confusion they might cause, and have doubted whether they address the main issue, namely the appropriateness of step-parent adoption.[12]

14.12 The Commission's provisional recommendations on step-parent adoption, detailed in Chapter 4, are designed to ensure that the suitability of step-parent adoption is carefully considered at the preliminary hearing. The guidelines that will govern adoption, while not forbidding step-parent adoption or limiting it to particular situations, will draw attention to the factors governing its suitability in particular situations. It is hoped that the procedures recommended will help to ensure that these matters are carefully considered. In the Commission's view, these recommendations would deal adequately with the issues arising in step-parent adoption, and in any case, the amendments to the *Family Law Act* 1975 (Cth) do not appear to be effective. Our present inclination is to recommend that the New South Wales Government negotiate with the Commonwealth with a view to having them repealed, or rendered inapplicable to New South Wales.

BIRTH CERTIFICATES OF ADOPTED PERSONS

14.13 The form of birth certificates of adopted people was discussed in many submissions, and was the subject of considerable diversity of views.

The present law

14.14 The present law and practice may be summarised as follows. When a person is adopted the order for adoption is transmitted to the Registry of Births Deaths and Marriages, and that office prepares a new birth certificate, known as an "amended" certificate. The amended certificate is indistinguishable from the birth certificate of people who have not been adopted.[13] The amended certificate gives the child's name as determined in the order of adoption, and the true date and place of birth. It sets out details of the names, occupations, ages and places of birth of the adoptive parents under the categories of "mother" and father". It sets out the date and place of the adoptive parents' marriage. It also lists, under the category "previous children of relationship", any children of the adoptive parents who were born before the date of birth of the adopted person.

14.15 The original birth certificate, which normally includes the name of the birth mother and sometimes the birth father, is not destroyed. It is not generally released by the Registry except under the provisions of the *Adoption Information Act* 1990 (NSW), by which the adopted person is entitled to the original birth certificate upon reaching that age of 18 years. When the original birth certificate is provided under the *Adoption Information Act* 1990 (NSW), it bears a certification in the following terms: "Superseded by a later record and issued under *Adoption Information Act* 1990. Not for Official Use." The original birth certificate is thus not available for official use by the adopted person, for example in obtaining a passport.

Issues and options

14.16 Clearly having access to the original birth certificate has meant a great deal to adoptees, and the Commission's recent review of the 1990 Act indicates that this right should continue.[14] However, it has been submitted that the continued use of the amended certificate is objectionable because it misrepresents the truth about the adoptee's life.

14.17 Evidence to the Commission indicates that adoptees have different needs in relation to the birth certificate. Some are content with the present situation. They appreciate the right to have the original birth certificate. They are happy to use the amended birth certificate, and pleased that in its present form it does not normally reveal their adoptive status. They take the view that they should have the right whether or not to disclose to people that they are adopted. As stated in the New South Wales Committee on Adoption Submission:

> The current system, although perpetuating undesirable secrecy, does give privacy. Schools and sporting organisations apparently require the sighting of a full birth certificate at the time of registration of a student/player deeming extracts to be inadequate.[15]

14.18 Other adoptees, however, would like to be able to use their original birth certificate for official purposes. Even though the present form of birth certificate does not disclose the fact that the person has been adopted, the information in particular cases may suggest this, or at least appear puzzling. For example, if the adopted person was born in another State, or another country, which the adopting parents had never visited, people who did not know of the adoption might seek an explanation of the stated place of birth.

What should be done?

14.19 In the Commission's view, there is much to be said for a form of birth registration in which the documentation is an accurate record of certain key events, such as birth, change of name, adoption and marriage. On this approach, there would not be a need for a separate birth certificate to issue upon adoption. While the Commission draws attention to this as a possible long-term reform of the system of registration, it recognises that the implementation of such a change would be an enormous task, that much of the relevant information is not now available, and that the privacy aspects of such a change would require careful consideration. Further, it is sufficient in the present context to focus on recommendations relating only to adoption.

14.20 Turning to options that might realistically be considered in the short and medium term, one possibility would be for the law to be flexible, perhaps by providing that some categories of adoption should not involve the issuing of a new birth certificate, or alternatively by providing that the court may determine in each case whether it is appropriate for a new birth certificate to be issued.[16] The Commission's tentative view is that such an approach may prove unduly complex, and might suggest a distinction between two categories of adoption. On

the whole, it would be attracted by such a proposal only if satisfied that it is impossible to find a satisfactory approach which would apply to all adoptions.

14.21 In this respect, the options appear to be as follows:

i **Retain the present system**. For the reasons given above, this is not entirely satisfactory, as the existing certificate is misleading and incomplete, and causes distress.

ii **Supplement the present system by registering a separate document, a certificate of adoption, which would include pre-adoption and post-adoption information.** Such a document would set out the child's original birth details, and also the date and place of the adoption, the names given to the child on adoption, and the names, occupations and address of the adoptive parents. The question of access to this document would need consideration. It could be governed by principles similar to those of the *Adoption Information Act* 1990 (NSW). On attaining the age of 18, the adopted person would have a right to obtain access to the document. While the child was under 18, the law could provide that it would be accessible to the adoptive parents, and perhaps, to the adopted child with the consent of the adoptive parents or an order of the court. This is the Commission's preferred option

iii **Remove the obstacles to adoptees using their original birth certificate, so that in any situation they would be able to choose which certificate to use.** This might, however, cause confusion or even provide occasion for deception. A possible variant, intended to meet this difficulty, could be to require the adoptee to elect which birth certificate to use; the other certificate could then be marked so it could not be used. These approaches, however, would entail a less than complete picture; choice of the original birth certificate would conceal the important fact of adoption, and choice of the amended certificate would continue the present difficulties.

iv **Combine the birth information and adoption information so that adoptees would have only one birth certificate, which would contain both birth and adoption details.** This approach would create a truthful and complete record. On the other hand it would mean that adoptees would have to disclose their adoptive status whenever they used the birth certificate. Some would see this as an invasion of their privacy. Some would also oppose this approach on the ground that they would not want a form of birth certificate that was different from that of non-adopted people.

The Western Australian Review favoured a version of this approach.[17] It recommended "issuing only one birth certificate which records details of both birth and adoptive parents, the date of the adoption and the name by which the adoptee will be known".[18] Access to the birth certificate by any of the parties would not normally be restricted. However, in order to allow people to avoid displaying the fact of the adoption unnecessarily, it recommended that there should be available to the adoptee and/or the adoptive parents on request "a certified copy of the Registration of Birth which does not include reference to the birth parents or adoptive status". This could be treated as a full birth certificate. This however does not appear to be a solution in cases where the full certificate is required. It is already possible in New South Wales to obtain a summary birth certificate, but this is not accepted for all purposes. In the Commission's view, therefore, the Western Australian proposal does not satisfactorily deal with the problem of disclosure of the person's adoptive status.

v **Provide that no new birth certificate should be issued upon the making of the adoption order.** The original birth certificate would remain in force unamended. There could be, however, an additional registration of the adoption, showing the adopted person's pre-adoption and post-adoption identities. It could be argued that this approach would provide a truthful record of the child's birth. However, in the ordinary case where the adopted person used the surname given on adoption, he or she would need to produce the adoption record as well as the original birth certificate when applying, for example, for a passport. Such a system would require the adopted person, or the adoptive parents when the child is young, to produce two documents rather than one, and to disclose the fact of adoption. It is the Commission's impression that relatively few adopted people would wish to have such a system.

Conclusions

14.22 The Commission's tentative view is to favour **proposal (ii)**. This would appear to meet the needs of most adopted people. It is true that it would not completely remove the misleading nature of the birth certificate, which would continue to give the impression that the child was born to the adopting parents. However, the certificate would express the important legal truth that the parental rights and responsibilities had been transferred to the adoptive parents, and the child had been accepted as a member of their family.

14.23 It might perhaps be said that birth certificates, identifying people as "father" and "mother" should be read as referring to social and legal parenthood where this does not coincide with birth parenthood. If that view is taken, then the amended birth certificate of an adopted person may not necessarily be seen as misleading. In this connection, it may be pointed out that at least in one other respect birth certificates are not purely records of the actual circumstances at the time of the birth. If a person can satisfy the Registry that he or she has been using a different surname for at least 12 months, it is possible to obtain a substitute birth certificate showing the new surname.[19] Comments on this difficult issue will be especially welcomed.

MISCELLANEOUS ISSUES

14.254 In this section we discuss briefly a number of other matters which are included in the review, and will be dealt with in the final Report, but which are of lesser importance or which have received relatively little comment in submissions.

Discharge of adoption orders

14.25 Discharge of adoption orders should continue to be rare. If difficulties arise, for example where the adoptive parents are separated by death or divorce, or where the child is neglected, the ordinary law should apply. Custody and guardianship matters will be dealt with under the *Family Law Act* 1975 (Cth) and welfare applications under the *Children (Care and Protection) Act* 1987 (NSW). The purpose of adoption is to relocate the child in a new permanent family, and broadly speaking this should be final. The law should continue to reinforce the idea that adoption represents a permanent commitment to the child. Where a less permanent relationship is contemplated, adoption is not the appropriate legal mechanism and orders for custody or guardianship might be more appropriate. The existing provisions of s 25(1) of the *Adoption of Children Act* 1965 (NSW), which make discharge of adoption orders difficult but possible in limited circumstances, appear to be satisfactory.

Complexities in the present legislation

14.26 In the Commission's view, the *Adoption of Children Act* 1965 (NSW) is drafted in a complex and convoluted way, and on many points requires intense concentration and persistence on the part of the reader before its meaning is clear.

14.27 Some examples may be given. In the very important section 21, the structure is so complex that it extends to five levels of heading: 21(1)(c)(i)(a). At many points, there are cross-references that send the reader on a chase through the Act while trying to remember the complex sentence in the original provision. For example, on the relatively simple matter of sending notice to people that an adoption application has been made, the reader starts with s 22, then has to turn to s 26 to learn who is referred to in para (a) of sub-s (1), and then has to take account of a proviso that notice does *not* have to be given to:

> (a) a person referred to in subsection (1)(a) if that person is a person to whom section 32(1)(h) applies; or
>
> (b) a person referred to in subsection (1)(b) if that person is ...

14.28 In the Commission's view, most if not all of the complexity reflects outdated styles of drafting, and the accretion of amendments over the years. It does not reflect complexity in the subject matter. In the Commission's view, it should not be difficult to write the new adoption legislation in terms that are easy to understand. Clarity is particularly important in this legislation, since it needs to provide guidance to the individuals and families involved, and to those engaged professionally in adoption work, as well as to lawyers and the court. Accordingly, the Commission proposes to recommend that particular effort be made to ensure that the new legislation is written in "plain English" so that it can be understood by the people it concerns.

14.29 The Commission also proposes that the provisions of the *Adoption Information Act* 1990 (NSW) be incorporated in the legislation, so that there will be a single Act relating to adoption. We are inclined to prefer the title "Adoption Act 19xx", both because it is shorter than the existing title and because, since adoption of adults is provided for, the words "of children" are not strictly correct. We note that the shorter title has been used recently in some Australian jurisdictions.[20]

Adoption of adults

14.30 The present law allows the adoption of adults in limited circumstances. The Commission is inclined to retain this power for use in exceptional cases.

Offences

14.31 The Act includes a set of offences. Some are associated with the regulation of adoption and the banning of privately arranged adoptions. Thus, it is an offence to make private arrangements for adoption, or to advertise for adoption.[21] A second group comprises offences designed to protect the adoption process itself. These offences are impersonation of a person whose consent is required,[22] making false statements in connection with proposed adoptions,[23] using force or duress to influence the parties in making decisions,[24] breaching the requirements relating to confidentiality,[25] and witnessing a consent to adoption without taking the required steps to ensure, for example, that the person understands the nature of the consent.[26]

14.32 A third group of offences are designed to prevent members of the birth family from interfering with the adoption process or the adoptive family. These provisions make it an offence for a birth parent to attempt to take the child away from the adopters, or to communicate with the child without the adopters' consent.[27] A related provision, which may not create a criminal offence, is that in certain circumstances unmarried fathers "may not" do anything inconsistent with the making of an adoption order.[28]

14.33 The Commission's tentative view is that the new legislation should reproduce the substance of the offences in the first two categories, but not the third. The general law of harassment has been considerably developed by legislation in recent years, and it would seem that any attempts by birth parents or others to contact adopted children could be dealt with adequately under the general law. The behaviour prohibited by the New South Wales Act fails to take account of a person's right to approach the Family Court for orders as to access. In addition, as the New South Wales Committee on Adoption's submission pointed out,[29] some of the language in the third group of offences is stigmatising and offensive, and inconsistent with present day attitudes and practice in adoption.

A closed court?

14.34 The present Act provides that the court is closed to the public when hearing adoption matters. The question whether courts should be closed in children's matters has been much debated in recent times. A closed court has been seen as protecting the privacy of the families involved, but constitutes a violation of the well-established principle that justice should not be carried on behind closed doors. The debate has been most developed in connection with the *Family Law Act* 1975 (Cth). That Act provides, in substance, that the court should be open to the public, but that publication of names and identifying information should be prevented.[30] The Commission is inclined to think that this approach should be followed in relation to adoption. It would be appropriate, however, for the Act also to provide that the court could exclude individuals or classes of individuals from the whole or part of the proceedings where this was necessary in order to prevent the disclosure of identifying information contrary to the provisions of the Act.

Should the rules of evidence apply to adoption proceedings?

14.35 The present Act renders the rules of evidence inapplicable to adoption proceedings. There has been little or no debate about the value of the rules of evidence in adoption proceedings, and the Commission has received no submissions on the question.

14.36 It is difficult to justify the present provision on the ground of a general dissatisfaction with the law of evidence, since this would suggest that the rules of evidence should be dispensed with altogether. The justification for s 65 must be that the rules of evidence are unsuitable for adoption. However, it is not obvious why this should be. In contested matters, for example, it does not seem obvious that the law of evidence is inappropriate. On the other hand, there is a tendency for the law of evidence to be excluded in children's matters. For example, there is a similar provision in the *Children (Care and Protection) Act* 1987 (NSW), but not in the *Family Law Act* 1975 (Cth), even in relation to custody and access matters. There is nothing in the *Family Law Act* to support the view that the rules of evidence do not apply to children's cases, although a number of provisions modify their application and some recent decisions of the Family Court suggest that the rules of evidence do not necessarily apply when their operation would be inconsistent with the principle that the child's welfare is paramount.

14.38 It may be that in practice, if adoption jurisdiction is to remain in the Supreme Court, the question will be of little practical importance. This is because, first, it seems that in civil cases generally, and children's cases in particular, the rules are applied rather flexibly, and second, it is likely that even if the rules were not strictly applicable, they would remain very influential in the way the Court exercised the jurisdiction. The Commission would welcome comment on this matter.

FOOTNOTES

1. Constitution, s 51 (xxi).

2. Constitution, s 51 (xxvi).

3. Constitution, s 51 (xxix).

4. Prior to the *Family Law Act* 1975 (Cth), the *Matrimonial Causes Act* 1959 had governed custody and guardianship matters arising in the context of divorce. Jurisdiction under this federal act was exercised by the New South Wales Supreme Court.

5. Victoria, South Australia, Tasmania. Queensland followed in 1990. Western Australia did not refer power, but has achieved somewhat similar results through its own legislation, and the establishment of the Family Court of Western Australia.

6. *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth); *Jurisdiction of Courts(Cross-Vesting) Act* 1987 (NSW).

7. *Family Law Act* 1975 (Cth) s 63C.

8. See *In the Marriage of Mole and Newling* (1987) 11 Fam LR 974.

9. See J Fogarty, K Sanders and M Webster, *A Review of the Inter-country Adoption Service in Victoria* (Family and Children's Services Council, Melbourne, October 1989).

10. *Family Law Act* 1975 (Cth), s 60AA and 63F(4).

11. *Law and Justice Legislation Amendment Act* (No 3) 1992(Cth), amending the definition of "special federal matters" in the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth).

12. O Jessep and R Chisholm "Step-parent adoptions and the Family Law Act" (1992) 6(2) *Australian Journal of Family Law* at 179-187; Fogwell and Ashton (1993) 17 Fam LR 94.

13. Until early 1993, it was possible for some people to identify amended birth certificates because the certificates were numbered in a particular way or certain categories of information were omitted from the certificate. The Commission has been advised that the Department is in the process of revising and re-issuing birth certificates so that they will cease to disclose the fact that the child has been adopted.

14. New South Wales. Law Reform Commission *Review of the Adoption Information Act 1990 (NSW)* (Report 69, 1992).

15. New South Wales Committee on Adoption, *Submission* (9 September, 1993) at 3.17.

16. New South Wales Committee on Adoption, *Submission* (9 September, 1993).

17. Western Australia. Adoption Legislative Review Committee *Final Report: A New Approach to Adoption* (February 1991).

18. Western Australia. Adoption Legislative Review Committee *Final Report: A New Approach to Adoption* (February 1991) at para 3.34.

19. There is, however, an annotation on the new certificate linking the person with the original name, to ensure that the process does not entail confusion of records, and, for example, to enable the person to apply for a second passport using the new birth certificate.

20. For example, South Australian and Victoria.

21. *Adoption of Children Act* 1965 (NSW), s 50-52.

22. Section 55.

23. Section 54.

24. Section 57.

25. Section 53.

26. Section 58.

27. Sections 49 and 50.

28. Section 31D.

29. New South Wales Committee on Adoption, *Submission* (9 September, 1993) at 38.

30. Family Law Act 1975 (Cth) s 121. See generally Australia. Parliament. Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act The Family Law Act 1975: Aspects of its Operation and Interpretation (1992) at 347-356.