

# NSW Law Reform Commission

## REPORT 69 (1992) - REVIEW OF THE ADOPTION INFORMATION ACT 1990: SUMMARY REPORT

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## Terms of Reference and Participants

### Terms of Reference

On 16 December 1991, the then Attorney General, the Honourable PEJ Collins QC MP referred the following matter to the Commission:

The Commission is to inquire into and report on the operation of the *Adoption Information Act* 1990 and the Adoption Information Regulations 1991, and in particular to consider:

- (i) the implementation, public awareness and administration of the legislation: and
- (ii) the impact of the legislation on birth parents, children surrendered for adoption, adopting parents and the extended families of all parties.

### Participants

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

The Hon R M Hope QC

Professor David Weisbrot

Justice J Brownie (until 13 July 1992)

Ms Jane Stackpool (until 13 July 1992)

Ms Clare Petre (from 13 July 1992)

### Executive Director

Mr Peter Hennessy

### Research and Writing

Associate Professor Richard Chisholm

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### Librarian

Ms Beverley Caska

### Desktop Publishing

Ms Julie Freeman

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# 1. Preliminary

## THE REVIEW

1.1 When the *Adoption Information Act 1990* was passed, the Government foreshadowed that, because of the sensitive issues involved, the legislation would be reviewed after it had been operating for a short time. The New South Wales Law Reform Commission was asked to conduct this review, and the Department of Community Services made a grant to the Commission providing the necessary resources.

1.2 The Commission employed a number of methods to collect information about the implementation of the Act and its impact on those affected. The review was extensively publicised by the Commission in the media, among adoption interest groups and to members of Parliament. An Issues Paper was prepared and nearly 1500 copies distributed. The community was invited to make submissions and comments in writing, by telephone or in person. More than 700 written and 300 telephone submissions were received, and the Commission met with many people individually and in groups. Nearly 100 people spoke at the eight public hearings conducted by the Commission, in Sydney, Tamworth, Lismore, Dubbo, Wollongong, Queanbeyan, Wagga Wagga and Newcastle. Research was commissioned from the social research consultants MSJ Keys Young on public awareness of the Act and its impact. The review has been one of the most extensive programs of consultation conducted by the Commission.

## THE COMMISSION'S REPORT

1.3 This Summary Report presents a brief account of the key features of the Commission's full Report, *Review of the Adoption Information Act 1990*. As there have been so many members of the general public participating in the review, the Commission feels it is desirable to make available to them the major findings and recommendations of the review. The full Report is a lengthy document. It contains detailed analysis of the legal principles and the law relating to adoption and the Commission's recommendations for minor amendments to the *Adoption Information Act 1990*. It also presents an extensive examination of the administrative procedures for the Act and a comprehensive report of the evidence obtained about its impact on the various groups of people affected. This Summary Report has been prepared to present the Commission's findings and recommendations in a more accessible form. The full Report may be purchased from the Commission. The order of Chapters in this Summary Report largely corresponds with that in the full Report noted below.

1.4 The Commission's Report contains the following material. Chapter 2 of the Report provides a brief introduction to the *Adoption Information Act 1990* and the context in which it came into being. (The *Adoption Information Act 1990* and the *Adoption Information Regulation* are reproduced in Appendix A to the Report.) Chapter 3 describes the publicity which was conducted in order to create community knowledge of the legislation and presents the Commission's findings on public awareness of the Act, based on the relevant results of the omnibus survey described in the MSJ Keys Young Report (which forms Appendix B). Chapter 4 reviews the implementation and administration of the legislation. The respective roles of the Family Information Service (FIS), the Registry of Births, Deaths and Marriages, and the Post Adoption Resource Centre (PARC) are examined. The operation of the main provisions of the Act, such as those dealing with access to birth certificates, supply of prescribed information, the Reunion Information Register, and the contact veto system is also considered. Chapter 5 provides a report on the impact of the legislation on birth parents, adopted people, adoptive parents and the extended families of all parties. Chapter 6 examines what the Commission regards as the basic principles of the legislation, matters that were addressed in many submissions to this review. Chapter 7 sets out the major recommendations relating to additional protection of privacy, and Chapter 8 deals with a number of particular aspects of the legislation, making some recommendations for minor amendments to the legislation.

## CONCLUSIONS

1.5 The Commission's major conclusions are as follows:

The majority of the public appears to be aware of the essence of the *Adoption Information Act 1990*.

Implementation of the Act has been accomplished successfully and its administration is working well.

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The vast majority of adopted persons and birth parents welcome the rights to information, and exercise them responsibly.

Compliance with the contact veto system is very high. Although there were rumours or suggestions of breaches, a careful examination of the evidence revealed only one incident that appeared to be a breach of a veto.

Post-adoption contact and reunions are seen as beneficial by almost all who initiate them, and positive or acceptable by the majority of those who are contacted.

The *Adoption Information Act* 1990 has functioned very much as expected by Parliament, with the following qualifications that:

- it is possible that the number of people who are unaware that they are adopted is somewhat higher than estimated;
- there may be somewhat greater resistance to the Act than expected on the part of adoptive parents (a majority) and adoptees (a significant minority); and
- compliance with the contact veto system is probably somewhat higher than expected.

1.6 From its study of the operation and impact of the Act, the experience under similar laws outside New South Wales, and the submissions made in the present review, the Commission concludes that there is no need to change the basic principles of the Act, which provide a reasonable and workable resolution of the conflicting interests involved. However, the evidence of real distress and anxiety caused to many adoptive parents and some adoptees and birth parents justifies some modifications to current law and practice.

### RECOMMENDATIONS

1.7 The Commission's major recommendations are as follows:

An **Adoption Information Exchange** should operate to facilitate communication between all parties affected by the adoption information laws.

An **Advance Notice System** should apply to delay release of identifying information for a fixed period at the request of a person who would be identified by it.

The Director-General should have a discretion to limit access to identifying information in exceptional cases.

1.8 The Commission also makes some minor recommendations including:

Publicity for the legislation should continue so as to reach all people affected by the law, and to inform them about the rights and procedures under the Act.

The Act should be amended so that the contact veto system terminates only if Parliament so decides.

The Director-General should have a discretionary power to order the supply of birth certificates, identifying and other information in situations which fall outside existing statutory entitlements.

An appeal should lie to the Community Welfare Appeals Tribunal against all major decisions of the Director-General exercising powers under the Act.

The statutory provisions relating to birth fathers should be clarified in order to implement more fully the intention to provide access to identifying information about adoption.

The Guardianship Board should be given any necessary powers to allow it to make appropriate orders where, because of disability it is impossible or unreasonable for people to exercise rights under the Act personally.

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The Act should be amended to allow, subject to the Director-General's discretion, the information rights of a birth parent or adoptee to be "inherited" by relatives on that person's death.

Birth parents should have a statutory right to non-identifying information about the adopted child (while under 18) corresponding to the existing rights of adoptive parents to such information about the birth parents.

## 2. Background to Adoption Information Legislation

### LAW AND PRACTICE BEFORE 1991

2.1 The previous law relating to information about adoption generally reflected the notion that adoption marked a complete and permanent severance between the adoptee and the birth family, and that this complete severance would serve the needs of all parties involved. This view of adoption was reflected in a variety of rules and practices. The court was closed to the public when hearing adoption applications, and court records, and the records of adoption agencies, were not open to inspection except by staff or on the order of a court. Efforts were made to prevent birth parents from learning the names and whereabouts of the adoptive parents, and to prevent the adoptive parents from learning the identity of the birth parents. There was a general expectation, at least in adoptions where a new-born baby was placed with unrelated adopting parents, that members of the birth family and members of the adoptive family would never learn of each others' identity, or meet.

2.2 This "clean break" model of adoption was based largely on practice rather than law until 1967, when the *Adoption of Children Act 1965* came into force. Practice was not entirely consistent. Adoptive parents were given the Order of Adoption which included details of the birth parents, and the degree of secrecy probably varied according to the period, and according to the way adoptions were organised. In particular, there may have been limited secrecy in adoptions arranged privately and in some adoptions such as adoptions by step-parents or by former foster parents, the parties may well have been known to each other. Secrecy acquired legal support mainly as a result of the 1965 Act, which also prohibited private adoption arrangements, requiring all adoptions outside the extended family to be arranged by authorised adoption agencies, or by what is now the Department of Community Services. In practice even then, however, secrecy was not always achieved: there were cases in which identifying information was accidentally discovered by either birth, and, with the help of organisations such as Jigsaw or Adoption Triangle, adoptees would sometimes manage to trace their birth families and vice versa.

### THE SOCIAL BACKGROUND

2.3 The secrecy surrounding adoption during this period was related to the social conditions and beliefs of the time. Most children surrendered for adoption were born outside marriage, and the births often resulted from unintended pregnancies, to which the young women were particularly vulnerable: sex education and contraceptive services were lacking or inadequate, and abortion often was unavailable or unacceptable. Stigma was associated with all those immediately associated with adoption: unmarried motherhood and illegitimate birth were widely seen as shameful, and infertility a source of embarrassment to adopting parents. Adoption was seen as a way of avoiding this stigma and serving the needs of all parties. The child would have the benefit of the status of legitimacy, and a good home with loving parents who very much wanted a child. The birth mother could avoid unmarried parenthood, achieve for the child what she expected would be a better home than she could provide, and make a new life for herself. The adopting parents would have a much-desired child of their own.

2.4 It was not uncommon for adoption arrangements to conceal the true facts and create the illusion that the child had been born to the adoptive parents. The birth mother would sometimes leave her usual community to have the baby in secret. The child could be "matched" in appearance with the adopting parents, and the adopting mother, in some cases, would simulate pregnancy to create the illusion that she was the biological mother. The children would not necessarily ever be told of their adoptive status. Not all cases, however, involved such thoroughgoing attempts to conceal the biological facts, and by at least the mid 1960s adoptive parents were being advised by adoption agencies to tell their children of their adoptive status. Even where the children were "told", however, their adoptive status was often an awkward subject both in their family and in the general community, and it was widely assumed to be best for all concerned if all parties treated the adoptive family as no different from other families.

### PRESSURES FOR CHANGE

2.5 By the 1980s the assumptions and values underlying this model of adoption had altered. The stigma associated with illegitimate birth and unmarried parenthood was fading: the supporting mother's benefit was introduced in 1973, and in the mid-1970s legislation intended to remove legal discrimination against ex-nuptial children (as they were now to be called) was introduced throughout Australia. A greater degree of frankness about sexual matters probably also reduced the stigma associated with infertility. By the late 1970s, the number of healthy new-born babies surrendered for adoption had commenced what was to become a steep decline.

2.6 These developments reduced the need to maintain the pretence that adopted children were the biological children of the adoptive parents. Other developments contributed to a further erosion of the “clean break” approach by suggesting that the interests of some of the parties, and perhaps all, would be served by a greater acknowledgment of the biological parentage of adoptees. Autobiographical publications and research indicated that many adoptees, including those in happy adoptive homes, experienced strong desires to know their biological inheritance, and in some cases to make contact with their birth mothers or other members of their birth families. Research also revealed that for many birth mothers, adoption had never marked a “clean break” in an emotional sense. Many of them had consented to adoption only with great reluctance, in the face of circumstances which made it difficult or impossible for them to keep their children. It became apparent that for many birth mothers, losing their children to adoption was the cause of intense and continuing emotions, notably grief and often shame and guilt. Far from having made a fresh start, the unresolved emotions associated with the relinquishment had continued to trouble them. Many birth mothers had longed for, and some sought, information about what had happened to their children, and if possible contact with them. Similar feelings were experienced by some birth fathers, particularly, but not only, when they had married the birth mother.

2.7 The positive experiences in countries where post-adoption information was available, combined with strong pleas from adopted people, created a new interest in opening up access to original birth records. England did so in 1976. Access to original birth records seemed more consistent with emerging views of human rights, especially notions of non-discrimination, with a growing appreciation of the importance of medical information about inheritable diseases and other characteristics, and with a growing interest in genealogical research. The view that adult adoptees should have access as of right to their original birth records was discussed enthusiastically at the First Australian Conference on Adoption in 1976, and rapidly became the dominant view of professionals working in the area of adoption.

#### **OPENNESS: DEVELOPMENTS AND DEBATES**

2.8 These developments were reflected in adoption practice, which began to stress the importance of honesty and frankness, and increasingly provided adoptive parents with non-identifying information about their children's birth families. In 1976, New South Wales introduced the Adopted Persons Contact Register, by which reunions could be arranged where all parties consented. After 1977, adoptive parents had to agree to tell their children of their adoptive status. Release of non-identifying information and outreach to locate birth parents and adoptees became more common. In 1984, Victoria introduced legislation giving adult adoptees rights to their original birth certificates. By the early 1990s similar legislation, some of it also giving rights to birth parents, had been passed in most Australian jurisdictions, and was under consideration in others.

2.9 The period between the 1970s and the 1990s saw continuing debate on the issues raised by the pressure for more openness in adoption. The new trends created great apprehension for some, especially adoptive parents who had adopted children in the climate of secrecy and feared that much that they had worked for was put at risk: they might lose the affections of their children, or have their lives otherwise complicated by the intrusion of members of the birth family. For adopting parents who had concealed the fact of the adoption from others, especially the adoptees themselves, the new openness threatened to reveal the true situation and raise difficult questions about why it had been concealed for so long. Even where the adoptees had been “told”, the new rights created dilemmas and difficulties: commencing a search could lead to revelations, emotions and relationships that would not necessarily be easy, and could have unpredictable effects on existing family relationships. There was apprehension, too, for some birth parents, especially those who had not revealed the facts to members of their present families. For some, opening the records held the promise of a personal voyage of discovery and might answer long-standing questions and ease stress and anxiety which had built up over the years; for others, it appeared to threaten the stability of their family relationships. For the former, it seemed indefensible for the law to continue to protect the secrecy of former times; for the latter, to open the records seemed grossly unfair, a retrospective law that betrayed the assurances of confidentiality which they saw themselves as having been given when they adopted children, or surrendered a child for adoption. Not surprisingly, the debate about adoption information law was intense and emotional, and various legal mechanisms were devised, or advocated, in an attempt to respond compassionately and fairly to the wide range of interests and perspectives held by those involved in adoption.

### 3. Adoption Information Legislation

#### THE ADOPTION INFORMATION ACT 1990

3.1 The *Adoption Information Act* 1990 was passed in October 1990 and came fully into force on 2 April 1991. It embodies, with only minor qualifications, the unanimous recommendations of the Legislative Council's Social Issues Committee (the Willis Committee) made in its report *Accessing Adoption Information* (1989). The Act had the support of all political parties and was passed by Parliament with only one dissenting voice. The central provisions of the Act create rights in adult adoptees to obtain their original birth certificates, and in birth parents to obtain the amended birth certificate showing the adoptee as the child of the adoptive parents. Adoptees and birth parents are also entitled to obtain from named bodies such as adoption agencies prescribed information, that is, information falling within categories set out in the *Adoption Information Regulation*, made under the Act.

3.2 The legislation also provides protection for privacy by establishing a contact veto system, whereby birth parents and adoptees may forbid contact by information recipients. The veto does not prevent the release of birth certificates or information. Where a veto has been lodged, a person obtaining a birth certificate under the Act is forbidden to contact or attempt to contact the person lodging the veto: to do so is a criminal offence punishable by a fine of \$2,000 or 6 months imprisonment or both.

3.3 All these provisions apply only when the adoptee reaches the age of 18 years. The Act applies to all adoptions recognised in New South Wales, including adoptions made before the Act came into force. Indeed, since its major provisions relate to adopted persons who have turned 18, so far it mainly affects people involved in adoption orders made before 1974.

3.4 The first aspect of the terms of reference requires the Commission to report on the implementation, public awareness and administration of the legislation. These matters are considered in this Chapter.

#### AWARENESS OF THE ACT

3.5 The Department of Community Services undertook an extensive publicity campaign prior to commencement of the Act in April 1991. Advertisements and publicity generated by press releases and interviews in all forms of mass media explained the rights to information and the contact veto system.

3.6 The Commission received comments in submissions about the extent of public awareness, and also commissioned a survey which tested knowledge of the law relating to adoption information of a random sample of more than 1000 people in New South Wales. The evidence before the Commission leads us to agree with the conclusion in the MSJ Keys Young Report that:

The majority of the public appears to be aware of the essence of the Adoption Information Act - that adopted people and the birth parents who surrendered them for adoption now have the right to identifying information about each other.

3.7 The Commission recommends that resources be available so that publicity about the adoption information legislation can continue to reach all people affected by the law. Publicity should aim to inform people of the details of rights and procedures, and also to reach people who live outside the State. The Commission suggests some approaches which could be used to publicise the law. These include advertising in general interest magazines, as well as those for adolescents and young women and distribution of brochures through community agencies and organisations, including those not usually connected with welfare.

#### ADMINISTRATION AND IMPLEMENTATION OF THE ACT

3.8 Administration of the Act primarily involves two government agencies. The **Family Information Service (FIS)** within the Adoptions Branch of the Department of Community Services has major responsibility for operation of the new legislation. FIS supplies prescribed information from Departmental files and records of adoptions since 1923 which it holds. It receives contact vetoes and administers the contact veto system and administers the Reunion Information Register. It also provides information, counselling and advice relating to the operation of the Act. The other agency involved is the **Registry of Births, Deaths and Marriages** which



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maintains registers of births, adoptions, marriages and deaths in New South Wales. It supplies original or amended birth certificates and extracts of marriage and death certificates from the registers in accordance with the *Adoption Information Act*. A new organisation, the **Post Adoption Resource Centre (PARC)**, was established by the Benevolent Society and funded by the Department of Community Services, to provide counselling and advice for people affected by the *Adoption Information Act*.

3.9 The accompanying table indicates statistics of the major activities under the *Adoption Information Act*. They are based on figures supplied by the Registry and FIS, current to the dates stated. Applications for original or amended birth certificates are being received at approximately 250 per month, and contact veto registrations at 12-15 per month. Adoptees have made 70% of the applications for certificates and placed 55% of the contact vetoes.

**Table 1: Statistics - Adoption Information Act 1990**

<b>ACTION</b>	<b>TOTAL</b>
Applications for original or amended birth certificates from 2 April 1991 to 30 June 1992.	7,358
Contact Veto Registrations from 1 December 1990 to 30 June 1992.	3,432
Birth certificates issued subject to a Contact Veto up to 30 June 1992.	225
Contact Vetoes lodged after the issue of a birth certificate up to 30 June 1992.	31
Contact Vetoes removed up to 31 May 1992.	31
Reunion Information Register registrations up to 30 June 1992.	15,985
Applications for further searches to 30 June 1992.	2,151
Fee waivers on applications for certificates (%)	35

3.10 The Commission has found that implementation of the *Adoption Information Act 1990* has been accomplished successfully and administration in the first year of operation has been working well. This is in large measure due to the efforts of the many committed staff who have been involved with operation of the Act, working within the constraints of available resources. Many have been highly complimentary in submissions about the assistance and understanding of those responsible for administration. There have been some complaints received about the activities of staff of FIS, District Offices of the Department of Community Services, the Registry and PARC. While all agencies responsible for administration acknowledge that some criticism is valid, it is only to be expected that not everyone will have been satisfied with their dealings with the administration. This is so particularly as highly charged emotional issues are involved. Some criticism is as much of the law itself as its administration. The contact veto system has drawn the most complaints. However in one matter, complaints about staff taking contact vetoes in the early stages of the Act's operation appear to have been dealt with by direction from the Director-General about procedures to be followed. The Commission has no evidence that administration of the Act has been improper or inefficient. Indeed there was considerable evidence that the agencies involved have paid careful attention to the rights and interests of people affected by the Act.

## 4. The Impact of the Act

4.1 Chapter 5 of the Report presents the results of the Commission's inquiry into the second major aspect of the terms of reference, "the impact of the legislation on birth parents, children surrendered for adoption, adopting parents and the extended families of all parties". It is difficult enough, even in the full Report, to describe the richness and variety of people's experiences; the present treatment will have to be brief indeed.

### BIRTH PARENTS

4.2 The Commission found that the information rights created by the Act are greatly welcomed by the majority of birth parents, although in most cases the birth mother is the one who seeks information. It is difficult to estimate the proportion, but in a significant number of cases, the birth parents were, or later had married. They were both involved in seeking information and shared the results. For many, these rights provide relief from years of wondering about the child they relinquished long ago, and whose loss they may continue to grieve. Many feel that they relinquished the children in circumstances that gave them little choice, and claim that it would be unfair for the law to treat them as if they had lost interest in the child, or forfeited all rights to information or contact. Birth mothers who exercise their information rights mainly want current information about the health and happiness of the adoptees. Frequently they are keen to meet the adoptee to see for themselves how he or she has fared in life, and, often, to explain to the adoptee how they came to sign the consent to adoption. The vast majority are very anxious not to disturb, hurt or shock any members of the adoptive family; many make their approach through intermediaries. Typically, they know they cannot take the place of the adoptive parents, and do not want to do so. However, they often would like to establish a friendly relationship with the adoptee, if he or she is willing. A sizeable number take the view that they are available should the adoptee want or need them. They feel unwilling to take the first step, and wait for the adoptee to take the initiative. It is rare, though not unknown, for birth parents to act insensitively or to intrude against the expressed wishes of the adoptee or the adoptive family.

4.3 A significant minority of birth parents, especially those whose present families do not know about the birth or relinquishment of the adoptee, are opposed to the Act, and feel that it violates their privacy. Of these, it seems that few have forgotten or feel indifferent towards the child they relinquished, and maintaining the secrecy of the original adoption may often involve continuing tension. However they are willing to accept this in order to avoid what they fear will be the more painful consequences of disclosure to their partners, children, and other family members. Some birth mothers, fearing the worst should the information be disclosed or contact made, in fact have experienced understanding and acceptance as a result.

4.4 Most birth parents who contributed to the review were mothers, although the Commission also heard independently from a small number of birth fathers. Birth fathers were upset that the law and practice tended to prevent or discourage their involvement: that the mothers were encouraged to keep their names off the birth certificate, and, in some cases, that they were not even aware of the birth, or of the adoption. These fathers greatly valued their rights to information, and the opportunity to contact or be contacted by the adoptee.

### ADOPTees

4.5 The majority of adoptees appreciate their rights under the Act, and are very pleased to receive their original birth certificate and other information about their birth family. Typically, those who exercise these rights do so in order to resolve uncertainties in their lives, to "discover who they are", or find "the missing piece in the jigsaw". More prosaically, they often want to see who they look like, and learn about any inherited traits or health problems. They frequently want to trace their birth mothers, and other family members. Sometimes they want to learn why they were relinquished for adoption, or to reassure their birth mother that they bear her no ill-will. In the vast majority of cases, they do not want to replace or hurt their adoptive families, nor is their search usually associated with an unhappy family life. Often they say, especially where the adoptive parents have been supportive, that the experience of discovering their origins and meeting members of the birth family has brought them closer to their adoptive parents.

4.6 A significant minority of adoptees strongly disapprove of the information rights given to birth parents, and even to adoptees themselves. They feel that the Act exposes them, their adoptive family, and also birth parents to unwanted interference and invasion of privacy. They feel that this is not fair to them or to their

adoptive parents, of whom they are often protective. Many considered that the contact veto system was insufficient protection. They argue that the legislation should be amended to prevent identifying information being supplied without the consent of the person to whom it relates, or, at least, that it should be possible for the person to prevent it being released - the so-called "information veto". Quite a number of adoptees who expressed these views were under 30, and in some cases attended public hearings or private interviews with their adoptive parents: in such cases their views (which were obviously strongly held) coincided with those of their parents. Adoptees who contributed separately to the review were more likely to express views supportive of the legislation.

4.7 Despite the pressure placed on adoptive parents over many years to tell adoptees of their adoptive status, some adult adoptees still have not been told. Evidence to the Commission shows that it is not uncommon for adoptees to have the distressing experience of discovering their adoptive status by chance, or even in the heat of a row with an adoptive parent or spouse who "knows". Often these adoptees do not disclose their knowledge to their adoptive parents, for fear of offending them. The number of adoptees who do not know of their status is unknown, but the PARC "found persons" survey (described below) indicates that it might be substantial. Adoptees who do not know of their adoptive status are in a vulnerable position under the Act, since they will not have had the opportunity to lodge a contact veto and thus they are unable to exercise a measure of control over any contact that might take place.

### **ADOPTIVE PARENTS**

4.8 The legislation poses difficulties for many adoptive parents, and the majority of adoptive parents who participated in the review were opposed to it - in many cases very bitterly. They saw the information rights created by the Act as threatening their position, and often the interests of the adoptees whom they wished to protect. They thought that the Act constituted unfair retrospective legislation. They told the Commission that when they adopted their children, they were assured that the law would prevent the release of information that would allow members of the adoptive family and birth family to identify each other. That was the basis on which they went ahead with the adoption and on which they conducted their family life, and they believed it was a grossly unjust to change the position relating to existing adoptions. They often said that the Act advanced the views of a small minority at the expense of the "silent majority", and that adoptive parents had not been properly consulted, or their position given proper consideration.

4.9 These adoptive parents often added that they had no objection to the new approach applying to *future* adoptions, for people contemplating adoption are able to choose whether to go ahead on this new basis. Nor did they object to post-adoption contact, or the release of identifying information, provided that all parties agreed to it. They advocated a return to the law as it was before the 1990 Act, when those who wished to contact each other could do so through the Adopted Persons Contact Register. If that was unacceptable, it was submitted that adoptees and birth parents at least should have a right to lodge an "information veto", that is, a veto that prevented the issuing of a birth certificate or the release of identifying information. These adoptive parents also argued that the contact veto system would not be an effective protection for their privacy.

4.10 Some adoptive parents tended to agree with the Willis Committee that adoptees and birth parent should have similar entitlements to prevent the release of information to the other. However others, including the Adoptive Parents Association, argued that while the information rights of adult *adoptees* should be maintained, those of the *birth parents* should be limited. The arguments of adoptive parents and some adoptees opposed to the Act, and the examples they used to illustrate them, mainly focused on what they saw as adverse consequences flowing from the rights given to the birth parents. Recognition was also given to the position of birth mothers who had made a new life and not revealed the relinquished child to present partners and children.

4.11 These arguments, or variations on them, were put by many individual submissions and by a small number of organisations concerned with adoption privacy, notably the Adoption Privacy Protection Group (APPG). They were also put, as noted above, by a significant minority of adoptees, and by some birth parents and relatives. Some adoptive parents had more ambivalent feelings about the Act, and were somewhat torn between what they saw as the injustice of denying information rights to adoptees and birth parents, and their anxieties about the consequences of releasing the information. They were most likely to indicate that they would support their adoptee's decision in the matter, whether it was for information, contact or privacy.

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4.12 A significant minority of adoptive parents, on the other hand, vigorously supported the Act. They considered that adoptees and birth parents should have the right to information about each other. Many had encouraged and assisted their adopted sons and daughters to seek information and contact, and supported their rights to take such action. They held these views even when the outcomes for the adoptees had not been entirely happy. Many welcomed their own opportunity to meet the birth parents. Most supported the contact veto system as striking a reasonable balance between what were seen as the conflicting rights to privacy and information. Some adoptive parents and others involved, suggested that the contact veto system should be removed, since both adoptees and birth parents owe each other the opportunity to have at least one meeting.

### RELATIVES

4.13 Spouses, relatives and other members of the extended families expressed a wide variety of views and experiences. Some enthusiastically supported the new information rights, while others condemned the Act as violating their privacy. Siblings were especially likely to want information about their full or half siblings who had been adopted out of the family; similarly, adoptees were often keen to meet their birth brothers and sisters. Grandparents, too, were sometimes intensely interested in contact or information. Some relatives were critical of the limited rights given to them under the Act. In particular there was criticism that other children of the birth parents had no rights to information about their birth siblings who had been adopted out. There was also criticism of the limited information rights given to relatives after the death of a birth parent or adopted person. Families of all people directly involved report that some re-adjustments are necessary in response to the emotional issues which surface and the new relationships that can be created.

### IMPACT OF CONTACT VETOES

4.14 The Commission was anxious to learn the extent to which people complied with contact vetoes as critics of the Act had urged that the contact veto system would prove ineffective. Efforts to ascertain whether breaches were occurring were also made by the APPG, which provided to the Commission questionnaires completed by members and supporters, and brought to the attention of the Commission a number of cases in which there were complaints relating to behaviour of people who had obtained information under the Act. Although there were rumours or suggestions of breaches, a careful examination of the evidence revealed only one incident that appeared to be a breach of a veto. Inquiries by the Commission indicated that no complaints of breaches had been made to the police, or the Privacy Committee, or the Ombudsman. No breaches have come to the notice of the Family Information Service or the Registry. It is of course possible that there have been breaches that have not been reported. However a number of people who objected to the consequences of the Act made strong representations to the Commission, to members of parliament, to APPG, and to the media (in some cases to several or all of these). It seems very likely that if there had been *numerous* breaches, some, at least, would have been brought to the Commission's attention during the review.

4.15 The Commission's conclusion is that there has been a remarkably high level of compliance with contact vetoes. Compliance seems to be based primarily on the eagerness of information recipients to respect with the wishes of the persons found, combined with the futility of non-compliance: disregarding the wishes of the other person is hardly a sensible way of commencing what is intended to be a friendly relationship. But the legal status of the veto appears to play a part: not so much because of the fear of penalty, but because it represents a formal public determination that the wishes of persons who lodge vetoes should be respected.

4.16 Despite what was found about compliance with vetoes, many argued on several grounds that the contact veto system was not an effective protection of privacy. A veto did not prevent the identifying information being supplied. This information could be used, and most probably would be, by a person determined to make contact. The definition of "contact" was unclear and so the statutory provisions could be difficult to enforce. The persons whose privacy was violated would be reluctant to take action to enforce the veto against the person in breach, and the authorities would be reluctant to pursue such proceedings. The penalties were widely regarded as too light to deter people desperate to make contact. For such reasons, and also because they resented the obligation to pay a fee of \$50 and attend an interview, many adoptees said that they had decided not to lodge a veto although they definitely did not want contact. In some cases, the unwanted contact had later occurred.

4.17 The Commission also considered other aspects of the veto system. As might be expected, many people applying for certificates dreaded that they might find that a veto had been lodged. Those who did encounter one were typically shocked and upset, but attached enormous importance to any message that

accompanied the veto. Even a brief message, giving some information and perhaps explaining why the veto was lodged, was greatly appreciated. However, the lodging of a veto did not necessarily mean that the other person completely opposed contact. The veto was used by a number of people not to prevent contact absolutely, but to *control or regulate* it. The veto lodger might want time to consider, or might wish, by exchanging messages prior to contact, to ensure that contact occurred in a particular manner. For example, an adoptee who thought that her adoptive parents might be distressed by contact from a birth parent might want to arrange for contact by the birth mother to be made directly, and discreetly, rather than through the adoptive parents. Several vetoes have been varied (formally through FIS) to allow for a one-off meeting or other communication, and the Commission has been told of some instances when vetoers themselves had contacted the information recipient.

## **CONTACTS AND REUNIONS**

4.18 Each story of contact between people and families who meet after being separated by adoption is different; indeed, the experiences are different for each of the persons involved in any one situation. They range from intensely joyful to extremely distressing experiences. Reunion can involve exciting discoveries and new relationships, but it can also bring less welcome news. Either the birth parents or the adoptee may have died, neither birth families nor adoptive families are immune from misfortune, domestic violence, cruelty, rape or incest, and in such cases the news that reunions bring can be grim indeed. Media accounts sometimes focus on cases that are extremely happy or extremely unhappy, but the evidence to the Commission suggests that the experiences of reunions are more often a complex mixture, with those involved often reacting in very different ways. Those involved typically go through stages: the initial contact is likely to be highly emotional, after which the relationship changes: in some cases it dwindles, in others, it develops. Contact typically involves other family members, and the various interactions that follow make it impossible to describe the “normal” reunion.

4.19 Arguments addressed to the Commission often made assertions or assumptions about what commonly happens in post-adoption contact. Some critics of the Act, for example, presented it as an inherently stressful, and often unproductive exercise, while supporters, recognising the stress, nevertheless took the opposite view. In addition to submissions received, the Commission examined published material in Australia and overseas to attempt to form an assessment of this matter. It also asked PARC to conduct a survey of 41 cases of post-adoption contact in which PARC had been involved in a supportive or counselling role.

4.20 The results of that examination are striking. Those who initiate contact are almost invariably glad that they have done so, even where the reunion itself was unhappy or what they learn distressing. Typically they say that they are pleased to have found the truth and resolved, or at least eased, the uncertainty and anxiety that had been created by the secrecy surrounding adoption. However it is the *impact on the persons found* that usually gives rise to concern, and this was the focus of the PARC survey. That survey indicated that for the majority of persons contacted, the experience was either positive, or at least acceptable; only in about 20% of cases was the experience described as unwelcome or unacceptable. Although based on limited numbers, this result is consistent with other available evidence, especially from Victoria, but also from overseas studies, and with evidence in submissions to the review.

4.21 The evidence presently available does not enable us to make confident assertions about the exact proportions of “acceptable” and “unacceptable” contacts, and words like “acceptable” are obviously imprecise. But the evidence does clearly indicate that critics of the legislation are wrong if they imply that the Act favours a few at the expense of the majority: nearly all those who initiate searches, and *the majority of those who are contacted*, are pleased that it has happened, or at least find it acceptable. All of the available evidence strongly suggests that contact, though it is often initially a shock, does not usually damage individuals or family relationships. Where the persons found wish to limit contact (eg to private meetings, or correspondence, or exchange of information and photographs) this is almost always respected by those who sought contact. It is not true, of course, that contact always or usually produces happiness for all involved. Where members of the families do meet, the new relationships can be bewildering initially, and can lead to new alignments that please some more than others. In particular, such meetings may lead to complications that some would have preferred to avoid. As PARC wrote in its submission:

Attempted reunion involves considerable personal risk, the risk of rejection, the risk of discovering adverse and distressing information, the risk of acquiring unanticipated responsibilities. Even “successful” reunion carries its own costs for individuals and families in terms of old sorrows

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relieved, adjustments to be made, new relationships accommodated. The potential gains... are undoubted... [but] there will inevitably be some who regard the experience as a negative one and who see themselves as being worse off as a result...

4.22 The finding that the release of information and contact is generally positive for those involved is important, but should not be allowed to obscure the fact that for some people contacted the experience is very distressing, and can on occasion lead to disturbing behaviour, such as insistent telephoning or visiting by the person seeking contact or other members of their family. The revelations that follow contact can lead to rejection (at least temporarily) by a spouse, child or relative of the person contacted, but although this is a commonly held *fear*, it seems a very uncommon occurrence.

## 5. The Basic Principles of the Act

5.1 In considering what recommendations to make, the Commission has thought it helpful to describe what might be called the "basic principles" of the Act, and consider whether the findings of the review provide reason to reconsider these. The basic principles, which are derived from provisions of the Act and background material such as parliamentary debates and the Report of the Willis Committee, may be stated as follows:

Providing to adult adopted persons rights to obtain their original birth certificate, and to information which would enable them to identify their birth parents, such rights being absolute in that their exercise cannot be prevented or limited by birth parents, or by other persons.

Providing to birth parents rights to obtain the amended birth certificate of their birth children, after the latter have reached adulthood, and to additional information, such rights being absolute in that their exercise cannot be prevented or limited by the adoptee, or by other persons.

Protecting the full parental rights of adoptive parents, and providing, in addition, rights to non-identifying information about the birth family during the adopted person's childhood.

Protecting the privacy of birth parents and adopted persons by making provision for each of them to forbid unwanted contact resulting from the release of identifying information under the Act (the contact veto system).

Protecting the privacy of all persons by limiting the disclosure of information that unduly intrudes on their privacy, and is not necessarily involved in giving effect to the information rights created by the Act.

Providing to members of the family, on a discretionary basis, information relating to a deceased adopted person or birth parent.

Facilitating reunions between adopted persons, birth parents, and other people approved by the Director-General of Community Services, where those persons have indicated their desire for such reunions.

5.2 To address the question whether these principles should be reconsidered, the Commission first considered its findings about the operation of the Act in New South Wales. These findings have been briefly summarised in the two previous Chapters. The Commission's conclusion is that they do not indicate any need for fundamental change. The information rights have been responsibly exercised in by far the majority of cases and there is a very high compliance with the contact veto system. The available evidence suggests that in New South Wales the contacts made as a result of the Act are positive, being seen as beneficial by almost all those exercising information rights, and as positive or acceptable by a majority of those people who are contacted.

5.3 Secondly, the Commission considered whether the experience under the Act was markedly different in any important way from what Parliament expected. It is possible that the number of persons who do not know they are adopted is somewhat higher than anticipated, (although this remains difficult to estimate). The resistance to the Act by adoptive parents, and the size of the minority of adoptees who are opposed may be a little higher than anticipated. Compliance with the contact veto system, on the other hand, is probably somewhat higher than anticipated. With these qualifications, which the commission believes do not justify any reconsideration of the basic principles, the Act has functioned very much as expected.

5.4 Thirdly, the Commission considered whether experience in other jurisdictions with similar laws gave any cause for concern. It did not. Available evidence tends to confirm the experience in New South Wales, and to the extent that it is relevant, to support the basic principles of the NSW legislation. Recent legislation in other Australian jurisdiction deals variously with the rights to post-adoption information and contact, and may find in the future lead to new evidence about the respective merits of different legislation approaches. At this stage, however, the evidence does not provide grounds for concluding that any of these various approaches would better serve that interests of people involved in adoption in New South Wales than the existing legislation.

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5.5 Fourthly, the Commission considered whether any arguments addressed to it during the review indicated a need for reconsideration. Again, it concluded in the negative. The arguments and submissions made to the Commission, while very helpful and informative, did not raise any matters or points of view which had not been previously considered. The Report, while not reopening the whole debate about such laws, deals with some of the arguments advanced against the information rights under the Act. These include arguments that it violates privacy, and that it is unacceptable retrospective legislation. The Commission's conclusion, in summary, was that these are important matters for consideration, but not decisive arguments against the basic principles of the Act. The legislation represents at least, one of a number of acceptable legislative approaches to a very difficult problem, and a reasonable adjustment of the often conflicting interests involved. The Commission therefore does not recommend any change in the basic principles of the Act.

5.6 Although the arguments against the information rights have not persuaded the Commission that the Act need fundamental modification, they have drawn attention powerfully to the real distress and anxiety caused to many adoptive parents, a significant number of adoptees, and some birth parents and members of the various families involved. The Commission considers that, consistently with the basic principles of the Act, some modification of law and practice might address these interests and concerns, and accordingly the Commission has made three major recommendations to this effect.



## 6. Additional Protection of Privacy

6.1 The Commission's findings showed that despite the success of the contact veto system there remained considerable anxiety, and in some cases anger, about the Act. Part of the explanation for these concerns may be lack of appreciation of the rights created by the Act and the way the Act has actually operated, and the general sensitive approach of those obtaining information. But the anxiety is well founded for the minority of persons who will find contact a negative experience. It is also linked with the understandable feeling of many adoptive parents, and some adoptees and birth parents, that the Act is unfair to those who believe that when they become involved in adoption they had been promised that the identity of the parties would remain secret.

6.2 In this section the Commission summarises three recommendations intended to provide a degree of relief and protection for those who see the information rights created by the Act as intruding unjustifiably on their privacy. Two of the recommendations involve minor qualifications to the information rights created by the Act. In the Commission's view this qualification is warranted by the considerable relief that the recommendations will provide for those who are identified by birth certificates and identifying information supplied under the Act.

### AN ADOPTION INFORMATION EXCHANGE

6.3 The Commission recommends that there should be an Adoption Information Exchange, administered on similar lines to the existing Reunion Information Register. People who wish to have a degree of control or influence over the behaviour of the information recipients ("searchers") would have the opportunity to place a message, addressed to the relevant searcher, on the Adoption Information Exchange. The system would allow for messages to be left not only by the birth parents and adopted people, but also by adoptive parents and relatives of each of the parties directly involved. Messages left on the Information Exchange would not in any way affect legal rights. For that reason, they would not alter the basic principles of the Act. In the Commission's view, however, the system would have considerable potential to reduce the amount of anxiety often associated with the exercise of information rights under the Act by facilitating communication between people before contact is made.

6.4 The system could be used by all the relevant parties for a variety of purposes. A message from an adoptee, for example, might be made to the effect that he or she would like the searching birth parent to make contact discreetly by telephoning a particular number or leaving a letter at a post box. Adoptive parents might leave a message to the effect that an adopted person was studying for Higher School Certificate examinations and requesting that the searcher delay any contact for some period. Again, adoptive parents might ask that the searchers should contact them before contacting the adopted person to give them an opportunity to explain to the adopted person that he or she has been adopted; they might alternatively, wish to stay out the transaction and might give the searcher the adopted person's current name and address and encourage the searcher to make direct contact with the adopted person. Birth parents, too, might use explain that she has not told her husband and other members of her family, and would prefer that no contact be made at all. She might, however, add some information that would be of importance to the searching adopted person, such as the reasons that she signed the consent for adoption. More commonly, perhaps, the birth parent might ask the searching adopted person to make contact in a particular way that would not disclose to other members of the family the fact that she had given up a child for adoption many years previously.

6.5 The possibility of adoptive parents leaving messages on this system is an important advantage. Earlier in this Summary Report, the Commission noted that the retrospectivity of the Act has caused difficulties for those who organised their affairs on the basis that adoption would provide a guarantee of secrecy. Although in the Commission's view this fact does not require any change in the basic principles of the Act, it does justify measures designed to protect the privacy rights of those involved to the extent that such measures can be devised consistently with those basic principles. It is clear that many of the adoptive parents that have spoken to the Commission would have benefited from such a system as is proposed.

### AN ADVANCED NOTICE SYSTEM

6.6 The Commission also proposes a second mechanism designed to reduce the anxiety arising out of access to identifying adoption information. This is a system that would allow persons who were anxious about being identified or contacted to ensure that they had prior notice of any access to information. We propose that it should be possible for a birth parent, an adopted person or and adoptive parent to ledge and "Advance Notice

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Application". Such an application would be noted on a register by FIS and also at the Registry of Births, Deaths and Marriages in the same way as a contact veto. When an application was made for the relevant birth certificate the applicant would be informed that an advance notice request was in force and the release of the certificate or information would be delayed by a fixed period, say two months (or whatever other period is determined). At the same time, the person who requested advance notice would be told that access to the birth certificate had been sought and the certificate would be released at the end of the period. This system would give the persons named on the certificate to be released or their relatives prior warning of its release. It would allow them to take whatever steps they wished to take during that period. They might tell the members of their family about the situation in a way that would be less traumatic for them than if the searcher contacted them without prior notice. They might seek an order for the Guardianship Board to lodge a contact veto on behalf of the person unable to lodge it themselves.

6.7 As with the recommendations for an adoption Information Exchange, this proposal includes adoptive parents and is intended to relieve anxiety on their part, as well as on the part of adopted persons and birth parent who would prefer not to be contacted without prior notice. Unlike the Adoption Information Exchange proposal, it does involve a small qualification on the rights of the recipient of identifying information, in that it delays the person's access to the information by two months. In the Commission's view this small modification of the rights of adoptees and birth parents is not too high a price to pay for the considerable easing of anxiety that this system might provide to a number of persons about whom information is released. In particular, it may be that adoptive parents who have not told the adopted person of their adoptive status would find this system attractive.

### **DISCRETIONARY POWER TO REFUSE BIRTH CERTIFICATES**

6.8 It has been noted earlier that the Commission found no reason to overturn the basic principles of the Act, and for this reason does not recommend that there should be a right to prevent the issue of a birth certificate or the release of prescribed information.

6.9 It has been proposed by the Department of Community Services that in a very limited class of exceptional cases, however, there should be a discretionary power to limit access to identifying information. The Commission agrees, and recommends that there should be provision for identifying information to be withheld in exceptional circumstances, at the discretion of the Director-General, where it can be demonstrated that such a measure is necessary to prevent serious harm. It would also be possible for the Director-General to make more qualified orders; for example that the supply of information be deferred, or that counselling be required. It is essential that the exercise of this power should be subject to review, and the Commission proposes that there be an appeal by any person affected by an exercise of the Director-General's discretion in this regard to the Community Welfare Appeals Tribunal.

## 7. Other Recommendations

7.1 The Commission also has made other recommendations, of a more minor nature, as a result of its review. The more significant of these may be summarised as follows:

The Act should be amended so that the contact veto system terminates only if Parliament so decides.

There should be a discretionary power given to the Director-General to order the issuing of birth certificates or the supply of identifying information in situations that fall outside the existing entitlements, eg to information on files beyond that which is prescribed, or to relatives of adoptees or birth parents.

There should be an appeal to the Community Welfare Appeals Tribunal against all major decisions of the Director-General exercising powers under the Act.

The statutory provisions relating to birth fathers should be clarified, in order to implement more fully the original intention that they should be entitled to information relating to the adoptee, and that adoptees should have access to identifying information relating to both their birth parents.

There should be a provision in the Act granting to birth parents a right to non-identifying information about the adopted child (while under 18), corresponding to the existing rights of adoptive parents to such information about the birth parents.

The Guardianship Board should be given any additional powers necessary to allow it to make appropriate orders in the case of people who have rights under the Act but where, because of disability, it is impossible or unreasonable for them to exercise those rights personally.

The Act should be amended to allow, subject to the Director-General's discretion, the information rights of a birth parent or adoptee to be "inherited" by relatives on that person's death.