

NSW Law Reform Commission

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

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Terms of Reference and Participants

To the Honourable Jeff Shaw QC MLC
Attorney General for New South Wales

Dear Attorney

Review of the Adoption of Children Act 1965 (NSW)

We make this final Report pursuant to the reference to this Commission dated 1 December 1992.

Michael Adams QC

(Chairman)

The Hon Justice Richard Chisholm

(Commissioner)

Terms of Reference

In a letter to the Chairman of the New South Wales Law Reform Commission dated 27 November 1992, the Attorney General, the Hon John P Hannaford MLC referred the following matters to the Commission for inquiry and report:

The Commission is to review the current scope and operation of the Adoption of Children Act 1965 and in particular to consider:

the criteria for the selection of the adoptive parents, regulation of standards of practice and recognition of adoption agencies and support groups;

the relationship between adoption and other forms of permanent care;

intra-family adoption;

the relevance of reproduction technology and surrogacy to adoption law;

the relevance of Aboriginal customary law, and ethnic and racial heritage;

inter-country adoption and overseas orders of adoption having special regard to any international treaties or conventions to which Australia is a party; and

any related matter.

Participants

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

Mr Michael Adams QC (from 3 October 1996)

The Hon Justice R Chisholm*

The Hon G J Samuels AC QC (until 28 February 1996)

The Hon H D Sperling (until 11 October 1996)

Ms Jane Stackpool (until 2 October 1996)

Professor David Weisbrot (until 7 October 1994)

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REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

Executive Summary

Introduction

In 1965, community attitudes towards ex nuptial birth, the roles of men and women in society, de facto relationships, sexual orientation and many other aspects of family life were significantly different from attitudes which currently prevail. The nuclear family, headed by a legally married husband and wife, was not only perceived to be the norm but was considered by many to be the only truly acceptable form of family. In Australia, at least, reproduction technology had barely begun to be explored. Australia had yet to establish itself as an essentially multi-cultural society. There was not a developed and widespread awareness of the values of other cultures: in particular, that of indigenous peoples. The process of reconciliation with indigenous peoples had not begun. It was in this climate that the *Adoption of Children Act 1965* (NSW) was drafted.

Since that time, legislation in many fields has been enacted or amended to reflect social changes. This is particularly apparent in the areas of Family Law, laws relating to indigenous peoples, anti-discrimination and reproduction technology. In addition, an international trend in the development of children's rights, and legislation to protect children, has placed new international obligations on Australia.

The Commission's terms of reference required a comprehensive review of the *Adoption of Children Act 1965* (NSW). This review has extended over four years, during which time the Commission released an Issues Paper and a Discussion Paper for public deliberation. It involved detailed research into developments in other jurisdictions, both in Australia and overseas, intensive community consultation and analysis of current research.

A new Act

The Commission recommends that the *Adoption of Children Act 1965* (NSW) be rewritten so that adoption:

is characterised by openness, and is no longer shrouded in secrecy;

conforms with Australia's international obligations; and

is brought into line with other areas of child law, as well as with prevailing community expectations and attitudes.

The language of the new legislation should reflect the contemporary approach to adoption and the standing of children as individuals with their own rights.

General principles

The welfare and interests of the child, expressed in the internationally accepted phrase "best interests", should continue to be the paramount consideration in adoption. The Commission recommends that the legislation include guidelines to assist in applying this principle.

In relation to all adoptions, the Commission recommends that an adoption order should only be made where it makes better provision for the best interests of the child than parenting orders under the *Family Law Act 1975* (Cth) or any other order for the care of the child.

There has been a growing recognition of a child's capacity and right to participate in the legal processes which affect him or her. This is reflected in case law, recent legislation and international conventions. The child affected by adoption proceedings should have a greater voice in those proceedings and respect for the child's viewpoint should underlie the language and application of the new legislation.

New adoption procedure

One of the most distinctive features 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. The *Adoption Information Act 1990* (NSW) enables *adult* adoptees to access information about their origins and to have contact with birth parents once they have reached 18 years of age. The Commission recommends that this Act be merged with the new Adoption Act. But separate from this is the need for openness from the start of the adoption process and during the course of the adoptee's childhood.

The Commission considered a legislative scheme for agreements for openness in an adoption. However, the Commission has concluded that the advantages of this are outweighed by the undesirability of creating legally enforceable rights in the parties to the open adoption agreement. Rather, the legislation should encourage the parties to negotiate a voluntary plan, making arrangements for contact and exchanges of information between the adoptive and birth families.

The Commission recommends that the principle of allowing the child to participate in his or her adoption, and respecting his or her views, be implemented in adoption procedure by providing for those views to be taken into consideration and given weight commensurate with the child's age and maturity. As well, the Court should have the power to appoint a guardian ad litem and/or a representative for the child, in appropriate cases.

Parties to the adoption should have access to assistance from the Court at any stage of the adoption process, by means of a preliminary hearing. The Commission does not envisage that a preliminary hearing would be common but, where necessary, it would enable many problems to be resolved prior to a final hearing. For example, where there is a potential for the child to be moved, an early independent review of the consents and adoption plans before a child becomes too settled in a placement would be in the child's best interests. Another instance where a preliminary hearing may be necessary is where an agency is having difficulty placing an Aboriginal or Torres Strait Islander child in accordance with the Commission's recommended Child Placement Principles. In appropriate cases, the Court could proceed to final orders at the preliminary hearing.

In relation to adoption of adults, the Commission recommends two changes only. It should continue to be permitted, but only where the adult, prior to turning 18, had been cared for, for at least five years, by the applicants. The marital status of the adoptee should be irrelevant. This latter recommendation applies to all adoptees.

At present, a step-parent wanting to adopt his or her step-child must make a joint application with his or her partner (the "custodial parent"), involving the custodial parent having to first relinquish his or her own child for adoption. Not surprisingly, this requirement is found by most applicants to be offensive, and it has been abandoned in other States. The Commission recommends that a step-parent be able to make a sole application, without having legal effect on the custodial parent's relationship with the step-child. However, step-parents, as well as foster parents, should have an established relationship with the child of at least five year's duration before being allowed to adopt. This introduces a new requirement.

The Commission's recommendations in relation to consent to the adoption of a child introduce the requirement of annexing to the form of consent an independent counsellor's report. This report would certify that the independent counsellor:

is satisfied the consent-giver understands the legal effects of adoption and the procedure for revoking consent;

has counselled the consent-giver on the emotional effects of adoption and the alternatives; and

is not aware of any mental, emotional or physical unfitness to give consent.

Presently, a person can give consent on the fifth day after the birth of the child. It is also possible for the Court to make an order for adoption before the 30 day revocation period expires. The Commission recommends that consent cannot be given until 30 days after the birth of the child and that an order for adoption cannot be made before the expiration of the period during which consent can be revoked.

Who can adopt

Under the *Adoption of Children Act 1965* (NSW), to be selected as an adoptive parent, an applicant must meet criteria relating to age, marital status and character. The Court is also required to consider the applicant's religious upbringing and convictions (if any) and his or her education. Further criteria are specified in the *Adoption of Children Regulation 1995* (NSW).

Selection of adoptive parents is a controversial area, as demonstrated by the volume and range of community response to this section of Discussion Paper 34. The Commission has concluded that there should be very few legislative requirements relating to eligibility to adopt. The role of the legislation should be to provide minimum requirements for eligibility, although guidelines should identify the factors that may be taken into account in assessing suitability to adopt. Beyond this, selection of the best parent for each child should be a matter for the agencies, which, equipped as they are with adoption expertise and experience, are in the best position to determine the more detailed requirements for eligibility.

The Commission recommends that the legislation should provide that an applicant to adopt must be resident or domiciled in New South Wales, over the age of 21 years and at least 18 years older than the child, and a fit and proper person to fulfil the responsibilities of a parent and the special tasks of adoptive parenting. The legislation should permit an adoption order to be made in favour of either a couple (whether married or living in a de facto, heterosexual or homosexual relationship) or a single person. The Commission recommends that the legislation require joint applicants to have been cohabitating for at least three years, and a step-parent applicant to have been cohabitating with the child's parent for at least three years, before applying for an adoption order.

Cultural heritage and Aboriginal customary law

The Commission's terms of reference required it to consider the relevance of ethnic and racial heritage and Aboriginal customary law in adoption legislation. The Commission prefers the term "cultural heritage" to "ethnic and racial heritage". Whilst it does not seem possible to put a quantitative value on cultural heritage or continuity of cultural heritage, it is generally accepted that cultural heritage *has* value: this is enshrined in both legislation and international conventions. The Commission recommends that the cultural heritage of every child to be adopted, and the desirability of continuity in that cultural heritage, will be a relevant consideration in the placement of the child. The Commission recommends that the legislation should specifically cater for the placement of both Aboriginal and Torres Strait Island children because of the special place which they occupy in Australia's history and because of particular, unique features of their cultures.

The Commission recommends that the legislation include:

- a Cultural Heritage Placement Principle;
- an Aboriginal Child Placement Principle; and
- a Torres Strait Islander Child Placement Principle.

As well, the Commission recommends involvement of indigenous persons in the adoption process.

Intercountry adoption

Intercountry adoption is an area which is barely mentioned in the current legislation, yet it now accounts for almost half of all non-family adoptions in NSW. This trend has been partly in response to

humanitarian considerations and partly as a result of the dramatic decrease in the number of healthy new-born Australian children available for adoption. It is a unique area of adoption in that adoptive parents have formed support groups to assist applicants to adopt overseas-born children and these groups now play a significant role in the adoption process.

Australia is poised to ratify the *Hague Convention on Protection of Children and International Co-operation in Respect of Intercountry Adoption*, which will require certain standards of practice in intercountry adoption. Some practices which have developed in New South Wales, if not regulated, will be in breach of the treaty. The Commission recommends legislative safeguards and requirements to ensure that adoption practice conforms with Australia's international treaty obligations. The Commission also recommends that parent support groups, or any other bodies which meet the legislative requirements, be able to apply to be accredited as intercountry adoption agencies. There would then be clearly delineated roles between the New South Wales Department of Community Services, the accredited agencies and the unaccredited parent support groups. The latter would no longer be involved in the adoption process but would continue their support and fundraising functions.

Surrogacy and donor reproduction technology

The Commission considered whether adoption legislation should be used to regulate rights and responsibilities in relation to children born where there is a surrogacy arrangement, or children born as a result of donor reproduction technology or embryo donation. The Commission has concluded that the legislation should neither specifically prohibit nor specifically allow the commissioning parents to adopt a child born of a surrogacy arrangement. The legislation should be applied generally to such applications to adopt. The Commission has also concluded that specialised legislation, not adoption legislation, should govern all legal issues arising from donor reproduction technology and embryo donation.

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

List of Recommendations

RECOMMENDATION 1

Adoption should be maintained as one in a range of care alternatives for children.

RECOMMENDATION 2

The principle that the best interests of the child is the paramount consideration in adoption law and practice should be maintained in the legislation, expressed in the phrase "best interests" rather than "welfare and interests".

RECOMMENDATION 3

The Court should not make an adoption order unless it considers that the making of the order would make better provision for the best interests of the child than parenting orders under the *Family Law Act 1975* (Cth) or any other order for the care of the child.

RECOMMENDATION 4

In determining what is in the child's best interests in adoption, the Court should have regard to:

any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the Court thinks are relevant to the weight it should give to these wishes;

the child's age, maturity, sex, background and family relationships, and any other characteristics of the child that the Court thinks are relevant;

the child's physical, emotional and educational needs, including the child's sense of personal, family and cultural identity;

the nature of the relationship which the child has with the applicant or each of the applicants, with relatives and with any other person in relation to whom the Court or agency considers the question to be relevant;

the attitude to the child and to the responsibilities of parenthood of each applicant;

the capacity of each applicant, or other relevant person, to provide for the needs of the child, including emotional and intellectual needs;

the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or being present while a third person is subjected or exposed to abuse, ill-treatment, violence or other behaviour;

the alternatives to the making of an adoption order and the likely effect on the child in both the short and longer term of changes in the child's circumstances caused by an adoption, so that adoption is determined among all alternative forms of care to best meet the needs of the child; and

any other fact or circumstance that the Court thinks is relevant.

RECOMMENDATION 5

Before making an order for adoption, the Court must find the applicant/s suitable to adopt the particular child, having regard to all relevant matters and in particular:

the best interests of the child;

in the event of an open adoption, that a [satisfactory] adoption agreement has been negotiated;

the Cultural Heritage Placement Principle;

the Aboriginal Child Placement Principle; and

the Torres Strait Islander Child Placement Principle.

RECOMMENDATION 6

The effect of s 51 of the Adoption Act should be retained. This section prohibits persons acting without the authority of an agency

to conduct negotiations or make arrangements with another person, or

to transfer possession or control of a child to another person

with a view to the adoption of the child by that person.

RECOMMENDATION 7

The Court should retain responsibility for making adoption orders, subject to the introduction of automatic recognition of overseas orders in certain circumstances.

RECOMMENDATION 8

The language of the legislation should reflect the contemporary approach to adoption. In particular, it should reflect the moderation of secrecy in adoption and avoid language which fosters notions of "ownership" of children, while recognising the profound changes in legal status which occur.

RECOMMENDATION 9

Section 35 of the Adoption Act (which sets out the general effect of adoption orders) should be amended to provide in substance:

that the adopted child shall be regarded in law as the child of the adopter or adopters and the adopter or adopters shall be regarded in law as the parent or parents of the adopted child;

that the adopted child shall cease to be regarded in law as the child of the birth parents and the birth parents shall cease to be regarded in law as the parents of the adopted child;

that the adopted child shall have the same rights in relation to the adopter and adopters as a child born to the adopter or adopters; and

that the adopter or adopters shall have the same rights and obligations in relation to the adopted child as the parent or parents of a child born to such adopter or adopters.

RECOMMENDATION 10

The legislation should expressly state that adoption is a service for children, not a service for adults wishing to acquire the care of a child.

RECOMMENDATION 11

The present system of licensing established by s 10 and 11 of the Adoption Act (under which, respectively: a charitable organisation may apply to the Director-General for approval as a private adoption agency; and the Director-General may grant or refuse the application on certain grounds and subject to certain conditions and requirements) should be retained.

RECOMMENDATION 12

Section 34 of the Adoption Act (which appoints the Director-General guardian of a child awaiting adoption) should be retained and its application extended to a non-citizen child upon that child entering Australia.

RECOMMENDATION 13

The Court should have the power, on the application of any interested person (including the child) or of its own motion, at any time between the giving of consent (or its dispensation) and the making of an adoption order and, in the case of intercountry adoptions, from the time of allocation of the child, to do any one or more of the following:

- (a) appoint a preliminary hearing;
- (b) give such directions relating to the hearing of an application for adoption as the Court sees fit, including orders as to care and custody of the child and any order that a court has power to make at the final hearing;
- (c) determine who should be notified of the preliminary hearing and give such directions as to notification as the Court sees fit;
- (d) appoint a guardian ad litem for the child and give such directions relating to the role of the appointment as the Court sees fit;
- (e) direct that the child have legal representation;
- (f) direct that any person including the child and/or the prospective adoptive parents should or may attend personally before the Court at such time during the hearing of the application for adoption as the Court directs.

RECOMMENDATION 14

The Court should be required to ascertain and take into account the child's views, perceptions and feelings, provided that the child should not be obliged to express views. The views and wishes of the child should be given due weight by the Court in accordance with the child's age and maturity.

RECOMMENDATION 15

The existing provisions of s 25(1) of the Adoption Act should be amended

to allow an application for discharge to be made by the Director-General, Attorney-General or any other interested person; and

to give the Court the power to require the Director-General to investigate the circumstances of any application for discharge and report back to it.

In all other respects s 25 should be retained.

RECOMMENDATION 16

The provisions of the *Adoption Information Act 1990* (NSW) should be merged with the Adoption Act and the new legislation be described as the “*Adoption Act*”.

RECOMMENDATION 17

The legislation should reproduce the substance of the offences in the Adoption Act, except those offences under s 49 and 49A which are designed to prevent members of the birth family from interfering with the adoption process or the adoptive family. These latter offences should be repealed.

RECOMMENDATION 18

The adoption proceedings should continue to be heard in a closed court, except as otherwise ordered by the Court.

RECOMMENDATION 19

Section 66 of the Adoption Act (which provides that, except as the Court otherwise orders, the contents of agency reports must not be disclosed to anyone) should be retained.

RECOMMENDATION 20

Section 65 of the Adoption Act (which allows the Court to act upon evidence which, in its opinion, may assist it to deal with the matter at hand, whether or not the evidence is in admissible form) should be retained.

RECOMMENDATION 21

The New South Wales Government should give consideration to a reference of power over adoption to the Commonwealth, in consultation with the other States and the Commonwealth.

RECOMMENDATION 22

The New South Wales Government should negotiate with the Commonwealth with a view to having the provisions of the Family Law Act relating to step-child adoption repealed, or rendered inapplicable to New South Wales.

RECOMMENDATION 23

Jurisdiction over adoption should be transferred to the Family Court. In the meantime, the adoption jurisdiction should continue to be exercised by the Supreme Court of New South Wales.

RECOMMENDATION 24

The present appeals and review system should continue. Any external appeals process to general tribunals on decisions relating to the selection of adoptive parents should not be allowed.

RECOMMENDATION 25

Section 18 of the Adoption Act should be amended as follows:

Subject to this Act, the Court may, on application, make an order for the adoption of a person who:

- (a) had not attained the age of eighteen years on the date on which the application was filed in the Court; or
- (b) had attained that age before that date and, prior to attaining that age and for at least five years:
 - (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 *Children (Care and Protection) Act 1987* (NSW), been in the care or custody of the applicant or applicants or of the applicant and a deceased spouse of the applicant.

RECOMMENDATION 26

The marital status of the person to be adopted should be irrelevant to the making of an adoption order.

RECOMMENDATION 27

Section 26(6) of the Adoption Act, which provides that consents of certain persons, such as the parents or guardians of a child, are not required in the case of a child who has attained the age of 18 years before the making of the adoption order, should be retained.

RECOMMENDATION 28

Adult applicants for adoption should be able to apply directly to the Court for an adoption order, without the need to obtain the consent or support of the Director-General or an agency.

RECOMMENDATION 29

A report to the Court by the Director-General, pursuant to s 21 of the Adoption Act, should not be required in the case of adult adoptions.

RECOMMENDATION 30

The legislation should permit an adoption order to be made in favour of step-parents and relatives providing that

the child has an established relationship of at least five years' duration with the applicant to adopt;

consent to the proposed adoption has been specifically given by the "appropriate person/s" in accordance with, and as defined in, s 26 of the Adoption Act; and

an order for adoption would make better provision for the best interests of the child than parenting orders under the Family Law Act or any other order for the care of the child.

RECOMMENDATION 31

An order for adoption should be permitted in favour of a step-parent solely. An order for adoption in favour of a step-parent should not have legal effect on the parental relationship between the child and the parent with whom the step-parent is cohabiting.

RECOMMENDATION 32

Applications for adoption by step-parents or relatives should, like other adoptions, be made with the consent of the Director-General or on behalf of the applicants by the Director-General or by the Principal Officer of an authorised adoption agency.

RECOMMENDATION 33

The Court should not be able to dispense with the making of a DOCS report in step-parent and relative adoptions.

RECOMMENDATION 34

In relation to applications to adopt children in care:

- (a) Section 18(2) of the Adoption Act (which requires applicant/s to obtain agency support for the making of an adoption application, should be retained.
- (b) The Court should not make an order for adoption in favour of the child's foster parents unless:
 - the Director-General and/or the agency have made a report to the Court; and
 - the order makes better provision for the best interests of the child than parenting orders under the Family Law Act or any other order for the care of the child.

RECOMMENDATION 35

In relation to applications to adopt children in private placements:

- (a) Section 18(2) of the Adoption Act, which requires applicants to obtain agency support for the making of an adoption application, should be retained.
- (b) The Court should not make an order for adoption in favour of the applicants unless:
 - the Director-General and/or the agency have made a report to the Court; and
 - the order makes better provision for the best interests of the child than parenting orders under the Family Law Act or any other order for the care of the child.

RECOMMENDATION 36

Section 68A of the Adoption Act (which gives the Director-General power to provide financial or other assistance to prescribed children) should be retained.

RECOMMENDATION 37

Legislation should provide that

- consent to adoption of a child cannot be given until 30 days after the birth of that child;

thirty days after consent has been given, consent becomes irrevocable;

at least seven days before the last day on which consent can be revoked, the person or child giving consent must be notified in writing by the relevant agency that he or she has a right to revoke consent by a day specified in the notice; and

an adoption order cannot be made before the revocation period expires.

RECOMMENDATION 38

Consents to adoption should continue to remain “general,” that is, not nominating identified adoptive parents, except where the child is to be adopted by a step-parent or relative or where consent is given by a child to his or her own adoption. In those cases the consent should be “specific”, that is, nominating the applicants to adopt.

RECOMMENDATION 39

Where the child to be adopted is in foster care or in a private placement, the birth parents or guardians of a child may give consent to either the adoption of the child by any persons (general consent) or, the adoption of the child by the child’s foster parents or carers (specific consent), providing those foster parents or carers have had care of the child for not less than two years.

RECOMMENDATION 40

The prescribed forms of consent for a general consent, a step-parent or relative consent or consent by a child who has attained the age of 12 years should:

be written in plain language;

clearly state the legal effect of signing;

include information as to who has guardianship of the child after the consent has been given, but prior to the adoption order;

state the last date up until which the consent can be revoked;

give clear instructions as to how to revoke consent and make clear that the process can be begun again at any time;

include information on the ability of the birth parent or guardian to have access to the child in the period between giving consent and the time consent becomes irrevocable;

provide for the consent to be witnessed; and

state that the person giving consent must be provided with a copy of all forms signed by him or her.

RECOMMENDATION 41

The Statement of Requests form (Form 6) prescribed under the Adoption Regulation 1995 (NSW) should be used in taking general consent and consent from a child who has attained the age 12 years. A statement of wishes as to the religious upbringing of the child and the religion of the adoptive parents should be removed from the general consent form (Form 1) and included in Form 6.

RECOMMENDATION 42

The witness to a general, step-parent or relative consent or consent by a child who has attained the age of 12 years must complete a separate statement on the instrument of consent attesting that he or she:

witnessed the birth parent, guardian or child give consent;

sighted documents of identity of the person or child giving consent;

is satisfied that at least 14 days before the date on which consent was given, the person or child giving consent was provided with a copy of the consent form and with written information about the adoption by the Director-General of DOCS or the principal officer of a private adoption agency, including information on the legal implications of adoption, the alternatives to adoption and the legal consequences of signing the consent;

has attached a report prepared by a social worker or psychologist accredited by the Director-General of DOCS (who is not the caseworker for the applicants and is not the agency case worker for the birth parent or child) being the independent counsellor stating that the independent counsellor:

- (a) has explained to the person or child giving consent the legal effects of an adoption and procedures including the procedure for revoking the consent to adoption, and is satisfied that the person or child giving consent understands these procedures and the effect of signing the consent;
- (b) has counselled the person or child giving consent on the emotional effects of adoption and the alternatives to adoption, including, in relation to birth parents, the feasibility of keeping the child; and
- (c) that the independent counsellor is not aware of any mental, emotional or physical unfitness of the person or child giving consent to provide consent.

RECOMMENDATION 43

The witness to a general, step-parent or relative consent or consent by a child who has attained the age of 12 years may be any person capable of witnessing a signature and being satisfied as to the identity of the signatory. It is not necessary that the witness be a person belonging to one of the categories presently set out in clause 22 of the Adoption Regulation.

RECOMMENDATION 44

The consent forms for the guardian of a ward under the *Children (Care and Protection) Act 1987* (NSW) and guardian of a non-citizen child awaiting adoption under the *Immigration (Guardianship of Children) Act 1946* (Cth) should continue to be attested by a witness prescribed by clause 22 of the Adoption Regulation in the manner set out in the present Forms 2 and 3 in Schedule 1.

RECOMMENDATION 45

Legislation should provide that the Court must not make an adoption order unless it is satisfied, among other things, that it has received the instrument of consent in the prescribed form.

RECOMMENDATION 46

Legislation should provide that consent to the adoption of a child under 18 years should be obtained from every person who is a parent or guardian of a child or who has parental responsibility for the child, except in the following circumstances:

where the child in respect of whom an adoption application is made has attained the age of 12 years, in which case consent is only obtained from the child;

the parent or guardian or person who has parental responsibility for the child is the applicant for the adoption order; or

the consent has been dispensed with by a Court order.

RECOMMENDATION 47

The legislation should require the agency to make reasonable efforts to locate the birth father and notify him of the proposed adoption and his rights in relation to his child.

RECOMMENDATION 48

The legislation should require the agency to give notice of the proposed adoption and information concerning participation in open adoption to any person who has actual care of the child.

RECOMMENDATION 49

A child who has attained the age of 12 years must consent to his or her adoption, unless the Court is satisfied that there are special reasons related to the best interests of the child why the adoption order should be made, notwithstanding that the child has refused to consent.

RECOMMENDATION 50

The consent of a child who has attained the age of 12 years to his or her adoption should be the only consent required.

RECOMMENDATION 51

The agency must provide a child who has attained 12 years of age with independent counselling prior to signing any consent and during any period of revocation of consent.

RECOMMENDATION 52

The first name of a child over the age of 12 months should not be changed on the making of an adoption order unless the Court is satisfied that there are special reasons relating to the best interests of the child that would justify a change of his or her first name.

RECOMMENDATION 53

A child who has attained the age of 12 years must consent to any change in his or her first name, unless the Court is satisfied that there are special reasons related to the best interests of the child why his or her first name should be changed, notwithstanding that the child has refused to consent.

RECOMMENDATION 54

Before the Court approves a change in the child's first names or surname, it must ascertain and give due consideration to the child's wishes and feelings on this point, having regard to the age and understanding of the child.

RECOMMENDATION 55

Section 32(1) of the Adoption Act should be amended as follows:

The Court on application made in accordance with subsection (1A), may, by order, dispense with the consent of a person (other than the child) to the adoption of a child where it appears to the Court that:

- (a) after reasonable inquiry, that person cannot be found or identified;
- (b) that person is in such a physical or mental condition as not to be capable of properly considering the question whether the person should give his or her consent;
- (c) the Court is satisfied that it is necessary to override the wishes of the parent or guardian in order to give effect to the best interests of the child.

RECOMMENDATION 56

The consent of a child who has attained 18 years of age prior to the making of an adoption order cannot be dispensed with by the Court.

RECOMMENDATION 57

The legislation should provide that the Court must not make an order for the adoption of a child unless it is satisfied that the applicant or each of the applicants is or are:

resident or domiciled in New South Wales at the time of making the application;

over the age of 21 years and a minimum of 18 years older than the child (unless the applicant is a birth parent or relative of the child); and

of good repute and a fit and proper person/s to fulfil the responsibilities of a parent.

RECOMMENDATION 58

The legislation should permit an adoption order to be made in favour of either a couple (whether married or living in a de facto heterosexual or homosexual relationship) or a single person.

RECOMMENDATION 59

The legislation should require joint applicants to have been cohabitating for a continuous period of not less than three years before applying for an adoption order.

RECOMMENDATION 60

The legislation should require that a step-parent applicant has been cohabitating with the child's parent for a continuous period of not less than three years before applying for an adoption order.

RECOMMENDATION 61

The parties to the adoption should reach agreement as to openness prior to the placement of the child with the adoptive family.

RECOMMENDATION 62

In applying for an adoption order, the parties must present to the Court their agreement for openness in the adoption. Prior to making an adoption order, the Court must be satisfied that the proposed arrangements are in the child's best interests and are proper arrangements in the circumstances.

RECOMMENDATION 63

Adoptive parents of children under 18 years of age and adult adoptees should have the option of applying for a birth certificate in one or both of two forms:

The first form should be exactly the same as the amended birth certificate which is currently issued for an adoptee, showing details of the adoptive parents and adoptive siblings, if any.

The second form should be divided into two sections. The top section should show details of the birth parents and any birth siblings. The bottom section should show details of the adoptive family and the date of adoption.

RECOMMENDATION 64

Where one of two joint applicants to adopt dies before the making of the Adoption Order, the surviving adoptive parent should have the right to apply to the Registry of Births, Deaths and Marriages for a notation as to the deceased's intention to adopt the child to be entered on the child's amended birth certificate.

RECOMMENDATION 65

Agencies should continue to devote resources to post-adoption support, including provision of mediation services by appropriately qualified workers.

RECOMMENDATION 66

"Cultural heritage" should be defined, for the purposes of the legislation, to include:

"beliefs, morals, laws, customs, religion, superstitions, art, language, diet, dress and race".

RECOMMENDATION 67

Legislation should require DOCS or the agency to take all reasonable steps to establish the cultural heritage of the child to be adopted.

RECOMMENDATION 68

A Cultural Heritage Placement Principle should be applied to every placement for adoption. The Cultural Heritage Placement Principle should take the following form:

When a child in need of permanent care is to be placed outside his or her birth family, then the order for priority of placement should be:

1. with an applicant or applicants of the same cultural heritage as the child;
2. with an applicant or applicants of a similar or compatible cultural heritage as the child;
3. with an applicant or applicants of a different cultural heritage from the child, who have demonstrated:

the capacity to assist the child to develop a healthy and positive cultural identity;

a willingness to learn about and teach the child about his or her cultural heritage;

a willingness to foster links with that heritage in the child's upbringing; and

the capacity to help the child should he or she encounter racism or discrimination in school or in the wider community.

RECOMMENDATION 69

The legislation should contain a statement 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.

RECOMMENDATION 70

The legislation should define an Aboriginal child as one of Aboriginal descent.

RECOMMENDATION 71

The legislation should require DOCS or an agency to make reasonable inquiry as to whether the child to be adopted is an Aboriginal child.

RECOMMENDATION 72

The legislation should deal expressly with the placement of Aboriginal children by the inclusion of an Aboriginal Child Placement Principle.

RECOMMENDATION 73

If, on reasonable inquiry, DOCS or the agency is satisfied that a child is Aboriginal, DOCS or the agency should apply the following Aboriginal Child Placement Principle in placing the child:

The first preference for placement of an Aboriginal child should be with an applicant or applicants belonging to the community, or one of the communities, to which the birth parent or birth parents of the child belong.

If it is not practicable or not in the best interests of the child to place him or her in accordance with the first preference, then the child should be placed with an applicant or applicants of another Aboriginal community.

If it is not practicable or not in the best interests of the child to place him or her in accordance with the first or second preferences, then the child should be placed with a non-Aboriginal applicant or applicants. The Court must be satisfied that the applicant or applicants have the capacity to assist the child to develop a healthy and positive cultural identity and are willing to learn about, and teach the child about, his or her Aboriginal heritage and foster links with that heritage in the child's upbringing.

RECOMMENDATION 74

In considering an application for adoption of an Aboriginal child, the Court must be satisfied that the Aboriginal Child Placement Principle has been properly applied.

RECOMMENDATION 75

Where DOCS or a private adoption agency has determined that a child to be placed for adoption is Aboriginal, prior to taking consent to the adoption, a consultation should be arranged between the birth parent(s) and an approved Aboriginal agency for the purpose of exploring the possibility of arranging care for the child in accordance with Aboriginal customary law.

RECOMMENDATION 76

If a birth parent refuses to consult face to face with the Aboriginal agency, the birth parent should be provided, at least 7 days before the taking of a consent, with an information kit prepared by the Aboriginal agency and setting out the matters that would have been canvassed by it in a consultation. When signing the consent form, the birth parent must sign an acknowledgement that he or she has read and understood the matters contained in the information kit.

RECOMMENDATION 77

The legislation should require the involvement of both an Aboriginal adoption worker employed by DOCS, or the private adoption agency, and an Aboriginal agency at all times in the placement process following taking consent for the adoption of the child.

RECOMMENDATION 78

Section 19(1A)(c) of the Adoption Act,(which allows people married by Aboriginal tradition to adopt) should be retained.

RECOMMENDATION 79

A Torres Strait Islander child should be defined as one of Torres Strait Islander descent.

RECOMMENDATION 80

The legislation should require DOCS or an agency to make reasonable inquiry as to whether the child to be adopted is a Torres Strait Islander.

RECOMMENDATION 81

The legislation should deal expressly with the placement of Torres Strait Islander children by the inclusion of a Torres Strait Islander Child Placement Principle.

RECOMMENDATION 82

If, on reasonable inquiry, DOCS or the agency is satisfied that a child is a Torres Strait Islander, DOCS or the agency should apply the following Torres Strait Islander Child Placement Principle:

The first preference for placement of a Torres Strait Islander child should be with the child's extended family.

If it is not practicable or not in the best interests of the child to place him or her in accordance with the first preference, then the child should be placed with an applicant or applicants from the community, or one of the communities, to which the birth parent or birth parents belong.

If it is not practicable or not in the best interests of the child to place him or her in accordance with the first or second preferences, then the child should be placed with an applicant or applicants of another Torres Strait Islander community.

If it is not practicable or not in the best interests of the child to place him or her in accordance with the first, second or third preferences, then the child should be placed with a non-Torres Strait Islander applicant or applicants. The Court must be satisfied that the applicant or applicants have the capacity to assist the child to develop a healthy and positive cultural identity and are willing to learn about, and teach the child about, his or her Torres Strait Islander heritage and foster links with that heritage in the child's upbringing.

RECOMMENDATION 83

In considering an application for adoption of a Torres Strait Islander child, the Court must be satisfied that the Torres Strait Islander Child Placement Principle has been properly applied.

RECOMMENDATION 84

Where DOCS or an agency has determined that a child to be placed for adoption is a Torres Strait Islander, prior to taking consent to the adoption, a consultation should be arranged between the birth parent(s) and an approved Torres Strait Islander agency for the purpose of exploring the possibility of arranging care for the child in accordance with Torres Strait Islander customary law.

RECOMMENDATION 85

If a birth parent refuses to consult face to face with the Torres Strait Islander agency, the birth parent should be provided, at least 7 days before the taking of a consent, with an information kit prepared by the Torres Strait Islander agency and setting out the matters that would have been canvassed by it in a consultation. When signing the consent form, the birth parent must sign an acknowledgement that he or she has read and understood the matters contained in the information kit.

RECOMMENDATION 86

The legislation should require the involvement of a Torres Strait Islander agency at all times in the placement process following taking consent for the adoption of the child.

RECOMMENDATION 87

Section 50 of the Adoption Act (which makes it an offence to make, give or receive payment or reward for the making of any arrangements for adoption, other than authorised expenses or fees, and which applies equally to local and intercountry adoptions) should be retained.

RECOMMENDATION 88

Payment of expenses reasonably incurred in the adoption, including reasonable legal expenses and expenses incurred by the sending country, but excluding compulsory donations, should continue to be authorised under the legislation.

RECOMMENDATION 89

Legislation should stipulate that unexpended monies paid in advance by applicants must be refunded at the completion of an adoption.

RECOMMENDATION 90

Legislation should prohibit applicants from having any contact, direct or indirect, with birth parents until the child has been allocated to those applicants by the overseas adoption authority and the allocation has been approved by DOCS and accepted by the applicants.

RECOMMENDATION 91

DOCS should be designated by appropriate Federal laws as the Central Authority in New South Wales having the authority, within New South Wales, over intercountry adoption given to Central Authorities by the Hague Convention.

RECOMMENDATION 92

No person or body other than DOCS should be permitted to:

- receive expressions of interest;
- decide whether or not to approve an applicant;
- issue approval/non-approval letters;
- seal the home study as an original;
- administer the appeal process in circumstances of non-approval; and
- approve an allocation made by the overseas authority.

RECOMMENDATION 93

Existing parent support groups, or any other non-government organisation, should be eligible to apply to be accredited to undertake the arrangement of intercountry adoptions.

RECOMMENDATION 94

Sections 10 and 11 of the Adoption Act (which provide, respectively, that a charitable organisation can apply for approval as a private adoption agency and that the Director-General may grant or refuse the application) should be retained.

RECOMMENDATION 95

Legislation should require an accredited body to be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.

RECOMMENDATION 96

Legislation should explicitly give DOCS the power to supervise an accredited body's composition, operation and financial situation and to require that an accredited body provide DOCS with audited accounts.

RECOMMENDATION 97

Legislation should provide for licensing requirements which restrict the directors, administrators and employees of an accredited body from receiving remuneration which is unreasonably high in relation to the services rendered.

RECOMMENDATION 98

Legislation should provide for licensing requirements which require DOCS and accredited bodies to act expeditiously in the process of an adoption.

RECOMMENDATION 99

Legislation should provide for licensing requirements which authorise accredited bodies to perform the following functions:

- to conduct information, preparation and education seminars;
- to assess expressions of interest;
- to arrange for assessment of applicants and preparation of the home study by an appropriate professional;
- to provide counselling;
- to prepare and collate required documentation;
- to forward adoption documentation to the overseas authority;
- to liaise and negotiate with the overseas authority;
- to receive allocation notifications;
- to arrange for the preparation of post-placement reports by an appropriate professional;
- to provide to DOCS and the overseas authority post-placement reports; and
- to obtain an adoption order in New South Wales, where applicable.

RECOMMENDATION 100

Legislation should provide for licensing requirements which prohibit accredited bodies being involved in fund raising, sponsorship and the sending of aid to an institution with which it has an intercountry adoption program.

RECOMMENDATION 101

Clause 29(2) of the Adoption Regulation (which provides that, before placing a child from overseas for adoption, the Director-General must obtain a report about the social, developmental and medical history of that child and his or her family) should be retained.

RECOMMENDATION 102

DOCS and the accredited agency must ensure that information received by them concerning the child's origin, identity of birth parents and medical history is preserved and that access to such information is given to the adoptive parents and to the child, in accordance with the *Adoption Information Act 1990* (NSW).

RECOMMENDATION 103

The State Government should negotiate with the Federal Government to include in conditions for the granting of an adoption visa the requirement that applicants travel to collect their allocated child.

RECOMMENDATION 104

Sections 46 and 47 of the Adoption Act (which provide, respectively, for the recognition of foreign adoptions where the adopters have been resident for at least 12 months or domiciled in the foreign country and for declarations of validity of such foreign adoptions) should be retained, although not as the only circumstances in which foreign adoptions will be recognised.

RECOMMENDATION 105

Legislation should give to the Director-General the power to “designate” countries which have ratified the Hague Convention and/or which conduct intercountry adoption in accordance with the Hague Convention. An adoption order made in a “designated” country in accordance with the law of that country should have, so long as it has not been rescinded under the law in force in that country, the same effect as if it were an order for adoption made in New South Wales, unless the adoption is manifestly contrary to the principles and practice provided for by the New South Wales adoption legislation.

RECOMMENDATION 106

Where a child is adopted from a non-designated country, legislation should require that a declaration of validity of the foreign adoption order be obtained in New South Wales.

RECOMMENDATION 107

Legislation should neither specifically prohibit nor specifically allow social parents to adopt a child born of a surrogacy arrangement.

RECOMMENDATION 108

The general provisions of the legislation should apply to applications to adopt following a surrogacy arrangement, in accordance with the recommendations in Chapter 4 of this Report relating to intrafamily and private placements.

RECOMMENDATION 109

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. The issues of any required consents, suitability for such procedures, or the keeping of, and access to, information surrounding donor reproduction technology should be the subject of a separate review and dealt with in specific legislation.

RECOMMENDATION 110

Issues of genetic identity and access to information for children born as a result of embryo donation should not be dealt with in adoption legislation. The issues of any required consents, suitability for such procedures, or the keeping of, and access to, information surrounding embryo donation should be the subject of a separate review and dealt with in specific legislation.

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

1. Introduction

OVERVIEW OF THE REPORT

1.1 This Report represents the culmination of the New South Wales Law Reform Commission's review of the *Adoption of Children Act 1965* (NSW) ("the Adoption Act"). The terms of reference were received by the Commission on 1 December 1992 and are set out above at page xv.

1.2 The Commission began its review of the Adoption Act in December 1992 and released an Issues Paper for public discussion in May 1993.¹ This paper explained the present adoption law in New South Wales and outlined the nature of the Commission's inquiry. The Issues Paper was intended to promote discussion, and invited submissions, on topics relating to the legislative control of adoption and alternative legal approaches. A more extensive paper, Discussion Paper 34, was released for public comment in April 1994.² This Paper drew on further research done by the Commission and material from the many submissions and comments received following the release of the Issues Paper. The Discussion Paper presented provisional proposals for reform of adoption law.

1.3 This Report contains final recommendations for reform of the Adoption Act based on

an analysis of current research;

responses and information elicited from public consultations;

responses to Issues Paper 9 and Discussion Paper 34 from individuals and organisations in Australia and overseas, including adoption service providers and consumers;

information and statistics provided by other individuals and organisations; and

a consideration of legislation, policy and adoption law reviews from other jurisdictions.

Background to the review

1.4 The Commission began reviewing legislation regulating adoption in New South Wales by examining the operation of the *Adoption Information Act 1990* (NSW). The Commission published its Report *Review of the Adoption Information Act 1990* in July 1992.³ The 1990 Act was the subject of intense debate and lobbying, and involved sensitive issues of information and privacy concerning thousands of adults and children involved with adoption. The Commission undertook research and consultation in order to gain a thorough understanding of the impact of the Act on those to whom it applied. Whilst the Commission's Report concluded that the Act was operating successfully, the Commission made three major recommendations:⁴

an Adoption Information Exchange should operate to facilitate communication between all parties affected by adoption laws;

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

the Director-General of the Department of Community Services in New South Wales should have a discretion to limit access to identifying information in exceptional cases.

1.5 These recommendations were implemented in the *Adoption Information Amendment Act 1995* (NSW).⁵

1.6 In December 1993, the Commission commenced work on the review of the Adoption Act. The release of this Report represents the completion of the Commission's examination of adoption law in New South Wales.

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

1.8 A large body of material has become available since the 1960s relating to people's experiences with adoption. Community attitudes and laws have changed in relation to ex-nuptial birth, the roles of men and women, de facto relationships, and many other aspects of family and community life. Attitudes, laws and practice relating to openness in adoption have changed markedly. Developments in law and practice have recognised a need for greater flexibility in family arrangements and the benefits of inclusion of the birth family in the decision-making process.

1.9 Australia's increasing international obligations to protect children's rights and interests, arising under its ratification of a number of conventions, has also made it timely for New South Wales to consider the adequacy of its adoption legislation.⁶ In addition, the continued development of national family laws since the introduction of the *Family Law Act 1975* (Cth) has prompted a reconsideration of the scope of New South Wales adoption legislation. In other jurisdictions, both in Australia and overseas, adoption legislation has been reviewed and changed. Adoption practice in New South Wales itself has changed, reflecting social and community changes which are not similarly reflected in the Adoption Act.

1.10 This review has provided the opportunity to

bring adoption legislation into line with other areas of child law as well as enabling it to accommodate the changing social patterns of adoption more effectively.⁷

1.11 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 Act has never been comprehensively reviewed.

CONSULTATIONS AND PUBLICATIONS

1.12 Throughout the process of the review, the Commission consulted with groups, organisations and individuals who were interested in the reform of adoption legislation. The Commission made particular efforts to seek out the views of each of the interest groups involved. The review of the Adoption Act was advertised via newspapers, television, local and national radio, public hearings and posters placed in clinics and youth centres. Issues Paper 9 and Discussion Paper 34 were widely disseminated in New South Wales as well as in other Australian States and internationally. Members of the Commission have participated in conferences,⁸ Interdepartmental committees,⁹ education programs¹⁰ and Continuing Legal Education Seminars¹¹ in which the review and its possible effects have been discussed. The Commission also initiated contact with a number of groups, members of which may not necessarily have come forward on their own.

Issues Paper 9

1.13 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. Issues Paper 9 outlined the nature and scope of the review and made 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. The Commission received 148 submissions following the release of Issues Paper 9 and took a further 372 inquiries in relation to the issues for discussion.

1.14 In July 1993, the Commission held three public hearings. One hearing was devoted to the topic of intercountry adoption, while the other two hearings invited members of the public to discuss any other

issues relating to adoption in New South Wales. During the course of the public hearings, 45 individuals took the opportunity to express their views in an open forum. This provided a valuable source of information to the Commission.

1.15 Public hearings were not the only means by which individuals or organisations could participate. Throughout the period of the review, the Commission issued an open invitation for any persons to discuss their adoption experiences by way of comments and submissions in writing or by phone or facsimile. Some chose to meet with members of the Commission in person.

Discussion Paper 34

1.16 It is common, in a review as extensive as the present one, for the Commission to release a second interim paper for public discussion prior to finalising its recommendations. The Discussion Paper format is used by the Commission to set out draft proposals for reform for the purpose of eliciting community response prior to preparing a final Report for the Attorney General.

1.17 This second step was considered to be particularly important in the context of this review because many of the proposals for reform in Discussion Paper 34 departed from the principles of adoption that had been fundamental to the drafting of the Adoption Act. Discussion Paper 34 also analysed reform issues in adoption, evaluated current legislation and discussed potential solutions to problems raised in submissions. This depth of detail allowed readers to contemplate the effect particular recommendations may have and to respond to the reasoning behind each of the provisional proposals.

1.18 Following the release of Discussion Paper 34, the Commission received a further 570 submissions, responses and inquiries from organisations and members of the public. After receiving the majority of submissions, the Commission then arranged further consultations on issues that either had not been addressed in submissions, or where further work was required to interpret the community's response.

Research Reports: Intercountry Adoption and Parent Support Groups; the Aboriginal Child Placement Principle

1.19 1994 was the International Year of the Family and grants were made available to conduct research aimed at families in Australia. In the period following the release of the Discussion Paper, the Commission put forward a submission to the International Year of the Family Secretariat, requesting funding for two projects addressing issues for families in New South Wales. Research for the Discussion Paper highlighted the lack of empirical data in the areas of intercountry adoption and the adoption of indigenous children. The Commission's proposals, *Overseas Adoption* and *Adoption within the Aboriginal Community* were approved. Funding of \$40,000 was made available to the Commission for the preparation of two research papers.

1.20 Research Report 6, *Intercountry Adoption and Parent Support Groups In New South Wales* provides a profile of each of the parent support groups currently involved in the process of intercountry adoption in New South Wales. The differences between the groups, in terms of their approach to the role of a parent support group, the extent of their involvement in the adoption process, their structure and style of operation are examined.

1.21 Research Report 7, entitled *The Aboriginal Child Placement Principle* evaluates the application of the Aboriginal Child Placement Principle ("the Principle") as found in s 87 of the *Children (Care and Protection) Act 1987* (NSW). The aim of the research was to evaluate the effectiveness of the Principle in placing Aboriginal children with Aboriginal people for fostering and adoption.

1.22 The Commission studied the child welfare and adoption legislation, and obtained data from the government departments responsible for child welfare, in each State and Territory. It also examined all expressions of the Principle set out in departmental policy documents. Information was also sought from Aboriginal and Torres Strait Islander child care agencies throughout Australia. The Research Report provides a statistical picture of the placement of Aboriginal and Torres Strait Islander children in Australia. However, this picture is limited by reason of the widespread failure to record data concerning

Aboriginal and Torres Strait Islander child welfare in many of the responsible government departments throughout Australia. The paucity of data raises questions about the accountability of these departments in relation to their implementation of the Principle.

1.23 The research revealed that there is still a significant proportion of Aboriginal children placed with non-Aboriginal foster and adoptive parents, although this proportion appears to be slightly lower in those States and Territories which have included the Principle in legislation. The Research Report also examines factors which prevent the effective operation of the Principle.

1.24 The value of these Research Reports lies not only in their being a source of information in areas where this has been lacking, but in their being an integral part of the research process, aiding the Commission in reaching its final recommendations in the review. This Report refers to material contained in the Research Reports where that material has been relevant to the formulation of particular recommendations.

OUTLINE OF THE REPORT

1.25 Throughout the Report, certain abbreviated terms are used. These are as follows:

The *Adoption of Children Act 1965* (NSW) is abbreviated to “the Adoption Act”.

The *Adoption of Children Regulation 1995* (NSW) is abbreviated to “the Adoption Regulation”.

The *Family Law Act 1975* (Cth) is abbreviated to “the Family Law Act”.

The New South Wales Department of Community Services is abbreviated to “DOCS”.

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

The New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965* (NSW) (Discussion Paper 34, April 1994) is abbreviated to DP 34.

“Court” is used to refer to the Supreme Court of New South Wales, unless otherwise specified.

The term “submission” is used to refer to both written and oral submissions, whether formally or informally couched, including submissions made in consultations or face-to-face meetings.

The term “legislation” is used to refer to statutes, regulations, rules, orders in council and other legislative instruments. In making its recommendations for legislative reform, the Commission has not embarked on determining in what legislative instrument a reform should be contained.

1.26 All legislation referred to, whether legislation of New South Wales, another State of Australia or overseas, is legislation current as at 31 December 1996.

1.27 The Report consists of this introductory chapter and ten further chapters as follows.

Chapter 2 looks at the purposes and philosophy of adoption and evaluates adoption as an option for the permanent care of children. It reconsiders three key features of the Adoption Act, namely, that the child’s welfare and interests are paramount, that adoption should be judicially sanctioned and adoption services regulated by government and that there should be provision for secrecy. The significance of international treaties for the practice and regulation of adoption in New South Wales is discussed. The chapter also examines the legal effect of adoption orders. The chapter recommends guiding principles for the future conduct of adoption.

Chapter 3 examines certain procedural issues in the administrative and judicial process leading to an adoption and looks at some technical legal issues which do not fall readily within the other chapters.

Chapter 4 addresses particular concerns or considerations which arise in relation to the adoption of particular adoptees, namely, adults, step-children and other related children, children in care, children in private placements and children with special needs.

Chapter 5 considers consent requirements and the expression of the views of the child in the adoption process.

Chapter 6 gives an overview of the present law and practice in relation to eligibility requirements and the selection process. The chapter then considers the relevance of certain factors to eligibility and the desirability of specific legislative requirements relating to eligibility to adopt. The relationship between adoption legislation and the *Anti-Discrimination Act 1977* (NSW) is considered.

Chapter 7 begins with the general principle that adoption arrangements should be characterised by openness and honesty. It then considers whether, and if so how, the law should be reformed to ensure that this principle carries through to adoption practice.

Chapter 8 explores the value of cultural heritage and continuity of a particular cultural heritage for an adoptee. Recommendations are made as to ways in which adoption legislation and practice can promote cultural continuity in an adoption placement.

Chapter 9 considers separately the placement for adoption of children of Aboriginal or Torres Strait Islander descent. The chapter explains why the legislation should contain provisions specifically directed at these children.

Chapter 10 evaluates the concept of intercountry adoption, considers international treaties governing intercountry adoption, and critically examines current practices. The chapter also discusses the role of the Department of Immigration and Ethnic Affairs in intercountry adoption.

Chapter 11 looks at the relevance of reproduction technology and surrogacy to the legislative control of adoption.

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 of Children Act 1965* (NSW) (Discussion Paper 34, April 1994).
3. New South Wales Law Reform Commission *Review of the Adoption Information Act 1990* (Report 69, July 1992).
4. NSWLRC Report 69 at ix-x.
5. *Adoption Information Amendment Act 1995* (NSW) s 30-31E, s 15A-15J, s 12A.
6. For example, the *Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*, adopted by the General Assembly of the United Nations on 3 December 1986 and the *Convention on the Rights of the Child* adopted by the General Assembly of the United Nations on 20 November 1989 and ratified by Australia in 1990. The *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* has not been ratified yet by Australia, although it is expected to ratify in 1997, giving rise, when ratified, to further international obligations.
7. C Bridge "Changing the Nature of Adoption: Law Reform in England and New Zealand" (1993) 13 *Legal Studies* 1 at 81. This has also been the perceived aim of law reform proposals in the United Kingdom and New Zealand.

8. The 1994 Australian Adoption Conference *Has Adoption a Future?* Masonic Centre, (Sydney, August 29-31 1994) (organising committee and key note speech); New South Wales Department of Community Services, Adoption Branch Planning Day *The Review of the Adoption of Children Act* (Sydney, 15 March 1993); *First World Congress on Family Law and Children's Rights* Sydney Convention Centre Darling Harbour (Sydney, 4-9 July 1993).
9. The Interdepartmental Committee for the International Year of the Family 1994.
10. Infertility Awareness Week *Donor Sperm Information Night* (Royal Prince Alfred Hospital Medical Centre, 30 August 1994); Law Week 1995 *The Process of Law Reform* (Mitchell Library Gallery 2, 22 May 1995).
11. College of Law Continuing Legal Education Seminar *The Law of Adoption* (Masonic Centre, Sydney, 18 November 1994).

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

2. The Concept of Adoption

2.1 This chapter establishes a **policy framework** for the more detailed recommendations in this Report. It considers whether adoption should continue to exist at all and, concluding that it should, re-evaluates three key features of current adoption law and practice. The effect of international treaties on adoption law and the legal effect of adoption orders are also examined. Finally, this chapter recommends principles which should now guide adoption law and practice.

SHOULD ADOPTION CONTINUE TO EXIST?

2.2 DP 34 outlined the views of both supporters and critics of the continued existence of adoption.¹ The Commission proposed that the concept of adoption be maintained but its regulation and practice be amended to accommodate relevant criticisms.²

2.3 The approach of the Commission was overwhelmingly supported in submissions. The submissions showed there is widespread community support for the continuation of adoption. Adoption is a well understood and familiar legal concept in Australia and in many other countries. It is recognised in international forums. Most submissions indicated there is a relevant and valued place for adoption today as one in a range of alternative care options for children unable to be cared for by their birth parents. It is the most long-term and permanent substitute care option since it severs a child's legal ties with his or her birth parents and creates new and permanent legal ties with his or her adoptive parents.

2.4 The legal permanency which adoption provides can offer a child stability, security, continuity of relationships, a sense of belonging and identity, and a defined legal status.³ However, submissions also cautioned that adoption was not always a suitable long-term alternative care plan for a child.⁴ In each case, the system should ensure, as far as possible, that thoughtful and informed decisions are made in relation to the needs of each child. This refers not only to the needs in existence at the time the adoption order is made but also to those that may arise later in the child's life. Adoption should only be considered where the circumstances of the particular child dictate that it is the alternative care order that best meets his or her needs.

RECOMMENDATION 1

Adoption should be maintained as one in a range of care alternatives for children.

THREE KEY FEATURES OF ADOPTION LAW RECONSIDERED

2.5 The Adoption Act was the first comprehensive treatment of adoption law in New South Wales. Many of its features remain today. It introduced three major changes to the law. The first was a provision that, in making orders relating to the child, the Court should regard the child's welfare and interests as "the paramount consideration."⁵ The second was to introduce a more comprehensive legal regulation which included the banning of privately-arranged adoptions, except within the extended family.⁶ The third feature was the introduction of provisions intended to shroud adoption in secrecy.⁷

CHILD'S WELFARE AND INTERESTS ARE THE PARAMOUNT CONSIDERATION

2.6 The first feature of the Adoption Act, the paramountcy of the child's welfare and interests as the principal determinant of adoption law and practice,⁸ is now uncontroversial. It was overwhelmingly supported in submissions, and is expressly provided for in the *United Nations Convention on the Rights of the Child* ("UNCROC").⁹ This means that the child's best interests must prevail over the interests of other parties in the adoption process. This applies to all aspects of the adoption process and extends beyond childhood interests into adult life.

2.7 An issue now arises as to whether the language in s 17 of the Adoption Act should be amended to reflect the widespread use of the phrase “best interests of the child”. At present, the language refers to “welfare and interests of the child”.

2.8 UNCROC uses the language “best interests of the child shall be the paramount consideration” in adoption.¹⁰ The *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (“the Hague Convention”) refers to the “best interests of the child”.¹¹ This language is reflected in the Family Law Act, which has been amended to replace “welfare” with “best interests of the child”.¹² The Explanatory Memorandum to the Act notes that this change is intended to be consistent with the language of UNCROC and is not intended to change the concept in the Family Law Act that the welfare of the child is the paramount consideration.¹³ For example, “interests” in relation to a child under the Family Law Act are defined as including “matters related to the care, welfare or development of the child”.¹⁴

2.9 The Adoption Act should refer to “best interests of the child” for consistency with the International Conventions and the Family Law Act.¹⁵ However, it should be recognised that this would not change the meaning of the present provisions in the Adoption Act which refer to “welfare and interests of the child.”

RECOMMENDATION 2

The principle that the best interests of the child is the paramount consideration in adoption law and practice should be maintained in the legislation, expressed in the phrase “best interests” rather than “welfare and interests”.

2.10 The final consideration is whether legislative guidance should be provided to the Court and administrative decision-makers as to the meaning of the phrase “best interests of the child” in the context of adoption.

2.11 “Best interests of the child”, like “welfare”, is an imprecise term.¹⁶ However, it is used as a standard with respect to children in many areas of law, both international¹⁷ and domestic.¹⁸ With statutory guidance as to its meaning it can be effective.¹⁹

2.12 A list of matters which should be taken into account by the Court when considering the “best interests of the child” would assist the Court in applying the principle. It would provide the Court with a checklist of issues to be considered before making the adoption order. Similar legislative considerations now apply in the Family Law Act.²⁰ Considerations as to the “best interests of the child” contained in the Family Law Act can form the basis for considerations appropriate to adoption.

RECOMMENDATION 3

The Court should not make an adoption order unless it considers that the making of the order would make better provision for the best interests of the child than parenting orders under the *Family Law Act 1975* (Cth) or any other order for the care of the child.

RECOMMENDATION 4

In determining what is in the child’s best interests in adoption, the Court should have regard to:

any wishes expressed by the child and any factors (such as the child’s maturity or level of understanding) that the Court thinks are relevant to the weight it should give to these wishes;

the child’s age, maturity, sex, background and family relationships, and any other characteristics of the child that the Court thinks are relevant;

the child's physical, emotional and educational needs, including the child's sense of personal, family and cultural identity;

the nature of the relationship which the child has with the applicant or each of the applicants, with relatives and with any other person in relation to whom the Court or agency considers the question to be relevant;

the attitude to the child and to the responsibilities of parenthood of each applicant;

the capacity of each applicant, or other relevant person, to provide for the needs of the child, including emotional and intellectual needs;

the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or being present while a third person is subjected or exposed to abuse, ill-treatment, violence or other behaviour;

the alternatives to the making of an adoption order and the likely effect on the child in both the short and longer term of changes in the child's circumstances caused by an adoption, so that adoption is determined among all alternative forms of care to meet best the needs of the child; and

any other fact or circumstance that the Court thinks is relevant.²¹

2.13 The Court should also be required under the Adoption Act to consider other central principles in the current approach to adoption. These principles are discussed in later chapters.²²

RECOMMENDATION 5

Before making an order for adoption, the Court must find the applicant, or each of the applicants, suitable to adopt the particular child, having regard to all relevant matters and in particular:

the best interests of the child;

where an adoption plan has been negotiated, that it is a proper one in the circumstances;

the Cultural Heritage Placement Principle;²³

the Aboriginal Child Placement Principle;²⁴ and

the Torres Strait Islander Child Placement Principle.²⁵

Public regulation of adoption

2.14 The second feature of the Adoption Act, the comprehensive legal regulation of adoption, is also uncontroversial today.²⁶ Submissions overwhelmingly supported public regulation of adoption services and the judicial sanctioning of adoption. Such control is considered better than private placements in ensuring the child's interests come first in any contemplated adoption and that the best alternative family is sought for a child in need of permanent placement.²⁷ One submission observed that

the impetus [for] and focus of private arrangements are usually the needs of the adults: the rights and needs of the child may not be recognised or protected, birth parent's rights may be infringed.²⁸

2.15 Public regulation provides better safeguards for the protection of the rights of all parties involved in an adoption. This is highlighted in intercountry adoption where such regulation assists in preventing corrupt adoption practices and trafficking in children. The main features of the present legal regulation of adoption should therefore remain.

RECOMMENDATION 6

The effect of s 51 of the Adoption Act should be retained. This section prohibits persons acting without the authority of an agency

to conduct negotiations or make arrangements with another person, or

to transfer possession or control of a child to another person

with a view to the adoption of the child by that person.

RECOMMENDATION 7

The Court should retain responsibility for making adoption orders, subject to automatic recognition of overseas orders in certain circumstances.²⁹

Secrecy

2.16 This last feature of the Adoption Act, namely provisions for secrecy, has been greatly modified by recent developments, particularly by the *Adoption Information Act 1990 (NSW)*. It is now widely accepted that adoption practice should recognise the continuing importance of the birth link, with respect to both family and cultural ties. Children should be treated as individuals who have ties with people, by virtue of their birth, that cannot be eradicated. Adoption law should ensure that genealogical distortions, legal fictions, secrecy and non-legal severance of birth family ties should not occur.

2.17 One submission observed that many of the criticisms of past adoption practice, in particular its secrecy, severance of birth links, and disregard for cultural heritage, have been largely addressed by present adoption practice.³⁰

2.18 The Adoption Act does not reflect the policy of open adoption presently encouraged in practice by the agencies, a failing which should be remedied.³¹ Open adoption recognises the reality of two sets of parents and families in the child's life - birth and adopted. Although most submissions strongly supported legislating for open adoption, it should not become a rigid formula.³²

Children should have the right to information about their biological parents from the earliest age and they should have the ability to initiate or sustain contact with their birth parents or members of their family of origin. But contact should not be forced on a child who is unwilling.³³

2.19 Open adoption should be flexible rather than restrictive, accommodating changes over time.³⁴ It can include continuing contact between the child and important relatives and friends, as well as the birth parents.

2.20 Current views indicate that the law faces the difficult task of acknowledging the importance of birth relationships, while continuing to provide security for the adoptive parents in their care of adopted children, and providing appropriate protection for the privacy interests of the people involved in adoption. Open adoption is discussed in detail in Chapter 7 where specific recommendations are made.

SIGNIFICANCE OF INTERNATIONAL TREATIES

2.21 Australia has ratified UNCROC³⁵ and is likely to ratify the Hague Convention in the near future. These international treaties recognise the continued existence of adoption as a form of alternative care

for children whose parents cannot care for them and provide safeguards against the abuse of adoption.³⁶ Although such treaties do not restrict the power of the New South Wales Parliament,³⁷ adoption law, policy and practice in this State should conform to international treaties to which Australia is a party, unless there is a compelling reason to depart from them in some respects.³⁸

2.22 Australia's international treaty obligations with respect to children include:

the right of a child to express his or her views freely on all aspects of the adoption and for these views to be given due weight;

the opportunity for the child to be heard in any judicial or administrative proceedings relating to the adoption, either directly or through a representative;

the right of the child to contact with his or her birth parents; and

the same safeguards and standards being applied to a child adopted from another country as those applied to a child adopted in New South Wales.³⁹

LEGAL EFFECT OF ADOPTION ORDERS

2.23 The Adoption Act presently states that one of the consequences of adoption is that

the adopted child becomes the child of the adopter or adopters, and the adopter or adopters become the parent or parents of the child, as if the child had been born to the adopter or adopters in lawful wedlock.⁴⁰

2.24 Submissions agreed that the wording of s 35 of the Adoption Act should be amended to reflect the continuing relevance of the child's birth family, and generally agreed with the language proposed in DP 34.⁴¹ Several believed the legislation should also refer to the child's full and equal membership of the adoptive family.⁴² The National Children's and Youth Law Centre submitted that the language should reflect the wider development in family law to move away from concepts of children as property with "transfer[s] of ownership, naming rights and indefeasibility of title" and emphasise instead "parental responsibilities."⁴³ Such language would also be consistent with amendments to the Family Law Act.⁴⁴

RECOMMENDATION 8

The language of the legislation should reflect the contemporary approach to adoption. In particular, it should reflect the moderation of secrecy in adoption and avoid language which fosters notions of "ownership" of children, while recognising the profound and permanent changes in legal status which occur.

2.25 A general definition of the consequences of adoption should retain the important principle 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.

RECOMMENDATION 9

Section 35 of the Adoption Act (which sets out the general effect of adoption orders) should be amended to provide in substance:

that the adopted child shall be regarded in law as the child of the adopter or adopters and the adopter or adopters shall be regarded in law as the parent or parents of the adopted child;

that the adopted child shall cease to be regarded in law as the child of the birth parents and the birth parents shall cease to be regarded in law as the parents of the adopted child;

that the adopted child shall have the same rights in relation to the adopter and adopters as a child born to the adopter or adopters; and

that the adopter or adopters shall have the same rights and obligations in relation to the adopted child as the parent or parents of a child born to such adopter or adopters.

2.26 The proposed revision to s 35 properly describes the changes in relationship between the birth parents, adoptive parents and child which occur upon an adoption order.⁴⁵ Other features of an adoption order are dealt with elsewhere in the Act, for example: the need for adequate and informed parental consent prior to an adoption order; and, once consent is given, the largely irreversible nature of an adoption order.

GUIDING PRINCIPLES FOR THE PRACTICE OF ADOPTION

2.27 From the above overview emerge general principles which should guide adoption policy and practice. These principles underpin the other chapters in this Report and are as follows:

The best interests of the child must be the paramount consideration. This principle is discussed in paragraphs 2.6 to 2.12.

Adoption is a service to children and not a service to adults. Where adoption and its practice falls for consideration as a service, it must be viewed as a service provided to the child. It should not, for example, be seen as a service to the adult or adults wishing to create, complete or extend their families. The fact that it is not a service to adults should be made explicit in the legislation.⁴⁶

RECOMMENDATION 10

The legislation should expressly state that adoption is a service for children, not a service for adults wishing to acquire the care of a child.

No right to adopt a child exists. Adoption is a process to find parents to benefit children in need of permanent care, not to supply children for the benefit of adults wishing to create or extend their families. This is presently alluded to in clause 35 of the Adoption of Children Regulation.⁴⁷

The child's viewpoint should be respected.

A child should be able to preserve his or her own identity.

Respect for the child's viewpoint

2.28 Children should be consulted and able to participate as far as possible in their adoption. Their views, feelings and opinions should be encouraged and ascertained, and effectively conveyed and considered throughout the adoption process by the agencies and the Court.⁴⁸ In practice, if there is to be real and effective participation

children must be given the opportunity to discuss the adoption freely and openly;⁴⁹

they should not be misled on crucial background information;⁵⁰

they should be provided with clear and useful information, in a form they can understand; and

they should have the nature and effect of any decision which is likely to affect them fully explained.⁵¹

2.29 Children's views should not be undervalued. The age or maturity of a child should not determine whether or not these views are considered, but rather go to the weight reasonably given to these views.⁵² This includes, as far as possible, considering their wishes as to placement⁵³ and their consent to an adoption.⁵⁴ Where children find it difficult to explain or express their views, they should have access to independent assistance.⁵⁵

2.30 However, the right to participate does not mean a child has to take responsibility for choices with consequences he or she cannot understand or cope with,⁵⁶ nor should a child be *required* to express his or her wishes.⁵⁷

2.31 Where a child has the capacity to make balanced and informed decisions in relation to issues surrounding his or her adoption, the child's wishes should be accorded serious consideration in the adoption process.⁵⁸ In particular, legislation should provide defined age limits at which a child must give his or her consent to the adoption.⁵⁹

2.32 How the agencies and the Court can inform themselves of the wishes and feelings of children, including legal representation, is dealt with in Chapter 3. The child's views and the child's consent to an adoption are examined in Chapters 3 and 5 respectively. Recommendations in relation to these issues are made in those chapters.

Preserving the child's identity

2.33 A child should be able to retain, wherever possible, his or her own name. At present in New South Wales, upon adoption the child automatically takes the surname of his or her adoptive parents and takes such first names as the Court approves on the adoptive parents' application.⁶⁰ However, the Court can decide whether or not to change the surname of a child, if the child has been generally known by that surname prior to the adoption.⁶¹ A child of 12 years or older must consent to a change of his or her first name, unless the Court is satisfied that special reasons, relating to the child's best interests, justify a change of first name.⁶²

2.34 Since to be known by a name is an integral part of identity, all children of sufficient understanding and maturity should be independently consulted about any proposed changes to their first name and surname. The Court should give careful consideration to the child's wishes and feelings on this point.⁶³ This issue is considered in detail in Chapters 5 and 10.

2.35 Adoption law and practice should also assist a child in knowing his or her birth family and cultural background, in providing continuing contact with those who are important to his or her well-being, and in accessing and enjoying his or her cultural heritage.⁶⁴ In so doing, due regard should be paid by the Court and other decision-makers in the adoption process to the desirability of cultural continuity for the child. This is examined in Chapter 8. Cultural issues relating specifically to Aboriginal and Torres Strait Islander children are examined in Chapter 9.

FOOTNOTES

1. New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965 (NSW)* (Discussion Paper 34, April 1994) Chapter 3.
2. NSWLRC DP 34 at para 3.19.
3. NSW Department of Community Services *Submission* (5 September 1994) at 2, 3 and 12.
4. NSW Department of Community Services *Submission* (5 September 1994) at 2-3; Barnardos Australia *Submission* (26 July 1994).

5. *Adoption of Children Act 1965* (NSW) s 17.
6. s 27(1), 51 and 52.
7. See on this aspect of the legislation, New South Wales Law Reform Commission *Review of the Adoption Information Act 1990* (Report 69, July 1992) Chapter 2.
8. *Adoption of Children Act 1965* (NSW) s 17 states: "the welfare and interests of the child concerned shall be regarded as the paramount consideration".
9. *United Nations Convention on the Rights of the Child* Article 21.
10. Article 21.
11. *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* Preamble.
12. *Family Law Act 1975* (Cth) s 67ZC(2) (as amended by the *Family Law Reform Act 1995* (Cth)) replacing the earlier language in s 64(1)(a). See the Parliament of the Commonwealth of Australia, House of Representatives, *Family Law Reform Bill 1994*, Explanatory Memorandum, at paras 329 -330.
13. Parliament of the Commonwealth of Australia, House of Representatives, *Family Law Reform Bill 1994*, Explanatory Memorandum, at para 330.
14. *Family Law Act 1975* (Cth) s 60D(1) definitions.
15. Other provisions in the *Adoption of Children Act 1965* (NSW) which refer to the "welfare and interests of the child" include s 19(1A)(a)(iii) and (1B), 21(1)(c)(ii), 25(2) and (4), 33(1), 38(2A), 68A.
16. *Secretary, Department of Health and Community Services v J W B* (Marion's Case) (1992) 175 CLR 218 at 270-271 per Brennan J. However, the National Children's and Youth Law Centre *Submission* (29 July 1994) at 5-6 believes the term should be retained in legislation, with statutory guidance as to its meaning.

A fresh way of thinking of "best interests of the child" is proposed in a paper by J Eekelaar, "The Importance of Thinking that Children Have Rights" in P Alston, S Parker and J Seymour (eds) *Children, Rights and the Law* (Clarendon Press, Oxford, 1992) 221 at 228-230. Eekelaar postulates that policies towards children, including the "best interests of the child," should be framed in terms of children's rights ("rights-based approach") rather than in terms of promoting their welfare ("welfarism approach"). The welfarism approach requires adults to act towards children solely in accordance with the adult's perception of the child's welfare. The rights-based approach relies instead on children's claims. It requires a hypothetical judgment by the adult decision-maker of what duties children would want to be exercised towards them if they are fully informed of the relevant factors and of mature judgement. One benefit of the rights-based approach is that it does not abstract the child from his or her context.

17. *United Nations Convention on the Rights of the Child* Articles 3.1 and 20 and the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* Preamble.
18. See, for example, *Family Law Act 1975* (Cth) s 67ZC(2).
19. *Secretary, Department of Health and Community Services v J W B* (Marion's Case) at 271-272 per Brennan J.

20. *Family Law Act 1975* (Cth) s 68F(1), (2).
21. This list is drawn from the *Children Act 1989* (UK) s 1(3); *Adoption Bill 1996* (UK); and *Family Law Act 1975* (Cth) s 68F(2). See also the National Children's and Youth Law Centre *Submission* (29 July 1994) at 6.
22. See Chapters 7, 8, 9.
23. See Chapter 8.
24. See Chapter 9.
25. See Chapter 9.
26. NSWLRC DP 34 at paras 4.6-4.10. *United Nations Convention on the Rights of the Child* Article 21(a) upholds the legal regulation of adoption by competent authorities.
27. Anglican Adoption Agency *Submission* (26 August 1994).
28. NSW Department of Community Services *Submission* (5 September 1994) para 1.1 at 6.
29. See Chapter 10.
30. Anglican Adoption Agency *Submission* (26 August 1994).
31. Although the *Adoption of Children Regulation 1995* (NSW) Schedule 1 Form 6 provides for birth parent requests as to future information about the child. Note: For the purposes of this Chapter, "agencies" refers to both the Department of Community Services and the private adoption agencies unless the context otherwise requires.
32. National Children's and Youth Law Centre *Submission* (29 July 1994) at 6; Anglican Adoption Agency *Submission* (26 August 1994) at 4.1.
33. National Children's and Youth Law Centre *Submission* (29 July 1994) at 6-7.
34. Barnardos Australia *Submission* (26 July 1994).
35. *United Nations Convention on the Rights of the Child*, adopted by the General Assembly in November 1989 and ratified by Australia in December 1990.
36. For example, *United Nations Convention on the Rights of the Child* Articles 20 and 21.
37. Although binding in international law, ratification does not mean the Convention provisions form part of Australian domestic law. In *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 69 ALJR 423, the High Court held that Australia's ratification of the *United Nations Convention on the Rights of the Child* gives rise to a "legitimate expectation" that the decision-maker will exercise a statutory discretion in accordance with the terms of that Convention when considering the deportation of a convicted drug dealer who had Australian-born children. The *Administrative Decisions (Effect of International Instruments) Bill 1995* (Cth) was introduced as an attempt to minimise the impact of Teoh's case by narrowing the effect of such Conventions on administrative decisions under Australian domestic law. However the Bill was not passed and has since lapsed.
38. To achieve compliance with the provisions of the international Conventions to which Australia is a party, the National Children's and Youth Law Centre *Submission* (29 July 1994) at 2-3 suggests that at present the following points need to be incorporated in adoption law:

Free and independent counselling for birth parents - Prior to consent, birth parents should be offered free counselling by an independent trained counsellor who can explain the forms of support and assistance available to the parent or members of their extended family if the child is cared for within the family groups.

Independent representative for child - Prior to any adoption decision, the child should be entitled to representation before the court or tribunal. This applies to applications to dispense with consent and applications for an adoption order.

Maintenance of birth links - Adoption should preserve to the greatest extent possible (unless contrary to the child's best interests) the child's personal and family identity and should not deny or impede access of the child to information and, if the child wishes, contact with the birth parents or other members of the birth family.

Naming and personal identity - The adoptive parent(s) should not have the power to change a child's names when the child has reached an age when he or she is aware of his or her names, unless the child has expressed a wish to change his or her names.

39. See *United Nations Convention on the Rights of the Child* Articles 9.3, 12, and 21.
40. *Adoption of Children Act 1965* (NSW) s 35(1)(a).
41. Anglican Adoption Agency *Submission* (26 August 1994) at 4.2 commented on the present language of section 35: "... the adoptive parents are never the 'parents of the child as if the child had been born to them in lawful wedlock.' The birth parents are the biological genetic and genealogical parents, which implies a bond which cannot be broken."
42. National Children's and Youth Law Centre *Submission* (29 July 1994) at 5; Barnardos Australia *Submission* (26 July 1994); NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 13; NSW Department of Community Services *Submission* (5 September 1994) at 10; and Post Adoption Resource Centre (a service of the Benevolent Society of NSW) *Submission* (5 August 1994) at 4.
43. National Children's and Youth Law Centre *Submission* (29 July 1994) at 3.
44. See the *Family Law Reform Act 1995* (Cth) which amends the *Family Law Act 1975* (Cth). Parliament of the Commonwealth of Australia, House of Representatives, *Family Law Reform Bill 1994*, Explanatory Memorandum, at para 1 states this is a new approach to dealing with children which "emphasises the concept of parental responsibility for the care, welfare and development of children rather than giving parents any rights to custody and access, which tends to foster notions of ownership in children." This approach is based on the *Children Act 1989* (UK).
45. However, the proposed revision to the language of the *Adoption of Children Act 1965* (NSW) s 35 does not change the intention of the current provisions regarding succession and other dispositions of property upon an adoption order under s 35(2), 35(3), 36 and 37. Provisions such as *Children (Equality of Status) Act 1976* (NSW) s 5(2), and 9(3) (which relates to the status of children and dispositions of property), and the *Family Provision Act 1982* (NSW) s 7 would continue to have effect. Note that the *Children (Equality of Status) Act 1976* (NSW) is intended to be repealed shortly by the *Status of Children Bill 1996* (NSW) (which was assented to on 29 October 1996 but has not yet been proclaimed). However, cl 4(2) and 8(4) of the Bill re-enact in substance the provisions of the Act cited above.
46. See the *Adoption Act 1984* (Vic) s 32 which states: "In all matters relating to the exercise of powers and the performance of duties under this Act, the Director-General and the principal officer of an approved agency shall have regard to adoption as a service for the child." The Council of Social Welfare Ministers *Draft National Minimum Principles in Adoption*, July 1995 para 1.2 and *National Minimum Principles in Adoption*, June 1993 para 1.2 state: "Adoption is a service for children, not for adults wishing to acquire the care of a child."

47. *Adoption of Children Regulation 1995* (NSW) cl 35 states: “Nothing in this Regulation: (a) requires the Director-General or the principal officer of a private adoption agency to place a child for the purposes of adoption with an applicant whose name is on the adoption register; or (b) gives an applicant whose name is on the adoption register any right or entitlement to the placement of a child for the purposes of adoption.”

48. For example, *Adoption Act 1984* (Vic) s 14 requires the Court, prior to making an adoption order, to ascertain and consider the wishes and feelings of the child, having regard to the child’s age and understanding. Also see *Adoption Act 1993* (ACT) s 19(2)(a). The Council of Social Welfare Ministers *Draft National Minimum Principles in Adoption*, July 1995 para 8.2 and *National Minimum Principles in Adoption*, June 1993 para 8.2 endorse this.

49. *United Nations Convention on the Rights of the Child* Article 12. See also E E Sutherland “Adoption: The Child’s View” [1994] *Scots Law Times* 37.

50. Sutherland “Adoption: The Child’s View”. See also Australian Youth Foundation Inc and National Children’s and Youth Law Centre *Australian Children’s Charter: Draft for Consultation* (The National Children’s and Youth Law Centre, Sydney, June 1995) at 12.

51. Australian Youth Foundation Inc and National Children’s and Youth Law Centre *Australian Children’s Charter: Draft for Consultation* at 29.

52. *United Nations Convention on the Rights of the Child* Article 12.1. *In the Marriage of Harrison and Woollard* (1995) 18 Fam LR 788. The Australian Youth Foundation Inc and National Children’s and Youth Law Centre state that where a child lacks capacity, he or she should be free to express his or her views and have these taken into account: *Australian Children’s Charter: Draft for Consultation* at 29.

53. For example, *Adoption Act 1994* (WA) s 52(1)(a)(v) provides qualified support for this.

54. As with many States and Territories in Australia, the *Adoption Act 1988* (SA) s 16 requires the consent of a child over the age of 12 years. However, the Act also provides a period for the revocation of this consent and requires certain formalities to be adhered to in taking the child’s consent.

55. *United Nations Convention on the Rights of the Child* Article 12.2. For example, *Adoption Act 1984* (Vic) s 106 allows for separate legal representation for the child in certain circumstances. Also see *Adoption Act 1993* (ACT) s 107 and *Adoption of Children Act 1994* (NT) s 80 which allow for representation of the child.

56. M G Flekkoy “The Future of Child Advocacy on the National and International Level” in J Harvey, U Dolgopol and S Castell-McGregor (eds) *Implementing the UN Convention on the Rights of the Child in Australia* (South Australian Children’s Interests Bureau, Adelaide, 1993) at 36.

57. See *Family Law Act 1975* (Cth) s 68H. See also the Australian Youth Foundation Inc and National Children’s and Youth Law Centre *Australian Children’s Charter: Draft for Consultation* which outlines the fundamental rights of children, one of which is that “[c]hildren have the right not to express any views or opinions if they make an informed choice not to do so”: at 12. The Anglican Adoption Agency also observed that in expressing his or her wishes, a child should not be asked to chose an alternative family to his or her birth family, since loyalty to the birth parents remains high: *Submission* (26 August 1994) at para 6.4.

58. Australian Youth Foundation Inc and National Children’s and Youth Law Centre *Australian Children’s Charter: Draft for Consultation* at 11 and 29.

In the House of Lords case of *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112 at 184-189, Scarman LJ, in a majority judgment, commented: “rather than by reference to a fixed age of the child, parental right to care,

custody and control of a child yields to the child's right to make his own decisions when the child reaches a sufficient understanding and intelligence to be capable of making up his or her own mind on the matter requiring decision". In the High Court case of *Secretary, Department of Health and Community Services v J W B (Marion's Case)* (1992) 175 CLR 218 at 237-238, the majority judgment of Mason CJ, Dawson J, Toohey J and Gaudron J approved the principle in *Gillick*: "A minor is ... capable of giving informed consent when he or she 'achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed'."

59. The rationale for this is explained in an article by J Eekelaar "The Emergence of Children's Rights" (1986) 6 *Oxford Journal of Legal Studies* 161 at 181. While concurring that a child must not only understand the nature of a transaction but be able to evaluate its implications (in other words, "intellectual understanding must be supplemented by emotional maturity") Eekelaar cautions: "It is easy to see how adults can conclude that a child's decision which seems, to the adult, to be contrary to his interests, is lacking in sufficient maturity. In this respect, the provision of the simple test of age to provide an upper limit to the scope of a supervisory paternalistic power has advantages." All Australian States and Territories, except Victoria, require a child either over the age of 12 or aged 12 years or older to consent to his or her adoption. Victorian legislation does not require the child's consent but does require that the wishes and feelings of the child to be adopted (regardless of age) have been ascertained and due consideration given them, having regard to the age and understanding of the child: *Adoption Act 1984 (Vic)* s 14.
60. *Adoption of Children Act 1965 (NSW)* s 38(1).
61. s 38(2).
62. s 38(2A).
63. For example, *Adoption Act 1988 (SA)* s 23 states that before a Court orders a change in the name of a child, any wishes of the child should be taken into account. However, the Court cannot change the name of a child who is over 12 years unless the child consents or is intellectually incapable of consenting.
64. This is supported by the *United Nations Convention on the Rights of the Child* Articles 7, 8, 9 and 30.

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

3. The Adoption Process

3.1 This chapter examines certain procedural issues in the administrative and judicial process leading to an adoption, such as the regulation of standards of practice for private adoption agencies, legal responsibility for the child before an adoption order, independent review of adoption placements, independent representation of the child and discharge of adoption orders.

3.2 It also looks at some technical legal issues which do not fall readily within the other chapters, such as State-Federal issues and which court or body should have jurisdiction. The chapter also examines offences under the Adoption Act and appeals from, and review of, decisions.

REGULATION OF STANDARDS OF PRACTICE FOR PRIVATE ADOPTION AGENCIES

3.3 As noted in Chapter 2, one of the fundamental characteristics of the present legislative regime in adoption is the banning of private placements and the control of adoption practice by the Court and authorised adoption agencies.¹

3.4 In New South Wales, DOCS is the authority for licensing private adoption agencies, and is itself an adoption agency. Currently in New South Wales, there are three licensed private agencies which provide adoption services: Centacare Catholic Community Services (Adoption Services) ("Centacare"), Anglican Adoption Agency and Barnardos Australia ("Barnardos").²

3.5 Charitable organisations which intend to conduct negotiations and make arrangements for the adoption of children must first be approved as a private adoption agency by the Director-General of DOCS.³ The Director-General may grant or refuse an application.⁴ Whilst specific grounds for refusing an application are prescribed, the Director-General also has an unrestricted discretion to refuse an application. The approval of an application is subject to conditions and requirements prescribed in the legislation and imposed by the Director-General.⁵ Legislative requirements include: providing a copy of the constitution of the charitable organisation with the application for approval as a private adoption agency; providing for appropriate counselling facilities and the supervision of adoptee placements; retaining the advisory services of a panel of professional consultants; and the proposed principal officer meeting the required qualifications for the Principal Officer of the private agency. The approval may be later suspended or revoked by the Director-General.⁶ Agencies now also provide post-adoption services, in particular those supporting the provision of information and on-going contact between adopted children and their birth parents, and the continuing support given to special needs placements.

3.6 DP 34 did not focus on the regulation of standards of practice for private agencies and submissions did not generally comment on this issue, or criticise its current structure and form. An exception was the Barnardos submission which suggested that all adoption agencies, whether government or private, should be required to meet the same standards with regard to the provision of adoption services. It further supported the accreditation of private agencies and the regular review of licensing arrangements.⁷

Conclusion

3.7 A "best practice" standard should be met by all agencies, both government and private. By this is meant that agencies should strive for the highest standards of quality in areas such as administrative efficiency, record-keeping, proper application of law and policy, expeditious processing of applications, and fair decision-making.

3.8 Accreditation of private agencies should also be reviewed at regular intervals. A general standard for all licensing arrangements would need to be modified for the particular type of adoption service provided by each organisation. This is highlighted in a 1993 report to the Commission by Ms Anne Roughley. Roughley commented on two issues which focus on a need for greater explicitness in agency licences. One was that confusion can arise as to what an agency licence actually covers, for example, whether the licence is limited to children of certain ages or children with specific needs. The second

issue was that, to maintain a high standard of adoption service in non-metropolitan areas, specific standards of service provision for country areas may be required in licences.⁸

3.9 Taking note of Roughley's comments, the present system of licensing private agencies is operating satisfactorily. Formal responsibility for the regulation of private adoption agencies under the legislation should remain with the Director-General of DOCS. The Commission supports the continued licensing of private agencies under the regulatory supervision of DOCS to ensure the child's interests are protected and that the parties to adoption are not exploited. The Commission agrees with the statement in a recent British review of adoption law that:

good practice is more likely to develop and become generalised within a regulated system of agencies with publicly recognised responsibility for arranging adoptions and placing children for adoption.⁹

RECOMMENDATION 11

The present system of licensing established by s 10 and 11 of the Adoption Act (under which, respectively: a charitable organisation may apply to the Director-General for approval as a private adoption agency; and the Director-General may grant or refuse the application on certain grounds and subject to certain conditions and requirements) should be retained.

3.10 The conditions for obtaining and keeping licences by private agencies should ensure uniformity in the professional standards and qualifications of such organisations. This does not mean that professional judgments made within the agency's operations cannot be flexible to take into account an individual child's needs or the circumstances of the types of children for whom they provide a service. Uniform standards should also exist to safeguard generally the children's welfare, the interests of birth parents, and the integrity of consent, selection and placement procedures and open adoption arrangements. In the delivery of its adoption services, DOCS should adhere to the same standards as those required for the private agencies.

LEGAL RESPONSIBILITY FOR THE CHILD BEFORE AN ADOPTION ORDER IS MADE

Current law and practice

Local adoptions

3.11 At present in local adoptions,¹⁰ after all necessary consents have been given (or dispensed with) and until the order for adoption is made, guardianship of the child is transferred to the Director-General of DOCS,¹¹ except in the case of wards¹² or adoption by a parent or relative of the child.¹³ In practice, this means the duties arising from guardianship are delegated to DOCS. Guardianship is usually terminated on the making of the adoption order.¹⁴

3.12 The agencies¹⁵ oversee the care arrangements of the children for whom they have agreed to make adoption arrangements.¹⁶ The average time period involved is 12 months from the placement of the child for adoption (following the end of the revocation period of consent) to the adoption order.¹⁷

3.13 The practical result of guardianship being given to the Director-General takes various forms. The Director-General has the legal power to determine, for example, whether the child is restored to the birth parents, or is placed with temporary foster parents,¹⁸ or is placed with the proposed adoptive parents.¹⁹ The Director-General, as guardian up until the making of the adoption order, can make decisions with respect to any matter considered to be in the child's best interests. This can include whether there will be contact between the child and the birth family or whether the child can travel outside the State.

3.14 The Adoption Act provides no rules or guidelines as to how the Director-General is to exercise his or her powers of guardianship during this period of time.²⁰ For example, the only legal supervision of the Director-General's guardianship in this period 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. The Court may, for example, order that the child remain under the Director-General's guardianship for another year.²¹

3.15 Several submissions suggested that guardianship, including aspects such as authorising appropriate medical treatment, should be transferred to the Principal Officer of a private agency with responsibility for making arrangements for the adoption of children.²² This is what occurs in some other States.²³ However, the Commission is not persuaded that the present arrangements for guardianship should be altered.

Intercountry adoptions

3.16 In the case of intercountry adoptions, pursuant to the *Immigration (Guardianship of Children) Act 1946* (Cth) ("the Immigration Act"), the Minister for Immigration becomes the guardian of the child arriving in Australia until the making of the adoption order.²⁴ The functions of guardianship are delegated to the Director-General of DOCS.²⁵ An amendment to the Immigration Act in 1994 provides for States and Territories, rather than the Commonwealth, to legislate for guardianship of children entering Australia for adoption. However, New South Wales has not yet availed itself of this provision, although it is intending to do so in the near future.²⁶

3.17 Regulations to be enacted under the Family Law Act²⁷ are in the process of being drafted in anticipation of Australia ratifying the *Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* ("the Hague Convention"). One of the regulations is likely to provide that an adoption order made in a Contracting State in accordance with the Hague Convention will be recognised and effective in each State and Territory of Australia. This proposed regulation and the Commission's recommendations are discussed in Chapter 10. If automatic recognition is given to particular adoption orders, guardianship will not vest in the Minister for Immigration in relation to those adoptees upon their arrival in New South Wales.

3.18 DOCS practice requires the child to live with the proposed adopters for 6 months before seeking an adoption order.²⁸ During this time, two or three post-placement interviews take place before DOCS authorises the proposed adopters to finalise the adoption through an order of the Court.

3.19 The provision in local adoptions²⁹ that the Director-General must make a written report to the Court if he or she has remained guardian for more than a year and that the Court may make such orders for the care and control of the child as it thinks fit,³⁰ is not a requirement under the Adoption Act for intercountry adoptions. In this respect, intercountry adoption is less strictly regulated. One submission suggested that the legislative requirement for the Director-General to report to the Court if his or her guardianship exceeds one year would help resolve some intercountry placements where, for various reasons, the adoptive parents are reluctant to seek an adoption or alternative order in New South Wales leaving the children with a welfare status.³¹

Conclusion

3.20 In all types of adoption, including intercountry, the legislation should set out clearly who has guardianship of the child pending the adoption and require the guardian to report at intervals to the Court. Of course, there would be no New South Wales guardianship of intercountry adoptees whose overseas adoption orders are given automatic recognition in New South Wales.³²

RECOMMENDATION 12

Section 34 of the Adoption Act (which appoints the Director-General guardian of a child awaiting adoption) should be retained and its application extended to a non-citizen child upon that child entering Australia.

INDEPENDENT REVIEW OF ADOPTION PLACEMENTS

Current law and practice

3.21 The Director-General's guardianship of children pending adoption has practical advantages, as mentioned in DP 34. DOCS can deal swiftly with any matters that arise during this interim period according to their prevailing policies, not only with respect to the child's placement, but also with respect to any need to arrange medical treatment.

3.22 The existing law gives the Director-General enormous power as guardian, but there is little opportunity for effective review by the Supreme Court. As one submission to IP 9³³ pointed out, this is because the extensive, but largely unregulated, power of guardianship creates the possibility that the Court will do little more than "rubber stamp" administrative decisions already made.³⁴ For example, under the existing provisions, in a local adoption 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.³⁵ 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.

Discussion Paper 34

3.23 The Commission proposed in DP 34 that the period between the consent being given (or dispensed with) and the making of the adoption order should be more closely regulated by law; but that 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.³⁶ It suggested that a two-stage judicial process could achieve the objectives of flexibility and legal regulation. This would involve an early preliminary hearing in all adoptions. A later adoption hearing to grant the adoption order would occur after all necessary arrangements, assessments and probationary periods had been completed.

3.24 The Commission proposed that the Court would continue to be the body exercising the adoption jurisdiction, including any extension of the Court's role to a preliminary hearing. It also proposed that the judge who dealt with the preliminary hearing should normally also deal with the adoption hearing.³⁷

Submissions and response

3.25 Although the Commission's proposals³⁸ in DP 34 were generally supported in the submissions, there were reservations as to their practical implementation. Submissions drew attention to the advantages of having a preliminary hearing in the Court early in the adoption process such as an early independent scrutiny of consent taking and of the adoption plans made for the child.³⁹ The underlying objectives of the proposed system and the need for a more regulated structure were widely supported in submissions, regardless of whether an adoption plan is contested.⁴⁰ In particular, where there is a potential for the child to be moved, an early independent review of the consents and adoption plans before a child becomes too settled in a placement would be in the child's best interests. In summary, genuine concerns focusing on the long term viability of the adoption placement should be able to be brought forward to a court hearing expeditiously.

3.26 One submission observed that a preliminary hearing would give more specific legal authority and guidance in relation to arrangements leading to adoption.⁴¹ Submissions also suggested that legislation should provide a clear definition of the role of an early hearing and a time frame responsive to this.⁴²

3.27 On the other hand, several submissions expressed concern that a preliminary hearing would result in a potential increase in legal costs⁴³ and would contribute to delaying placement.⁴⁴ One submission by a Supreme Court judge commented:

The court should not impose further steps which would increase the costs of applicants unless it is seen to be for the greater benefit of the children concerned.⁴⁵

3.28 This submission also observed that nearly all adoption applications are unopposed and that defended matters are rare.⁴⁶ Nearly all applications for adoption orders are presently heard in the judge's private chambers without any representation, rather than at a court hearing.⁴⁷ In the adversarial court system, as there is usually no opposition to an adoption, a judge has no way of testing whether the choice made is the correct one and to some extent must rely on the integrity of the organisation concerned:

In considering what is in the best interests of the child a judge can only rely on the evidence which is filed. If there is only one party before the court then there would have to be a clear inadequacy in that evidence for any doubts to arise ...⁴⁸

3.29 The submission pointed out that any preliminary hearing in the Supreme Court would have to continue to rely on the evidence of the reports put before the judge and the judgment of those making the applications, as is the case with the present system of one court attendance.⁴⁹ Arguably, the procedure for two hearings would therefore not produce practical advantages over the present system.

3.30 Another submission by a Supreme Court judge concurred with this view:

Adoption applications take the form of litigation but in substance almost all of them are registrations after successful placements. Only if an application is contentious would a hearing achieve anything which would justify the costs of representation. It is only in rare cases that one hearing is necessary, and the procedure for two hearings would not produce practical advantages.⁵⁰

3.31 Submissions expressed concern that preliminary hearings could delay children being placed with their prospective parents through protracted court proceedings. Delays in proceedings and the resulting need for several short-term interim carers for the children might be psychologically detrimental to them.⁵¹ The Adoption Regulation already requires a private agency to make an application to the Court for an adoption order "with the least possible delay having regard to the circumstances of that placement".⁵²

3.32 The perceived disadvantages of the proposed two hearing system were, in summary, increased legal costs, the potential for further litigation and court hearing delays. Furthermore, the benefits of a preliminary hearing in relation to the Court's decision-making process is questionable since the judge would still be relying on the unchallenged evidence filed.

3.33 Many submissions proposed that other courts or tribunals, rather than the Supreme Court, should exercise jurisdiction in adoption.⁵³ The issue of the most appropriate jurisdiction for adoption is discussed later in this chapter.

Conclusion

3.34 In the light of these comments, the Commission supports a discretionary supervision by the Court of individual adoption plans at a preliminary stage. Such a system involves the use of a preliminary hearing, but *only* in appropriate cases. What form a preliminary hearing should take, what issues might trigger it, and who may request it are considered below.

Preliminary hearing

3.35 Upon an application for a preliminary hearing, the Court would decide whether or not a preliminary hearing would be appropriate. At a preliminary hearing the Court would review individual adoption plans and have the power to make whatever arrangements were appropriate for the case. The preliminary hearing should not be a roving judicial enquiry into a proposed adoption placement. Rather,

it should be initiated by the Court for a specific purpose. This purpose would vary in each case. The Commission does not envisage that a preliminary hearing would be used frequently in adoptions.

3.36 The preliminary hearing should be consultative, rather than adversarial.⁵⁴ It should provide an opportunity for judicial scrutiny of specific issues in a proposed placement if there is a good reason to raise these issues at an earlier stage than at a final hearing.

3.37 At a preliminary hearing the Court might decide to examine certain aspects of a proposed adoption plan where, for example:

an Aboriginal placement has been requested for an Aboriginal child and the agency has not complied with the request;

a child has indicated he or she does not want to be placed with the proposed family;

the continued access of relatives important to an older child has not been provided for;

no notice of the expiration of the revocation period has been given to the birth parents by the agency;

the birth parent has not received counselling or is dissatisfied with the counselling received prior to consent being given;

evidence is potentially inadequate as to the dispensing with the birth father's consent and there is difficulty in finding the birth father;⁵⁵ or

a request is made for the appointment of a guardian *ad litem* or separate legal representative for the child.

3.38 The preliminary hearing might result in orders giving appropriate security to people having the child's care, whether they are foster parents or the intending adopters. It might also make orders in relation to the right of certain persons to be served with documents or whether specific persons can be heard in the adoption hearing. Applications to dispense with parental consent could be dealt with in the preliminary hearing. Where the Court is satisfied at the preliminary hearing of all factors in relation to the adoption,⁵⁶ it could in appropriate cases proceed to a final order.⁵⁷

3.39 The timing of a preliminary hearing would depend on the circumstances of the proposed adoption. This preliminary hearing could occur at any time between the giving of consent and the making of an adoption order.

3.40 At the adoption hearing, the Court should have available to it the materials filed at the preliminary hearing (if any), together with further information relating to events since that hearing. If practicable, the judge who dealt with the preliminary hearing should also deal with the adoption hearing.

Who could request a preliminary hearing?

3.41 The Court could order a preliminary hearing on its own initiative or at the request of others, such as an agency, the birth parents, the child, the prospective adoptive parents, relatives or friends of the child.

3.42 The Commission considered whether to give certain persons, such as the birth parents or agencies, the *right* to apply to the Court for a preliminary hearing, while allowing others, such as relatives, friends or children's advocacy groups, to apply only by *leave*. It would be simpler and fairer to allow anyone interested in the adoption plan to request a preliminary hearing. All interested parties in the adoption should be notified, in every case, of the preliminary hearing. Indeed, all interested parties should also be notified, in every case, of the final hearing.

INDEPENDENT REPRESENTATION OF THE CHILD

3.43 In recent times, there has been a major trend in law and social policy towards recognising children's rights - that is, treating children as individuals with distinct interests deserving promotion and protection to the exclusion of other community and family interests.⁵⁸ Part of this trend is the increased role of child advocacy.⁵⁹

3.44 At present, different court jurisdictions have different approaches to giving a child a voice in legal proceedings, including the separate party status⁶⁰ of the child and the appointment of an appropriate person to represent the child in court.

3.45 Whether or not a child is a separate party to proceedings, representation of the child is used in some jurisdictions. Independent representation of the child currently takes three main forms in New South Wales: guardian *ad litem*; separate legal representative (these first two used, for example, in the Children's Court); and a separate representative used in proceedings in the Family Court of Australia ("the Family Court"). What form of representation is used, and the roles and functions given to a representative, depend to some extent on the court involved.⁶¹ The unifying characteristic of these independent representatives is that they are discretionary court appointments relating to legal proceedings involving a particular child. All are used in judicial proceedings as a way of allowing a court to hear, among other matters, about the views, wishes or best interests of the child.

Current law and practice

3.46 The National Principles in Adoption include a provision that, regardless of age, children to be adopted should have access to independent representation throughout the adoption process.⁶² It considers that this ensures their wishes are heard, that they understand the implications of adoption and that their rights are protected.⁶³

3.47 An independent representative is not normally used in adoptions in the Supreme Court,⁶⁴ nor are children separate parties to adoption proceedings, except in rare cases.⁶⁵ However, the Court does require, as a matter of practice, all children over the age of five to be aware of the adoption proceedings and to express their views (and all children over the age of 12 years must consent to their adoption). These views are conveyed to the Court either through:

a private social worker's report or agency report recommending the adoption;

the consent of the child older than twelve; or

an affidavit from the child.⁶⁶

3.48 While the Commission supports this practice, the formal introduction of an independent representative into the adoption process, in accordance with the National Principles in Adoption, has many practical benefits and would meet a criticism commonly expressed in submissions

that the present system appears to be little more than a judicial endorsement of decisions already made by the Department - there is no independent, professional advice to the Court.⁶⁷

3.49 The use of an independent representative would also comply with Australia's international treaty obligations under Article 12 of the *United Nations Convention on the Rights of the Child*. ("UNCROC"). UNCROC emphasises the importance of procedural fairness, and states that children should have an opportunity to be heard in any judicial and administrative proceedings that concern them, to the extent that they are able to do so, either directly or through a representative.⁶⁸

3.50 In particular, Article 12 provides:

a child who is capable of forming his or her own views has the right to express those views freely in all relevant matters;

a child's views will be given due weight in accordance with the age and maturity of the child; and

in order to express his or her views, a child will be given the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly or through a representative or an appropriate body.

Discussion Paper 34

3.51 In DP 34 the Commission invited comments on how to ensure the Court forms an independent view of the child's best interests, and how children's views may be heard without imposing unfair responsibilities on them.⁶⁹ The Commission proposed that children should be represented in the preliminary and adoption hearings. In all cases some person should have the task of talking with children, and reporting to the Court on their perceptions, feelings and wishes.⁷⁰

Submissions and response

3.52 Submissions overwhelmingly supported a child's views and wishes being independently placed before the Court.⁷¹

3.53 The submissions of the New South Wales Law Society and the New South Wales Bar Association pointed out that while adoption proceedings do not presently have the facility of independent legal representation, children can be separately represented in Family Court proceedings.⁷² The Bar Association further observed that, without remedy, there appears to be two different standards on separate representation operating in respect of children subject to contested proceedings: one in adoption hearings in the Supreme Court and one in the Family Court.⁷³

3.54 Many submissions suggested a system similar to that in England or in the Children's Court in New South Wales, where an independent person with social work training is appointed as guardian *ad litem* to make an independent assessment of the effect an adoption order is likely to have on the welfare of a child and report back to the Court.⁷⁴ The guardian *ad litem* should also be required to inform the Court separately of the child's wishes and feelings.⁷⁵ A guardian *ad litem* is not a full guardian (that is, the guardian of the child's body and estate), but is appointed by a court to assist the child for the purpose of the particular suit. If the recommendation of the guardian *ad litem* is at variance with the wishes and feelings of the child,⁷⁶ or the adoption is contested,⁷⁷ a lawyer should be appointed to represent the child in the adoption proceedings.⁷⁸

3.55 The National Children's and Youth Law Centre preferred the dual use of a guardian *ad litem* and a separate lawyer to that of the separate representative in Family Court proceedings where the two distinct roles exist in the one position. It believed this latter approach can create a potential conflict. This is because the separate representative is retained by the Family Court to advise it on matters relating to the child's welfare and he or she may therefore recommend a course of action which is contrary to his or her client's clear wishes.⁷⁹

3.56 Most submissions emphasised that any independent representative of the child should be highly skilled and trained and that the role should be controlled by professional guidelines and receive adequate funding.⁸⁰

Conclusion: provision for guardian *ad litem* and independent legal representative

3.57 The legislation should provide that children may have recourse to independent and impartial representatives during the adoption process. Two forms of representation should be available for use in appropriate cases:

A **guardian *ad litem*** should be appointed in appropriate cases to safeguard the best interests of the child.

An **independent legal representative** should be appointed to represent the child in the adoption proceedings in certain circumstances.

3.58 It may be feasible for these roles to be linked administratively to the Office of the Status of Children and Young People, should this be established, or similar statutory body established in the future in New South Wales.⁸¹ This would depend on the following purposes and functions of the separate roles of guardian *ad litem* and independent legal representative being complied with and adequately funded.

Discretionary appointment

3.59 The Court should have the discretion to appoint a guardian *ad litem* or a legal representative for the child. Either could be appointed by the Court at any time after consent (or from its dispensation) until the adoption order is finalised. Neither a guardian *ad litem* nor a legal representative for the child would be needed in all adoption placements. They could be utilised where some aspect of the child's adoption is of concern to the Court, or where the Court requires further information.

3.60 Although the appointment of a legal representative would be used rarely, a child should have access to his or her own lawyer in some circumstances, such as in proceedings dispensing with parental consent, or in contested adoption proceedings, or where the wishes of a child capable of giving instructions clearly conflict with the views of the guardian *ad litem* as to the best interests of the child. The guardian *ad litem* could apply to the Court for the appointment of a legal representative.

Role of the guardian *ad litem*

3.61 The role of a guardian *ad litem* would be to provide advice and information about the best interests of the child, through an independent investigation, of the effect that an adoption order would be likely to have on the welfare of the child, and to report back to the Court. In so doing, the guardian *ad litem* would help the Court in considering the more difficult issues in any adoption and in determining the most suitable care arrangements for the child. Although the guardian *ad litem* would represent the child's best interests, he or she would also have an obligation to inform the Court of the child's wishes, particularly where the two differ. The guardian *ad litem* would also perform those duties he or she considered necessary to complete his or her role, and would be able to attend any proceedings on the child's behalf.

3.62 The Court could either appoint a guardian *ad litem* generally, or could give specific directions to the guardian *ad litem*, tailoring the role to the particular circumstances of the case. It could order that a report be prepared and impose a time frame in which the Court should be provided with the report.

3.63 *Funding and independence.* It is important that the role of guardian *ad litem* be independent and unfettered. In making a truly independent contribution to the Court's decision-making process, the guardian *ad litem* should not only be, but also be seen to be, separate from the other parties to the process. This would suggest that the role should be independently funded, recruited and managed. Funding would need to be adequate.⁸²

3.64 The guardian *ad litem* should be sufficiently trained to bring any issues or concerns in relation to an adoption placement to the attention of the Court.⁸³ This suggests a social worker, not necessarily with a background in adoption, but certainly with experience in working with children and an understanding of the law and legal system relating to his or her responsibilities as a guardian *ad litem*. As presently used in courts, guardians *ad litem* come from a variety of professional backgrounds, although they usually have social work experience.⁸⁴

Role of the child's legal representative

3.65 In court proceedings where both are used, the child's legal representative serves a separate role from that of guardian *ad litem*. The child's legal representative acts as an advocate in proceedings for the child and must follow the child's instructions; whereas the guardian *ad litem* is required to report back to the court on the child's best interests. The submission of the National Children's and Youth Law Centre believes the following interaction between the two different representatives is the best approach in adoption:

We favour a system based on the English provisions for guardians *ad litem* in child protection proceedings whereby an independent person with social work training is appointed to make an independent assessment of the affect that an adoption order is likely to have on the welfare of a child. The guardian *ad litem* should also be required to inform the court quite separately of the wishes and feelings expressed by the child. If the recommendation of the guardian *ad litem* is at variance with the wishes and feelings of the child a lawyer should be appointed to represent the child in the adoption proceedings and at any hearing.⁸⁵

3.66 This approach encourages the discretionary appointment of a guardian *ad litem* in the first instance, while also allowing for separate legal representation in appropriate situations. The Commission prefers this approach to one where the appointment of a guardian *ad litem* is usually only considered appropriate where the child lacks the necessary age or capacity to give instructions to his or her own lawyer.⁸⁶

3.67 Separate representatives in the Family Court essentially combine the role of a guardian *ad litem* and the child's advocate in one person.⁸⁷ However, the Commission prefers maintaining distinct and dual roles whereby the guardian *ad litem* acts in the child's best interests and the separate legal representative acts on the child's wishes.

Separate party status of the child in proceedings

3.68 Although children are not presently parties to adoption proceedings, a few submissions considered that older children should have the status of a separate party to adoptions.⁸⁸ One submission observed that in care applications in the Children's Court, children of 10 years and older are served with the relevant documents.⁸⁹

3.69 However, the child need not be a party to the proceedings if the mechanism is in place to appoint a separate legal representative for the child.⁹⁰

Presence at the proceedings granting the adoption order

3.70 Adoption applications are normally dealt with by a judge in private chambers, without the presence of the child or the adopting family.⁹¹ Most adoption applications proceed without a contested hearing by way of various forms, reports and affidavits. The court process is seen as remote and largely invisible for the people most directly affected.⁹²

3.71 Many submissions suggested that the child and the prospective adoptive parents should be allowed to attend the proceedings which grant the adoption order.⁹³ Such attendance provides a family's "rite of passage", marking the transfer of family membership and commitment of the people involved. This is of particular importance in the adoption of older children⁹⁴ but should be available to all children. The Commission supports this approach,⁹⁵ although it should be a matter for the Court to consider in each case.

The Court should have the power, on the application of any interested person (including the child) or of its own motion, at any time between the giving of consent (or its dispensation) and the making of an adoption order and, in the case of intercountry adoptions, from the time of allocation of the child, to do any one or more of the following:

- (a) appoint a preliminary hearing;**
- (b) give such directions relating to the hearing of an application for adoption as the Court sees fit, including orders as to care and custody of the child and any order that a court has power to make at the final hearing;**
- (c) determine who should be notified of the preliminary hearing and give such directions as to notification as the Court sees fit;**
- (d) appoint a guardian *ad litem* for the child and give such directions relating to the role of the appointment as the Court sees fit;**
- (e) direct that the child have legal representation;**
- (f) direct that any person including the child and/or the prospective adoptive parents should or may attend personally before the Court at such time during the hearing of the application for adoption as the Court directs.**

CHILD'S VIEWS

3.72 As discussed, there has been a growing recognition of a child's capacity and rights to participate in the legal processes that involve him or her, and this is reflected in case law⁹⁶ and recent legislation.⁹⁷ It is also reflected in UNCROC.⁹⁸ It raises issues about the child's ability to express his or her views on the adoption as well as to consent to it. Consent of the child is discussed in Chapter 5.

Current law and practice

3.73 The Adoption Act does not generally empower a child to express a view or preference in relation to an adoption placement. The Adoption Act only refers to the child's views and wishes in relation to the consent of a child of 12 years and over to the adoption⁹⁹ and his or her wishes as to name,¹⁰⁰ or to the suitability of the proposed adoptive parents in relation to any religious convictions of the child.¹⁰¹ However, in practice, a child over the age of five is required to be aware of the proposed adoption and his or her origins. Furthermore, in practice his or her views on the proposed adoption are considered by the agencies and the Court.

Discussion Paper 34

3.74 The Commission's provisional view was that the legislation should require that children's views, perceptions and feelings be ascertained and taken into account, provided that children should not be required to express views if they do not wish to do so.¹⁰² Children of an appropriate age and understanding should be able to express wishes as to the choice of adoptive parents.¹⁰³ There should be appropriate facilities for counselling children.¹⁰⁴

Submissions and response

3.75 There was much support in submissions for giving children greater opportunities to participate in the adoption process.

A European woman who adopted an older child whom she had been fostering recently said to us 'He adopted me: I did not adopt him'. If children are to be given substitute

parents it is important to encourage them to feel that they are an important part of the process and the decision.¹⁰⁵

3.76 Some submissions also pointed out the potential for children to feel pressured and considered that children should be encouraged, but not required, to express their views.¹⁰⁶

3.77 All submissions supported the Commission's proposal that children should be allowed to express wishes on the choice of adoptive parents.¹⁰⁷ This is, in fact, now implemented in practice.¹⁰⁸ However, as one submission noted, a child should not be asked to choose an alternative family to his or her birth family, since loyalty to birth family remains high.¹⁰⁹

3.78 Submissions also concurred with the Commission's proposal that there should be appropriate facilities for counselling children. Submissions supported the introduction of a wider scheme of placing the views of children before the Court in situations where no formal consent of the child is required to be taken. The Law Society felt that the key to such a proposal was a greater emphasis on sensitive counselling to ascertain the wishes of the child, to the extent that the child is counselled and represented independently of the other parties.¹¹⁰

Conclusion

3.79 The Commission does not depart from its provisional views, expressed in DP 34 and outlined above, including that the agencies should provide appropriate facilities for counselling children. However, provision of counselling is a matter for agency practice and is not a matter which should be prescribed by legislation.

RECOMMENDATION 14

The Court should be required to ascertain and take into account the child's views, perceptions and feelings, provided that the child should not be obliged to express views. The views and wishes of the child should be given due weight by the Court in accordance with the child's age and maturity.

DISCHARGE OF ADOPTION ORDERS

3.80 Section 25(1) of the Adoption Act makes discharge of adoption orders difficult in that only the Director-General or Attorney General can apply to the Court for a discharge.

3.81 Submissions to DP 34 agreed that the law should continue to reinforce the underlying premise that adoption represents a permanent and irrevocable commitment to the child. Where a less permanent relationship is contemplated, other orders or arrangements might be more appropriate than an adoption order.

Conclusion

3.82 Discharge of adoption orders should continue to be rare. The purpose of adoption is to relocate or confirm the child in a permanent family and, broadly speaking, this should be final. As a general rule, family relationships in adoption should be severed only by means available to other families in the community. However, there may be some exceptional circumstances where the discharge of an adoption order is appropriate. The legislation should provide that the Court may require the Director-General to investigate the circumstances of the application and report to the Court.¹¹¹

3.83 Although discharge of adoption orders should be granted only in exceptional circumstances, the present restrictions should not remain. Any interested person, including the child, should be able to apply for an order discharging the adoption.

RECOMMENDATION 15

The existing provisions of s 25(1) of the Adoption Act should be amended

to allow an application for discharge to be made by the Director-General, Attorney General or any other interested person; and

to give the Court the power to require the Director-General to investigate the circumstances of any application for discharge and report back to it.

In all other respects s 25 should be retained.

DRAFTING OF LEGISLATION

3.84 DP 34 noted that the Adoption Act is drafted in a complex and convoluted way.¹¹² This is principally caused by outdated styles of drafting and the accretion of amendments over the years, rather than the complexity of the subject matter. Some of the drafting also reflects outmoded styles of language. For example, s 50 refers to an offence being committed where a payment or reward is made in relation to “the transfer of the possession or control of a child with a view to the adoption of the child”. Words such as “possession” and “control” describe a child in similar terms to that of a chattel and are inconsistent with modern attitudes to children as individuals with their own rights. The offence could perhaps be more appropriately described as one involving the transfer of legal parental responsibilities in consideration of a payment or reward. In summary, the language needs to be updated and written in “plain English” so that it can be clearly understood by the people it concerns.

3.85 As well, the provisions of the *Adoption Information Act 1990* (NSW) should be incorporated into the Adoption Act, so that there is a single piece of legislation relating to adoption. As mentioned in DP 34, the Commission prefers the title “*Adoption Act*”, both because it is shorter than the existing title, “*Adoption of Children Act*”, and because, since adoption of adults is provided for, the words “of children” are not strictly correct. This shorter title has been used recently in some Australian jurisdictions.¹¹³

RECOMMENDATION 16

The provisions of the *Adoption Information Act 1990* (NSW) should be merged with the Adoption Act and the new legislation be described as the “*Adoption Act*”.

OFFENCES

3.86 The Adoption Act includes a set of offences. Some are associated with the regulation of adoption and the banning of privately arranged adoptions. In this category, it is an offence to make payments or private arrangements for adoption, or to advertise for adoption.¹¹⁴ A second group comprises offences designed to protect the adoption process itself. In this second category, it is an offence to impersonate a person whose consent is required,¹¹⁵ make false statements in connection with proposed adoptions,¹¹⁶ use force or duress to influence the parents or guardians in making decisions,¹¹⁷ breach the requirements relating to confidentiality,¹¹⁸ and witness a consent to adoption without taking the required steps to ensure, for example, the person understands the nature of the consent.¹¹⁹

3.87 The third group comprises offences designed to prevent members of the birth family from interfering with the adoption process, or with 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.¹²⁰ These offences were introduced as part of the emphasis under the Adoption Act to what is often referred to as the “clean break” between the child and the birth family.¹²¹ A related provision, which does not appear to create a criminal offence, is that in certain circumstances unmarried fathers must not do anything inconsistent with the making of an adoption order.¹²²

3.88 The legislation should reproduce the substance of the offences in the first two categories, but not the third, which should be repealed. That is, offences associated with the regulation of adoption and the banning of privately arranged adoptions, or those designed to protect the adoption process itself should

be retained.¹²³ However, offences designed to prevent members of the birth family from interfering with the adoption process or the adoptive family should be removed.¹²⁴

3.89 Submissions generally agreed with this approach. As the New South Wales Committee on Adoption and Permanent Family Care observed, such provisions, which carry criminal sanctions, raise “unnecessary spectres and create unfounded stereotypes about parents”¹²⁵ and should be removed. Any attempts by birth parents or other birth relatives to contact adopted children could be dealt with adequately under the general law.¹²⁶

RECOMMENDATION 17

The legislation should reproduce the substance of the offences in the Adoption Act, except those offences under s 49 and 49A which are designed to prevent members of the birth family from interfering with the adoption process or the adoptive family. These latter offences should be repealed.

A CLOSED COURT?

3.90 The Adoption Act provides that the Court must be closed to the public when hearing adoption matters.¹²⁷ Other Australian jurisdictions follow this approach.¹²⁸ As noted earlier, however, almost all adoptions applications are unchallenged and are dealt with by a judge in private chambers without representatives of the parties attending.¹²⁹

3.91 In DP 34, the Commission provisionally favoured court proceedings open to the public with certain limitations.¹³⁰ This was in line with the Family Law Act. However, it could be argued that adoption proceedings are very similar to care applications which take place under the *Children (Care and Protection) Act 1987* (NSW), where court proceedings are closed to the general public.¹³¹

3.92 Several submissions argued that protecting the rights of the child in terms of his or her long term placement plans and involvement in adoption proceedings would be aided by a closed hearing.¹³² For the purposes of adoption, the Court should be closed as it is in other children’s matters.¹³³ Furthermore, it was felt that open court proceedings would tend to depersonalise the adoption proceedings.¹³⁴ These disadvantages were seen to outweigh any advantages an open court would bring to the adoption process:

[T]he adoption process in court is already too impersonal ... The additional effort involved [in an open court] to keep matters confidential and to decide who to exclude from the court would seem to be very cumbersome, to achieve what we can only see as a token justice to those who may feel that an open court would in some way be a reflection of a new openness in adoption.¹³⁵

Conclusion

3.93 The Commission sees the merit in the arguments raised in submissions for maintaining a closed court. Accordingly, in line with the present law, the Court should continue to close proceedings to all those who are not parties to the proceedings or their representatives, except as it otherwise decides. This would allow the Court to retain a discretion to open the proceedings further to those persons who, in the interests of justice, the Court decides should attend. These could include persons, such as birth parents, friends or relatives, closely involved in the adoption. It could also include the child. Any other person or group who could establish to the satisfaction of the Court that their predominant interest in the matter of the proposed adoption is the best interests of the child should also be able to attend at the Court’s discretion.

3.94 The Court should retain a discretion as to who should or may attend under what circumstances. For example, the Court could direct any persons it allows to attend, including the child, to leave the room if the Court is of the opinion it is not in the child’s best interests for those persons to remain, for example,

during the examination of a particular witness. It could exclude any persons from the whole or part of the proceedings where this was considered necessary to prevent the public disclosure of identifying information contrary to the provisions of the Adoption Act.

RECOMMENDATION 18

The adoption proceedings should continue to be heard in a closed court, except as otherwise ordered by the Court.

DISCLOSURE OF CONTENTS OF REPORT

3.95 The Adoption Act prohibits agency reports on the proposed adoption or other care arrangements for the child being made available to anyone, unless the Court otherwise orders.¹³⁶ This provision should continue. The discretion given to the Court would allow, for example, a guardian *ad litem* or a child's legal representative to seek a direction from the Court allowing him or her to examine any report held by an agency which impacts significantly on the child's welfare.

RECOMMENDATION 19

Section 66 of the Adoption Act (which provides that, except as the Court otherwise orders, the contents of agency reports must not be disclosed to anyone) should be retained.

RULES OF EVIDENCE

3.96 Section 65 of the Adoption Act deals with matters admissible in evidence. It allows the Court to act upon evidence which, in its opinion, may assist it to deal with the matter at hand, whether or not the evidence is in admissible form. This approach means that the Court is not inappropriately constrained in determining what is in a child's best interests. The section should be retained.

RECOMMENDATION 20

Section 65 of the Adoption Act (which allows the Court to act upon evidence which, in its opinion, may assist it to deal with the matter at hand, whether or not the evidence is in admissible form) should be retained.

STATE-FEDERAL ISSUES

3.97 DP 34 at paragraphs 14.2 to 14.12 explained in more detail the interaction of the State and Federal jurisdictions in adoption matters. In particular, DP 34 noted that the Family Court can exercise its jurisdiction in guardianship, custody and access¹³⁷ over all children whether or not they have been adopted.¹³⁸

3.98 This was raised as an area of concern in some submissions. Anecdotal evidence suggests that adoption better safeguards the interests of children and birth parents than other long term care orders (such as guardianship and custody) by requiring adequate and fully informed consents and by the rigorous selection procedures for adoptive parents. There is concern among adoption professionals that orders other than adoption are being used to legitimise informal care arrangements which, in practical effect, amount to "unofficial adoptions."

3.99 Two State-Federal issues were raised in DP 34: whether the Federal jurisdiction should take over all adoption matters from the States; and whether the technical complexity of certain Federal and State laws impacting on step-parent adoptions is warranted.

Uniform legislative power over adoptions?

3.100 The question whether adoption should be referred to the Commonwealth, or should be transferred to the Commonwealth by constitutional amendment, has been considered from time to time.

3.101 At present, adoption is legislated and administered by the States. Relative uniformity was achieved in adoption laws among the States in the mid-1960's based on a model adoption Act followed by all Australian jurisdictions. Since this time, however, the differences between the Australian jurisdictions have become much greater as a result of numerous amendments, and in some cases completely new Acts. The question arising from this failure to maintain uniformity among the States is whether or not jurisdiction in adoption should be transferred to the Family Court. The Family Court already has jurisdiction over parental responsibility and the power to make "parenting orders" (formerly orders for guardianship, custody and access).¹³⁹

3.102 Arguments in favour of a Federal transfer were set out in DP 34 at paragraph 14.9. These include the desirability of lasting uniform adoption laws across Australia, the expertise of the Family Court in family matters, and the reduction in duplication of resources, such as the review and updating of adoption laws. Federal responsibility might also be appropriate in light of the close links between intercountry adoption and immigration issues.

3.103 There seems little reason why the relatively small number of adoptions in Australia could not be successfully dealt with at a Federal level. Furthermore, there is no intrinsic feature of adoption which requires a separate approach from State to State.

Conclusion

3.104 Discussion among the State and Federal Governments with a view to a uniform Australia-wide approach to adoptions and legal consistency in adoption in Australia would be beneficial. Naturally, the more difficult aspects of such an approach would need to be addressed, in particular the relationship between the adoption legislation and the delivery of services in adoption, which is under State administration. However, these problems are not insurmountable. One possibility might be, for example, 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.¹⁴⁰

RECOMMENDATION 21

The New South Wales Government should give consideration to a reference of power over adoption to the Commonwealth, in consultation with the other States and the Commonwealth.

The Family Law Act and step-parent adoptions

3.105 The appropriateness of adoptions in step-parent situations is examined in Chapter 4 of this Report. A subsidiary issue relates to certain provisions of the Family Law Act.

3.106 DP 34 at paragraphs 14.11 to 14.12 outlined how certain provisions of the Family Law Act in relation to step-parent adoption are open to criticism. In short, under these provisions,¹⁴¹ unless the Family Court consents to a step-parent adoption before the adoption order is obtained under State law, the adoption will not have its full effect of transferring parental responsibility from the birth parents to the adoptive parents. A step-parent adoption, when made without the Family Court's leave, does not succeed in transferring full parental responsibility to the step-parent, although it does have the other effects of adoption.

3.107 The Federal-State cross-vesting legislation¹⁴² complicated the issue further, raising the possibility either that the Family Court, having granted leave for the step-parent adoption, might go on to deal with the adoption application; or that the Supreme Court might itself grant the required Federal leave to commence the step-parent adoption application, using jurisdiction cross-vested from the Family Court. In 1992, an amendment to the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) appeared to

have closed off this latter possibility.¹⁴³ However, *Re: Adoption Application* found that special reasons existed to hear the matter in the Supreme Court.¹⁴⁴

3.108 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 adoptions.¹⁴⁵ Of those submissions which commented on the issue, most agreed with the Commission's proposal that the relevant family law provisions should be repealed or rendered inapplicable to New South Wales.

RECOMMENDATION 22

The New South Wales Government should negotiate with the Commonwealth with a view to having the provisions of the Family Law Act relating to step-child adoption repealed, or rendered inapplicable to New South Wales.

WHICH COURT OR BODY SHOULD HAVE JURISDICTION?

3.109 The Commission canvassed the advantages and disadvantages of a tribunal or a court-based system for adoptions in DP 34 at paragraphs 5.33 to 5.45 and proposed that the adoption jurisdiction should continue to be exercised by the Supreme Court.

Tribunal or court?

3.110 Submissions to DP 34 varied in their opinions as to whether a tribunal or a court should have jurisdiction in adoption.¹⁴⁶ Advantages of creating an adoption tribunal were seen to be greater accessibility and cost-effectiveness, with specialist staff and fewer delays.¹⁴⁷ Disadvantages were seen to include the cost of establishing a specialist tribunal for the relatively small number of adoption hearings.¹⁴⁸

3.111 The main advantage of a tribunal in the determination of adoption cases is its specialist nature. However, the Commission is not aware of any evidence to support the suggestion that a tribunal would be more likely than a court to consider the issues from the perspective of the child. A main concern in submissions favouring a tribunal system was the belief that, under the present system, the child's viewpoint or an independent assessment of a child's welfare and needs are not being brought adequately to the decision-maker's attention.¹⁴⁹ If the recommendations on the use of independent representatives for children in adoption cases are followed, these concerns would be mitigated.

3.112 Furthermore, specialist tribunals may be more vulnerable than a court to the criticism that they embrace a particular theory or approach in areas where there are competing theories, and may be subjected to pressure to conform to the wishes of the government of the day.¹⁵⁰ Courts, while lacking specific expertise, are characterised by independence and a preoccupation with procedural fairness.¹⁵¹ This is a strong advantage in adoption where the basic legal status of various parties is being examined and orders are being made with far-reaching and largely irrevocable consequences. Finally, it is probably unrealistic to call for the creation of an adoption tribunal because of the costs involved in establishing and administering a new specialist tribunal to deal with a comparatively small number of cases.

Which court?

3.113 There were different views among those submissions favouring a court jurisdiction for adoption as to which would be the appropriate court. Some favoured lower courts, such as the Children's Court or District Court. Others favoured higher courts, such as the Supreme Court or the Family Court.¹⁵² The exercise of the adoption jurisdiction by the Family Court was preferred in several submissions because it was seen as having wide-ranging expertise in children's matters and possessing independent assessment facilities, such as counselling.¹⁵³

3.114 The Commission considers that the Family Court is the most appropriate court to exercise jurisdiction in adoption matters. This conclusion is not based on any criticism of the Supreme Court, but is based on the specialist nature of the Family Court. Many of the facilities favoured in this Report already exist in the Family Court, such as staff counsellors, who could provide independent advice on the suitability of adoption plans. It already has a national network of Registries which are accessible throughout Australia.¹⁵⁴ It has a Standing Committee for consultation with Aboriginal communities, which the Australian Association of Social Workers believes is well placed to advise the Family Court on appropriate procedures for adoption of Aboriginal children.¹⁵⁵ The Family Court is experienced in dealing with family issues, including the legal responsibilities and authority of parents for their children, and examining the short and long-term welfare of children in family environments. The experience of the Family Court in examining access arrangements would serve well in looking at the long-term viability of negotiated adoption agreements. As discussed above, a transfer of jurisdiction would involve issues of Federal/State jurisdiction and the delivery of services in adoption, which is now a State administered service. Obviously, these issues would need to be resolved before any transfer was contemplated.

RECOMMENDATION 23

Jurisdiction over adoption should be transferred to the Family Court. In the meantime, the adoption jurisdiction should continue to be exercised by the Supreme Court of New South Wales.

APPEALS AND REVIEW

Current law and practice

3.115 Decisions which are able to be reviewed or appealed under the adoption legislation presently fall into two categories. These are: selection of adoptive parents; and approvals of private adoption agencies. The legislation provides for review of the former decisions and appeals from the latter.¹⁵⁶

Selection of adoptive parents

3.116 If the Director-General of DOCS or the Principal Officer of a private agency:

declines to approve applicants as suitable to adopt;

approves an applicant subject to conditions; or

revokes an approval

the applicant must be given written reasons for the decision as well as notification of his or her right to a review of the decision.¹⁵⁷

3.117 On a request to review any one of the three decisions above made by the Director-General, the Director-General must review the decision (including considering any material submitted by the applicant and obtaining any assistance from adoption/child professionals) and then confirm it or rescind it and approve the applicant.

3.118 If the decision to decline or revoke approval is made by a delegate of the Director-General, then the review must be conducted by another delegate or the Director-General personally.¹⁵⁸

3.119 Private agencies must make provision for independent review of those applicants not approved as suitable to adopt.¹⁵⁹ For example, one private agency institutes a Review Committee comprising two internal and two external consultants to review an application which has been initially refused. If an applicant is dissatisfied with an initial review by an internal agency panel, another private agency makes provision for an independent review by an external person.

Approvals of private adoption agencies

3.120 Appeals against a decision by the Director-General of DOCS to refuse approval of a private agency, or to revoke or suspend such an approval, can be made to the Community Services Appeals Tribunal.¹⁶⁰ Decisions of the Tribunal are binding.¹⁶¹ The Tribunal can make decisions on the merits of the case, that is, substitute its own decision for that of the Director-General.¹⁶²

3.121 Appeals may also be made to the Supreme Court where the Director-General refuses an application, subjects an approval to conditions or requirements, or revokes or suspends an approval. The Supreme Court reviews the decision to refuse an application and either confirms it or approves the organisation as a private agency subject to any conditions it thinks fit.¹⁶³

Discussion Paper 34

3.122 DP 34 considered that the proposed system of instituting a preliminary hearing in adoptions would transfer much decision-making power from the agencies to the Court and hence reduce the significance of appeals and review.

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.¹⁶⁴

Submissions and response

3.123 The appeal and review procedures in adoption were not generally raised as an issue in submissions. However, one area of concern which was raised briefly in both IP 9 and in DP 34 was the possible use of an administrative tribunal to hear appeals from unsuccessful applicants for adoption. Assuming the Community Services Appeals Tribunal would be such a tribunal, the New South Wales Committee on Adoption cautioned:

the major issue for the Community Services Appeals Tribunal is likely to be appeals from applicants against being declared unsuitable adoptive parents - usually for an unknown child. In such situations the appellants are articulate and generally present their desire to be parents in compelling ways. The unknown child is silent and unrepresented. It is the experience of the COA [Committee on Adoption] that in a similar case before the Community Welfare Appeals Tribunal where none of the tribunal members had specific adoption knowledge that the members were confused by the issues of adoption and focussed on the provision of services to the persons before them. What was known about the needs of children to be generally placed within community norms etc was overlooked. Priority was given to the needs of the applicants - not to the needs of the unknown, silent and unrepresented child.¹⁶⁵

Conclusion

3.124 The Commission notes that appeals from administrative decisions can cover a wide range of subjects and that other statutory appointed bodies, such as the Community Services Commission,¹⁶⁶ are given a wide ambit of power to investigate or make recommendations on bureaucratic services. The Commission also notes the increasing use of tribunals to hear these administrative appeals. For example, the Community Services Commission can investigate a complaint of unreasonable conduct made against an agency in relation to a wide variety of adoption decisions and recommend action on the complaint in a report.¹⁶⁷ If the recommended action is not acted upon by the agency, an appeal by the complainant can be made to the Community Services Appeals Tribunal.¹⁶⁸

3.125 The Commission is also aware that the present New South Wales Government has determined to establish a general Administrative Appeals Tribunal to examine administrative decisions, as distinct from the present more specialised tribunals, such as the Community Services Appeals Tribunal.¹⁶⁹ It is also looking at rationalising the existing tribunals which might become part of the Administrative Appeals Tribunal.¹⁷⁰

3.126 In considering appeals and review mechanisms in relation to adoption, the discussion below is consequently confined to the agency's decisions impacting on the adoption generally, the selection of adoptive parents, placement decisions and the licensing of private agencies.

3.127 The recommendations in this Chapter deal appropriately with decisions made during the adoption process. The introduction of discretionary Supreme Court mechanisms of a preliminary hearing, guardian *ad litem* and legal representative would provide for review of agency decisions in the context of the individual adoption. Agency decisions which could be effectively examined in a preliminary hearing would include, inter alia, the acceptability of a birth parent or guardian consent or its dispensation, the placement of a child, or the appropriateness of an adoption order for a particular child.

3.128 The present system of review by the agencies was not subject to any significant criticism in submissions to DP 34. The present system of review under the adoption legislation is consistent with the fact that adoption is not a service to adults. Its fundamental purpose is to provide the best possible alternative care for children. For example, it is inappropriate for intending adoptive parents to challenge selection decisions through an external administrative appeals process, such as a tribunal.

3.129 It might be argued that there is an inconsistency in the present legislative system in that DOCS, although it must provide for review, is not specifically required to have independent scrutiny of selection decisions,¹⁷¹ while under the Adoption Regulation the private adoption agencies must make provision for independent review of selection decisions.¹⁷² However, the distinction could be justified on the basis that decisions by DOCS are subject to the principle of ministerial responsibility, and are also subject to scrutiny by the Ombudsman. Having regard to this, and to the lack of criticism in the submissions received, the Commission is not persuaded that there is any need to change the present system under the legislation. It may be, however, that the question could be reconsidered in the future in the context of any wider review by the Government of its system of review of administrative decisions.

3.130 Appeal and review procedures should be clearly set out in writing and readily obtainable by interested parties.

3.131 The current arrangements for appeals to an administrative tribunal, presently being the Community Services Appeals Tribunal, of the Director-General's decisions to license, deregister or impose conditions on a private agency are satisfactory.

3.132 Of the above types of potential appeals on adoption matters, only appeals in regard to the licensing of adoption agencies should be conducted in open hearings.

RECOMMENDATION 24

The present appeals and review system should be retained. Any external appeals process to general tribunals on decisions relating to the selection of adoptive parents should not be allowed.

FOOTNOTES

1. However, this strict system of regulation is tempered in relation to adoptions within families, such as adoptions by step-parents or adoptions by relatives. See further, Chapter 4.
2. A Roughley *Identifying Adoption Practice and Problems in Relation to the Local Adoption of Infants* Project prepared at the request of the New South Wales Law Reform Commission (September 1993) at 3-4.

3. *Adoption of Children Act 1965* (NSW) s 10 and 11.
4. s 11.
5. s 11(3) and 16; *Adoption of Children Regulation 1995* (NSW) cl 4, 5 and Schedule 2.
6. *Adoption of Children Act 1965* (NSW) s 13.
7. Barnardos Australia *Submission* (26 July 1994).
8. Roughley *Identifying Adoption Practice and Problems in Relation to the Local Adoption of Infants* at 4-5.
9. England and Wales - Department of Health and Welsh Office *Review of Adoption Law - Report to Ministers of an Interdepartmental Working Group - A Consultation Document* (October 1992) at 28.
10. *Adoption of Children Act 1965* (NSW) s 34(2C) and (2D): this includes an adoption where the Director-General becomes guardian of an interstate child now present in New South Wales (who is not a ward under the *Children (Care and Protection) Act 1987* (NSW)), after accepting guardianship from a similar officer in another State or Territory.
11. s 34(1).
12. s 34(2). Guardianship of wards under the *Children (Care and Protection) Act 1987* (NSW) is with the Minister of Community Services: s 90(1). However, functions arising from the guardianship can be delegated by the Minister to the Director-General: s 11.
13. *Adoption of Children Act 1965* (NSW) s 27 and 34(2): a consent to adoption by a parent or relative of the child is a *specific* consent. Guardianship is transferred to the Director-General for a *general* consent under s 34(1). A general consent is a consent to an adoption by any persons in accordance with New South Wales law: s27(1).
14. Other reasons can exist for the termination of the Director-General's guardianship: see *Adoption of Children Act 1965* (NSW) s 34(5).
15. For the purposes of this Chapter, "agencies" refers to both DOCS and the private adoption agencies unless the context otherwise requires.
16. See *Adoption of Children Regulation 1995* (NSW) Schedule 2 para 12 in relation to private adoption agencies. Schedule 2 para 13(2) requires the Principal Officer of a private agency to ensure the placement of a child with proposed adoptive parents is satisfactory before making an application to the Court for an adoption order.
17. Figures provided by the New South Wales Department of Community Services in February 1995 for domestic adoptions in the period from 1990 to 1994 inclusive.
18. Under the *Children (Care and Protection) Act 1987* (NSW).
19. In practice, this does not happen.
20. However, a child awaiting adoption, local or intercountry, is a "protected person" under the *Children (Care and Protection) Act 1987* (NSW) s 3(1), as defined in para (a1) and (c). Section 91(1) gives the Director-General (as the Minister's delegate) wide general powers to provide for the child's accommodation, care and maintenance, and remove the child from one place to another.
21. *Adoption of Children Act 1965* (NSW) s 34(3) and (4).

22. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 16; New South Wales Department of Community Services *Submission* (5 September 1994) at 16 and 19; Anglican Adoption Agency *Submission* to Issues Paper 9 (2 September 1993) at 4.16.
23. *Adoption Act 1993* (ACT) s 36(2); *Adoption Act 1984* (Vic) s 46(1).
24. *Immigration (Guardianship of Children) Act 1946* (Cth) s 6.
25. *Immigration (Guardianship of Children) Act 1946* (Cth) s 5. Except in the case of some foreign adoptions orders which are recognised in New South Wales: *Adoption of Children Act 1965* (NSW) s 46.
26. See further, Chapter 10.
27. *Family Law (Convention on Protection of Children and Intercountry Adoption) Regulations*
28. This requirement was decreased from 12 months in January 1995.
29. *Adoption of Children Act 1965* (NSW) s 34(3) and (4).
30. In practice, DOCS brings an application for an adoption order before the Court after six months. On average, an adoption order in local adoptions is made eight to nine months after the child has become available for adoption: Information given to the Commission in conference, 23 September 1996.
31. New South Wales Department of Community Services *Submission* (5 September, 1994) at 16. However, the implementation of the recommended automatic recognition in New South Wales of adoption orders made in countries which have ratified the Hague Convention or in “designated countries” would mean that such overseas adoptions would not come under this scrutiny: see further, Chapter 10.
32. See further, Chapter 10.
33. New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965* (NSW) (Issues Paper 9, 1993).
34. New South Wales Committee on Adoption *Submission* to Issues Paper 9 (9 September 1993) at 30.
35. In practice this does not happen; DOCS places the child with temporary foster carers at least until the revocation period expires.
36. NSWLRC DP 34 Chapter 5, Proposal 1.
37. NSWLRC DP 34 Chapter 5, Proposals 5 and 7.
38. See NSWLRC DP 34 Chapter 5, Proposals 2-7.
39. Post Adoption Resource Centre *Submission* (5 August 1994) at 7.
40. For example, New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 14; Post Adoption Resource Centre *Submission* (5 August 1994) at 7; Anglican Adoption Agency *Submission* (26 August 1994) at 5.1; Barnardos Australia *Submission* (26 July 1994), New South Wales Department of Community Services *Submission* (5 September 1994) at 17 and 19; Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 16; E Berzins *Submission* (27 July 1994) at 8; and Australian Society for Intercountry Aid for Children (NSW) Inc *Submission* (31 August 1994) at 8.

41. Anglican Adoption Agency *Submission* (26 August 1994) at para 5.1.
42. For example, Anglican Adoption Agency *Submission* (26 August 1994) at 5.1.
43. Justice B J K Cohen *Submission* (29 July 1994) at 5-6; Justice J Bryson *Submission* (3 August 1994); LDS Social Services Australia (Sydney Agency) *Submission* (5 October 1994) at 6; Post Adoption Resource Centre *Submission* (5 August 1994) at 7; Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 16; Barnardos Australia *Submission* (26 July, 1994).
44. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August, 1994) at 16; New South Wales Department of Community Services *Submission* (5 September 1994) at 19; Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 16; Barnardos Australia *Submission* (26 July 1994).
45. Justice B J K Cohen *Submission* (29 July 1994) at 6.
46. Cohen *Submission* at 1.
47. Cohen *Submission* at 6.
48. Cohen *Submission* at 2-3.
49. Cohen *Submission* at 3.
50. Justice J Bryson *Submission* (3 August 1994).
51. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 16-17 commented: "Any added delays in relation to the timing of a preliminary hearing is considered detrimental to the infant or young child awaiting adoption. If the delay is too long we could see a situation arising whereby the transfer of care of the child is occurring at a developmental stage which is increasingly disruptive for the infant. Bonding and attachment issues remain a critical focus for Centacare in considering the need for the prevention of undue delays at the Preliminary Hearing stage of the process. It is critical to keep sight of the principle of paramountcy with respect to the child's needs particularly for the infant and young child in a situation where all consents have been obtained and it could become the fact that the Court process itself is delaying the stability and security of the child. Furthermore undue delays have potentially negative effects on those birth parents that are wanting stability for their infant in as short a practicable time as possible." New South Wales Department of Community Services *Submission* (5 September 1994) at 17 also cautioned: "A system designed to protect children's rights should not impede their right to a secure placement as soon as possible."
52. *Adoption of Children Regulation 1995* (NSW) Schedule 2 para 13(2).
53. For example, Barnardos Australia *Submission* (26 July 1994); New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 16-17; LDS Social Services Australia (Sydney Agency) *Submission* (5 October 1994) at 8.
54. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 15.
55. Some submissions suggested that a preliminary hearing could also deal with the actual dispensation of parental consent: Justice B J K Cohen *Submission* (29 July 1994) at 3: "An early hearing would be useful where a decision is required as to dispensing with consent. Under the present Act a separate application can be made for this purpose, but it could be made more specific that it can be part of the application for adoption." See also Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 16.

56. For example, that there is no evidence of a dispute in the adoption and that the best interests of the child have been met.
57. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 17; New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 16; Anglican Adoption Agency *Submission* (26 August 1994) at para 5.1; Barnardos Australia *Submission* (26 July 1994): "... such situations may arise in the adoption of children by their step-parents or foster parents."
58. The 1989 *United Nations Convention on the Rights of the Child* is now the most widely supported of any UN Convention with 172 nations having ratified it as at April 1995: The Australian Youth Foundation Inc and National Children's and Youth Law Centre *Australian Children's Charter: Draft for Consultation* (National Children's and Youth Law Centre, Sydney, June 1995) at 7. In response to the Convention, the draft Australian Children's Charter outlines the fundamental rights of children in Australia through a national Charter to recognise and protect them.
59. The development of the role of a separate representative for the child in proceedings in the Family Court of Australia forms part of this trend in child welfare law: see for example, *Re K* [1994] FLC 92-461; *In the Marriage of Bennett* (1991) 14 Fam LR 397; *Separate Representative v JHE and GAW* (1993) 16 Fam LR 485. From 1992-93 to 1994-95, the increase in the total number of approvals by Legal Aid Commissions of separate representatives in Family Court Proceedings was around 280 per cent: D Smith "The Right of the Child to be Heard - The Family Court's Response", paper presented at Law Council of Australia, 29th Australian Legal Convention *The Competitive Edge - Proceedings* (Brisbane, 24-28 September 1995) 293 at 296-297.

A recent enquiry into child advocacy by the Standing Committee on Social Issues of the New South Wales Legislative Council has recommended that a special Office of the Status of Children and Young People should be set up to give young people a voice at the highest level of government. This is to be established as part of the Premier's Department. It has also recommended the appointment of a National Commissioner for Children to monitor, promote and protect children's interests: Standing Committee on Social Issues of the New South Wales Legislative Council *Inquiry into Children's Advocacy* (September 1996).

60. A separate party in legal proceedings, either alone or through a lawyer, can participate fully in the proceedings. A separate party can be served with documents, call evidence and be heard in the proceedings, examine and cross-examine witnesses, and appeal against any decision of the Court.
61. For example, the *Children (Care and Protection) Act 1987* (NSW) provides for a guardian *ad litem* to serve the best interests of the child during legal proceedings in the Children's Court: s 66(1), (2). It also provides for the appointment of a legal representative for the child, who serves a separate role from the guardian *ad litem*, acting as an advocate for the child. The appointment of the guardian *ad litem* and the legal representative is at the discretion of the Court in each case.

Separate legal representation for a child can be ordered by the Family Court where the Court considers it appropriate in a case, on its own initiative or on the application of any other person: *Family Law Act 1975* (Cth) s 68L. The legal representative forms an independent view on the child's best interests, which may not necessarily reflect the wishes of the child. The representative then prepares and conducts a case for the child in Court including, where appropriate, conveying the child's wishes. The representative may also participate in negotiations on behalf of the child. The Family Court has held that the representative is entitled to the same rights and is subject to the same obligations as an advocate for a party and accordingly may make an opening address, ask leading questions in cross-examination and indicate at commencement or in final address the orders sought. It should be noted that a child is rarely a party to proceedings under the Family Law Act: *In the Marriage of B and R* (1995) 19 Fam LR 594.

62. Council of Social Welfare Ministers *Draft National Minimum Principles in Adoption*, July 1995 para 1(12); *National Minimum Principles in Adoption*, June 1993 para 1(11).
63. Council of Social Welfare Ministers *Draft National Minimum Principles in Adoption*, July 1995 para 8(2); *National Minimum Principles in Adoption*, June 1993 para 8(2).
64. At present in the Supreme Court, the capacity of a child to participate in proceedings is circumscribed by the relevant court rules: *Supreme Court Rules 1970* (NSW) Pt 63. A child can participate in proceedings through a "tutor": Pt 63 r 2, 3. The tutor combines the roles of a next friend and guardian *ad litem* of the child: *Supreme Court Rules 1970* (NSW) Pt 1 r 8(1). G C Lindsay comments that where it is necessary to refer to the office of a tutor, he or she is described as a tutor, unless it is necessary to distinguish between the offices of "next friend" (as tutor of a plaintiff) and "guardian *ad litem*" (as tutor of a defendant): *Guide to the Practice of the Supreme Court of New South Wales* (Law Book Company, Sydney, 1989) at 83. The Court may appoint a tutor on the motion of a party to the proceedings or another person: *Supreme Court Rules 1970* (NSW) Pt 63 r 7(1). However, a child is not a party to adoption proceedings and so a tutor is not normally used in adoptions.
65. The child can be made a party to the proceedings by order of the Court pursuant to the *Supreme Court Rules 1970* (NSW). However, this would be extremely unusual. The child would only be made a party if the proceedings were contested and, in that case, they would be likely to be represented: see the discussion on "tutor" above.
66. New South Wales Department of Community Services *Submission* (5 September 1994) at 18. It is not uncommon for the Court to ask the child to appear at the proceedings in order to ascertain the child's views on the adoption.
67. The Australian Association of Social Workers Ltd (NSW Branch Office) *Submission* (11 August 1994).
68. *United Nations Convention on the Rights of the Child* Article 12.
69. NSWLRC DP 34 at 87.
70. NSWLRC DP 34 at para 7.82. Compare with the *Family Law Act 1975* (Cth) s 62G.
71. For example: Barnardos Australia *Submission* (26 July 1994); Anglican Adoption Agency *Submission* (26 August 1994) at para 5.2; The Law Society of New South Wales *Submission* (24 August, 1994) at 3; Gay and Lesbian Rights Lobby Inc *Submission* (29 July 1994) at 4; E Berzins *Submission* (27 July 1994) at 8.
72. The New South Wales Bar Association *Submission* (16 September 1994) at 1; The Law Society of New South Wales *Submission* (24 August 1994) at 3.
73. The New South Wales Bar Association *Submission* (16 September 1994) at 1.
74. National Children's and Youth Law Centre *Submission* (29 July 1994) at 8; New South Wales Department of Community Services *Submission* (5 September 1994) at 18 and 20; LDS Social Services, Australia Sydney Agency *Submission* (5 October 1994) at 7; Anglican Adoption Agency *Submission* (26 August 1994) at para 5.2; New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 17.
75. National Children's and Youth Law Centre *Submission* (29 July 1994) at 8.
76. National Children's and Youth Law Centre *Submission* (29 July 1994) at 8.
77. Anglican Adoption Agency *Submission* (26 August 1994) at para 5.2.

78. National Children's and Youth Law Centre indicated that only with this dual mechanism, of guardian *ad litem* and separate legal representative, can Article 12 of the *United Nations Convention on the Rights of the Child* be fully effective: *Submission* (29 July 1994) at 8.
79. National Children's and Youth Law Centre *Submission* (29 July 1994) at 8. I Kennedy and L Formica "The Role and Powers of a Separate Representative" in papers delivered at a BLEC Masterclass *1995 Family Law Handbook: Day One* (BLEC Books, Melbourne, March 1995) 37 at 41.
80. Barnardos Australia *Submission* (26 July 1994); New South Wales Department of Community Services *Submission* (5 September 1994) at 18 and 20; Anglican Adoption Agency *Submission* (26 August 1994) at para 5.2; A Marshall *Submission* (1 August 1994) at 3-4; Post Adoption Resource Centre *Submission* (5 August 1994) at 8.
81. Recommendation of the Standing Committee on Social Issues of the New South Wales Legislative Council *Inquiry into Children's Advocacy* (September 1996). This is to be established as part of the Premier's Department.
82. The Australian Youth Foundation Inc and National Children's and Youth Law Centre commented on the impact shortages in community resources have on the practical implementation of the UN Convention on the Rights of the Child (including a child's ability to express his or her views in court): "It is not only laws that are relevant to deciding if Australia is meeting its obligations under the Convention. Policy and practice in all areas relating to children need to be reviewed. 'It is arguable that the Convention is breached in Australia most frequently by failure to provide sufficient resources to fully implement its provisions to an acceptable standard' (Hogan, Munro, Cronin and Young, 1989 p 10)": *Australian Children's Charter: Draft for Consultation* at 7. The New South Wales Department of Community Services cautioned that based on the Children's Court experience of guardians *ad litem*, funding and responsibility for the scheme in adoptions would need to be resolved: *Submission* (5 September 1994) at 18.
83. For example, in the Family Court jurisdiction, the Law Council of Australia, through its Family Law Section, has set up a committee which is developing a national training programme for separate representatives. Legal Aid Commissions and the Family Court are represented on this Committee: D Smith "The Right of the Child to be Heard - The Family Court's Response", paper presented at the Law Council of Australia, 29th Australian Legal Convention *The Competitive Edge - Proceedings* (Brisbane, 24-28 September 1995) 293 at 297.
84. Anglican Adoption Agency *Submission* (26 August 1994) at para 5.2.
85. National Children's and Youth Law Centre *Submission* (29 July 1994) at 8. See further on the English approach: P Munro and L Forrester *The Guardian Ad Litem* (2nd ed, Jordan Publishing Limited, Bristol, 1995) Chapter 4.
86. This latter approach has been taken in two Supreme Court cases *De Groot v De Groot* (1989) 13 Fam LR 292 and *Cirkov v Cirkov* (Supreme Court, NSW, Smart J, 30 July 1990, ComMD 11120/90, unreported) examining the interaction between the guardian *ad litem* and the child's legal representative in the New South Wales Children's Court jurisdiction. See further on this, G Lane "The Children's Representative" CLE Seminar Papers *Children's Court Practice* (Sydney, April 1995) 65 at 71.

The Commission does not intend the role of guardian *ad litem* in adoption proceedings to follow the more restrictive interpretation given to the appointment of a guardian *ad litem* in the Children's Court by the New South Wales Supreme Court in the above two cases. In both cases, being challenges by the child to the magistrate's decision to appoint a guardian *ad litem*, the Supreme Court believed a guardian *ad litem* in the Children's Court should usually only be appointed where the child lacks the capacity to give instructions to a solicitor.

87. Several family law cases have suggested a range of appropriate situations when a separate representative should be appointed in proceedings (see *Re K* [1994] FLC 92-461) and have commented on the role and functions of the separate representative (see *In the Marriage of Waghorne and Dempster* [1979] FLC 90-700; *In the Marriage of Bennett* (1991) 14 Fam LR 397; *Separate Representative v JHE and GAW* (1993) 16 Fam LR 485; and *In the matter of P and P* [1995] FLC 92-615).

However, when the best interests of the child conflict with the child's own views, the separate representative argues for the predominance of the best interests of the child. This conflicting function of the separate representative has been criticised for leaving the child without an effective advocate for his or her own views. For example, Lane comments: "There is ... a growing body of opinion which casts doubt on the propriety of an advocate being put in a position of an assessor of the child's welfare [in the Family Court]. Whence comes the expertise to assume this function? It is suggested that the child's separate representative must suffer from some sort of role confusion when expected to wear these two hats of welfare and wishes": Lane "The Children's Representative" at 73.

It would be beneficial to watch developments in the role of the separate representative in the Family Court. For example in the Family Court jurisdiction, a Chief Justice's Working Party was established to consider guidelines for the respective roles of the separate representative and court counsellor working together where children are separately represented in the Family Court. The Working Party has issued its final report *Representing the Child's Interests in the Family Court of Australia: Report to the Chief Justice of the Family Court of Australia* (September 1996).

88. Barnardos Australia *Submission* (26 July 1994); New South Wales Department of Community Services *Submission* (5 September 1994) at 19; New South Wales Committee on Adoption *Submission* to Issues Paper 9 (9 September 1993) at 40.
89. See *Children (Care and Protection) Act 1987* (NSW) s 58.
90. The separate legal representative could do all things a lawyer could do for a party to the proceedings, such as serve documents, call witnesses, cross-examine and appeal. This would be similar to the powers of the separate representative in the Family Court as decided in case law. See Kennedy and Formica "The Role and Powers of a Separate Representative" at 41-44.
91. Barnardos Australia *Submission* (26 July 1994); Australian Association of Social Workers Ltd (NSW Branch Office) *Submission* (11 August, 1994); R Tupman "Family Law Applications Involving Children Outside the Family Court's Jurisdiction" CLE Seminar Papers *Children's Legal Services* (Sydney, November 1994) at 27.
92. Australian Association of Social Workers Ltd (NSW Branch Office) *Submission* (11 August 1994).
93. New South Wales Department of Community Services *Submission* (5 September 1994) at 19; Peterie *Submission* (14 July 1994) at 5.
94. Barnardos Australia *Submission* (26 July 1994).
95. In South Australia the child and the persons seeking to adopt must attend personally before the Court, as the Court requires, during the hearing of an application for an adoption order: *Adoption Regulations 1989* (SA) cl 30(2).
96. *Secretary, Department of Health and Community Services v JWB* (Marion's Case) (1992) 175 CLR 218.
97. See, for example: *Family Law Act 1975* (Cth) s 68F(2)(a), 68L and 69C(2)(b); *Children (Care and Protection) Act 1987* (NSW) s 61A, 58(1)(a), 62B, 65(1)(a), 66 and 69; *Adoption Act 1984* (Vic) s 14.

98. Article 12.
99. By those applicants nominated in the consent form: *Adoption of Children Act 1965* (NSW) s 26(4A) and 33 and *Adoption of Children Regulation 1995* (NSW) cl 28 and Schedule 1, Form 5.
100. A child over 12 years of age must consent to a change in his or her first names: *Adoption of Children Act 1965* (NSW) s 38(2A) and *Adoption of Children Regulation 1995* (NSW) cl 28 and Schedule 1, Form 5 which requires the child to express his or her wishes as to first name and surname.
101. s 21(1)(c)(i)(b).
102. NSWLRC DP 34 at para 7.81.
103. See NSWLRC DP 34 Chapter 6, Proposal 3.
104. NSWLRC DP 34 at para 7.82.
105. National Children's and Youth Law Centre *Submission* (29 July 1994) at 8.
106. National Children's and Youth Law Centre *Submission* (29 July 1994) at 9.
107. For example, New South Wales Department of Community Services *Submission* (5 September 1994) at 18 and 27; Anglican Adoption Agency *Submission* (26 August 1994) at para 7.2; NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 18.
108. Barnardos Australia *Submission* (26 July 1994): "Most children in Barnardos' program have input into the type of family with whom they wish to live, and are involved in the recruitment of families and are fully consulted during the process of introduction to a new family and prior to adoption."
109. Anglican Adoption Agency *Submission* (26 August 1994) at para 6.4.
110. The Law Society of New South Wales *Submission* (24 August 1994) at 11. However, the child should not be obliged to express a choice in any one direction.
111. See, for example: *Adoption Act 1993* (ACT) s 26(4); *Adoption Act 1984* (Vic) s 19(3), (4) and (5).
112. NSWLRC DP 34 at para 14.26-14.28.
113. For example: South Australia; Victoria; Australian Capital Territory; Western Australia; and Tasmania.
114. *Adoption of Children Act 1965* (NSW) s 50-52.
115. s 55.
116. s 54.
117. s 57.
118. s 53.
119. s 58.
120. s 49 and 49A. Section 49A was inserted by a provision in the *Adoption of Children (Amendment) Act 1980* (NSW) which, however, only came into force in 1987.

121. New South Wales Law Reform Commission *Review of the Adoption Information Act 1990* (Report 69, 1992) at para 2.7.
122. *Adoption of Children Act 1965* (NSW) s 31D.
123. For example, s 50-58.
124. For example, s 49 and 49A.
125. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August, 1994) at 45.
126. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August, 1994) at 6.
127. *Adoption of Children Act 1965* (NSW) s 64.
128. For example: *Adoption Act 1993* (ACT) s 112; *Adoption of Children Act 1994* (NT) s 79; *Adoption Act 1994* (WA) s 133; and *Adoption Act 1984* (Vic) s 107.
129. *Adoption of Children Act 1965* (NSW) s 64; *Supreme Court Rules* (NSW) Pt 73 r 11.
130. See NSWLRC DP 34 at para 14.34.
131. *Children (Care and Protection) Act 1987* (NSW) s 67.
132. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 46; Anglican Adoption Agency *Submission* (26 August 1994) at 14.1; New South Wales Department of Community Services *Submission* (5 September 1994) at 59.
133. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 46; Anglican Adoption Agency *Submission* (26 August 1994) at para 14.1.
134. LDS Social Services Australia (Sydney Agency) *Submission* (5 October 1994) at 20.
135. LDS Social Services Australia (Sydney Agency) *Submission* (5 October 1994) at 20.
136. *Adoption of Children Act 1965* (NSW) s 66.
137. Under amendments to the *Family Law Act 1975* (Cth) in the *Family Law Reform Act 1995* (Cth), the concepts of “guardianship”, “custody” and “access” have been replaced by “parental responsibility” and “parenting orders”.
138. NSWLRC DP 34 at para 14.8.
139. See *Family Law Act 1975* (Cth) s 61B, 61C, 61D, 64B and 65D.
140. The Law Society of New South Wales commented: “The giving to the Family Court of sole jurisdiction in adoption matters would not effect the provision of services by the Department of Community Services which could still continue to be the responsibility of the State”: *Submission* (24 August 1994) at 3.
141. *Family Law Act 1975* (Cth) s 60G, 60F(4), 61E and 65J.
142. *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW). This legislation gives the Supreme Court power to exercise jurisdiction of the Family Court, and gives the Family Court power to exercise jurisdiction of the Supreme Court. It also contains provisions allowing the two courts to transfer matters to each other, so that they

can ensure that each would normally continue to exercise jurisdiction in the ordinary way. In general, adoption matters continue to be heard by the Supreme Court and “parental responsibility” matters continue to be heard by the Family Court. This cross-vesting legislation has proved particularly effective where the proceedings involve several matters, some arising under Federal law and some under State law. The cross-vesting scheme enables one court to deal with all matters.

143. The *Law and Justice Legislation Amendment Act (No 3) 1992* (Cth) amended the definition of “special federal matters” in the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) to include a matter arising under *Family Law Act 1975* (Cth) s 60AA (now s 60G of the *Family Law Act 1975* (Cth)). Pursuant to s 60G, leave must be obtained from the Family Court to commence proceedings for the adoption of a child by a step-parent. Consequently, where a step-parent adoption application had been filed in the Supreme Court without the consent of the Family Court, the Supreme Court could no longer, as it did in the past, redeem the situation by using cross-vested powers from the Family Court to obtain the required consent. Instead, as a “special federal matter” under the amendment, the Supreme Court was compelled to transfer the application for leave to commence a step-parent adoption to the Family Court.
144. *Re: Adoption Application* (Supreme Court, NSW, McLelland CJ in Eq, 14 July 1995, ED 80249/93, unreported) held that despite the “special federal matters” provision requiring Family Court leave for adoption proceedings to commence, “special reasons” existed under the cross-vesting legislation to hear the matter in the Supreme Court, so that the Supreme Court could both grant the adoption order and give leave under the Family Law Act for the adoption proceedings to commence. The special reasons included the informed consents of the relinquishing birth parent and the children to the making of the adoption order in favour of the other birth parent and the step-parent.
145. O Jessep and R Chisholm “Step-Parent Adoptions and the Family Law Act” (1992) 6 *Australian Journal of Family Law* 179; *Fogwell v Ashton* (1993) 17 Fam LR 94.
146. For example: New South Wales Department of Community Services *Submission* (5 September 1994) at 20; Barnardos Australia *Submission* (26 July 1994); New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 16-17. However, the Law Society of New South Wales favoured the Family Court jurisdiction: *Submission* (24 August 1994) at 3. On the other hand, LDS Social Services Australia (Sydney Agency) favoured an adoption tribunal for uncontested cases, with contested cases being held in a higher court, such as the Supreme Court: *Submission* (5 October 1994) at 8.
147. Barnardos Australia *Submission* (26 July 1994); New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August, 1994) at 16-17; Anglican Adoption Agency *Submission* (26 August 1994) at para 5.2.
148. Anglican Adoption Agency *Submission* (26 August 1994) at para 5.2; Post Adoption Resource Centre *Submission* (5 August 1994) at 7.
149. For example, see New South Wales Committee on Adoption *Submission* to Issues Paper 9 (9 September, 1993) at 30.
150. H Meadows, in discussing the Victorian Children’s Court process specifically, and court proceedings generally, cites Family Court Chief Justice Nicholson as agreeing that the use of guardians *ad litem* has merit over an adversarial court process. However, this endorsement does not extend to the use of tribunals instead of courts: “I share the concern about the negative nature and consequences of purely adversary contests. I must say, however, that I view the suggested solution of a tribunal as no solution at all. Experience suggests that tribunals are no better and may well be worse than courts in performing the decision-making function. Their drawbacks include liability to political interference, either indirectly or by the removal of the tribunal if its approach is disapproved of by the government, expense (three decision-makers instead of one), lack of security of tenure and a lack of independence resulting from concerns

about re-appointment”: “A contradiction in terms?: Child Welfare and the Adversary System” (1995) 69 *Law Institute Journal* 307 at 309

151. The New South Wales Bar Association *Submission* (16 September 1994) at 1; E Berzins *Submission* (27 July 1994) at 9.
152. The National Children’s and Youth Law Centre favoured the Family Court: *Submission* (29 July 1994) at 9.
153. The Law Society of New South Wales *Submission* (24 August 1994) at 3; Australian Association of Social Workers Ltd (NSW Branch Office) *Submission* (11 August 1994).
154. Australian Association of Social Workers Ltd *Submission* (11 August 1994).
155. Australian Association of Social Workers Ltd *Submission* (11 August 1994).
156. *Adoption of Children Regulation 1995* (NSW) cl 20; Schedule 2 para 9(4); *Adoption of Children Act 1965* (NSW) s 14 and 67A.
157. *Adoption of Children Regulation 1995* (NSW) cl 14.
158. *Adoption of Children Regulation 1995* (NSW) cl 20(6).
159. *Adoption of Children Regulation 1995* (NSW) Schedule 2 para 9(4).
160. *Adoption of Children Act 1965* (NSW) s 67A.
161. Although an appeal can be made to the Supreme Court on a question of law: see *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) s 51(1) and 67.
162. *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) s 51(2). Proceedings on an appeal to the Tribunal are by way of a new hearing: s 45.
163. *Adoption of Children Act 1965* (NSW) s 14(3).
164. NSWLRC DP 34 at para 5.46.
165. New South Wales Committee on Adoption *Submission* to Issues Paper 9 (9 September 1993) at 37.
166. The *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) establishes the Community Services Commission (s 77) to investigate, among other things, complaints made by persons that a New South Wales “service provider,” principally being the Department of Community Services, has acted unreasonably: s 83(e). It can make recommendations for improvement in the delivery of community services: s 83(3).
167. *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) s 12, 13, 23 and 38(1).
168. s 40(1)(d); *Community Services (Complaints, Appeals and Monitoring) Regulation 1996* (NSW) cl 6(1)(a), (2).
169. See J Shaw QC MLC, New South Wales Attorney General *Law & Reform* (Issue 1, February 1996) at 6.
170. See Shaw *Law & Reform* at 6.
171. *Adoption of Children Regulation 1995* (NSW) cl 20.

172. *Adoption of Children Regulation 1995* (NSW) Schedule 2 para 9(4).

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

4. Particular Categories of Adoption

INTRODUCTION

4.1 In relation to certain adoptees, there may be particular concerns or considerations which need to be addressed, in addition to taking into account issues relevant to all adoptions. For this reason, it is justified to give separate deliberation to particular categories of adoption. This chapter looks at the adoption of:

adults;

step-children and other related children;

children in care;

children in private placements; and

children with special needs.

4.2 Approximately one third of all local adoptions are adoptions of relatives, wards, foster children and children with "special needs". Furthermore, there are now almost as many intercountry adoptions as there are local adoptions. Within the category of "intercountry adoptions" there may be many children who have special needs. Table 1 gives a comparison of the numbers of adoptees in different categories.

Table 1: Adoption placements in New South Wales

Category	1992/1993 ¹	1993/1994 ²	1994/1995 ³
Infants (under 2 years)	72	60	45
Infant Wards	6	8	6
Special needs and older age	6	18	10
Special needs and older age wards	15	11	11
Relatives (a)	-	-	48
Intercountry adoptees	95	89	85

[\[Link to text only version of table 1\]](#)

ADOPTION OF ADULTS

Current law and practice

4.3 Section 18 (1)(b) of the Adoption Act allows the Court to make an order for the adoption of a person who has attained the age of 18 years provided he or she has been brought up, maintained and educated by the applicant(s) as their child or has been a ward in the care or custody of the applicant(s). The application must be made with the consent of the Director-General or on behalf of the applicants by the Director-General or by the principal officer of a private adoption agency.⁴

4.4 However, pursuant to s 18(4), the Court cannot make an order for the adoption of a person who is or has been married.

4.5 Section 21(1)(c)(ii) of the Adoption Act requires the Court to consider a report from the Director-General concerning the proposed adoption and satisfy itself that:

the applicant or each of the applicants is of good repute; and

in the particular circumstances of the case it is desirable that the “child”⁵ should be adopted by the applicant(s); and

in either case, the welfare and interests of the child will be promoted by the adoption.

4.6 Pursuant to s 26(6) of the Adoption Act, the consents of certain persons required to all other adoptions are not required to the adoption of an adult.

4.7 In practice, adult adoptions are rare and mostly not considered appropriate by either the Supreme Court of New South Wales or DOCS:

The Court is always very careful to see that adoption is used for the purposes contemplated by the Act and not for any collateral purposes. As Selby J said in *Re Lee Yen Chum* (1963) 4 FLR 296 at 299: “The Court looks with disfavour upon what are sometimes called ‘accommodation’ adoptions, that is to say, adoptions which are sought for a motive other than an intention to establish a parental relationship between the applicants and the person sought to be adopted. In such cases, the Court, in the exercise of its discretion, has refused to make the order asked.”⁶

4.8 Adults wishing to be adopted are usually motivated by emotional or sentimental reasons, or to cement their sense of identity. Where they have been brought up through all or most of their childhood by a particular adult or adults, when they themselves reach adulthood it may become emotionally important to recognise legally and formally the parent/child relationship. This has occasionally been precipitated by the imminent death of the parent or child. There have also been instances where the parties involved have wanted to bring the adoptee within the terms of a family trust,⁷ have wanted to enable the adoptee to qualify for a superannuation scheme⁸ or to prevent embarrassment.⁹

Discussion Paper 34

4.9 In DP 34, the Commission recommended that the current law be retained for use in exceptional circumstances.

Submissions and response

4.10 Two submissions were received in response to the Commission’s recommendation.¹⁰ The first submission detailed a case where a person of 36 years of age had had what was described in the submission as an 18 year “parent/child” relationship with the applicants commencing shortly *after* she had turned 18. All parties were eager for an adoption order to be made “to complete” the parent/daughter relationship.

4.11 Much to the parties’ disappointment, the application did not proceed because it failed to fall within the requirement of s 18 of the Adoption Act that the parent/child relationship take place before the child turns 18. The submission argued that:

having regard to the interests of the parties ... there is no justification for limiting an adult adoption to circumstances where a pre-age 18 relationship exists. Provided that the parties are consenting adults and that there is no intention of abuse it is submitted that the *Adoption of Children Act* should allow such adoptions to occur.¹¹

4.12 The second submission related to an application to adopt two adults, aged 21 and 20 years, who had been in the foster care of the applicants from babyhood. This submission raised the anomaly that two consenting adults “who have known each other for a few weeks or even a few days can undergo a simple and non-obtrusive procedure to marry” yet “consenting adults” who wish to adopt and be adopted must have their application processed by an agency, involving them in lengthy and extensive interviews and approval procedures.

Legislation in other States

4.13 The Australian Capital Territory has dealt with adult adoptions in s 10 of its *Adoption Act 1993* (ACT) very simply as follows:

An adoption order shall not be made if the child has attained the age of 18 years unless the Court is of the opinion that-

- (a) the applicants are persons of good repute; and
- (b) there are exceptional circumstances that justify the order.

4.14 Section 66(2) of the *Adoption Act 1994* (WA) provides:

A person who is 18 or more years of age may be adopted by a person who was a carer or step-parent of the first-mentioned person immediately before the first-mentioned person attained 18 years of age.

4.15 Section 13 of the *Adoption Act 1988* (SA) permits adoption of persons between the ages of 18 and 20 years of age if the person has been brought up, maintained and educated by the applicant(s) and there are special reasons for making such an order. In such a case the person’s birth parents are not required to give their consent to the adoption.

4.16 Adoption legislation in the Northern Territory, Queensland, Tasmania and Victoria does not permit adoption of people over 18 years of age.

Conclusion

4.17 The Adoption Act is primarily and fundamentally concerned with the permanent placement of children in a family so that they can be brought up, maintained and educated within a secure and loving family environment. It is therefore anomalous to allow the adoption of adults; the purpose of making such an order will always diverge from the provision of a home in which to be raised and protected.

4.18 Having said that, there is no real reason why legislation should so fetter the Court that it can never make an order for adoption of an adult. Provided the making of such order is seen as exceptional, the Commission recommends that the power to do so remain in the legislation.

4.19 It is necessary to consider the two limitations on the adoption of adults, namely, the restriction that an adult must have been brought up, maintained and educated by the applicant(s) *before* turning 18 and that the Court shall not make an order for the adoption of a person who is, or has been, married.¹²

4.20 Adult adoption lies at the outer margin of adoption. To allow the adoption of an adult who has never been parented by the applicant(s) *as a child* is too far removed from the fundamental purpose of the Act. On balance, the Commission does not recommend that adoptions of adults be allowed unless there has been a parenting relationship before the adult turned 18.

4.21 It is difficult to see why marriage should be a barrier to obtaining an adult adoption order. The exception is discriminatory. The fact that the adoptee has already made a home elsewhere and is not in need of rearing, maintenance, and education is not relevant in this context.

4.22 Requiring applications for adoption to be with the consent of the Director-General or with the support of an agency is to ensure that the applicants are proper persons to rear, maintain and educate a child and that the most suitable applicants to parent a particular child are found. In the case of adult adoption, where the reasons for seeking an adoption order fall outside providing a child with permanent care, there is no justification for subjecting the application to an agency approval process. It is a matter for the Court to find that the making of an adoption order is appropriate in the circumstances of the case.

RECOMMENDATION 25

Section 18 of the Adoption Act should be amended as follows:

Subject to this Act, the Court may, on application, make an order for the adoption of a person who:

- (a) had not attained the age of eighteen years on the date on which the application was filed in the Court; or**
- (b) had attained that age before that date and, prior to attaining that age and for at least five years:**
 - (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 *Children (Care and Protection) Act 1987 (NSW)*,¹³ been in the care or custody of the applicant or applicants or of the applicant and a deceased spouse of the applicant.**

RECOMMENDATION 26

The marital status of the person to be adopted should be irrelevant to the making of an adoption order.

RECOMMENDATION 27

Section 26(6) of the Adoption Act (which provides that consents of certain persons, such as the parents or guardians of a child, are not required in the case of a child who has attained the age of 18 years before the making of the adoption order) should be retained.

RECOMMENDATION 28

Adult applicants for adoption should be able to apply directly to the Court for an adoption order, without the need to obtain the consent or support of the Director-General or an agency.

RECOMMENDATION 29

A report to the Court by the Director-General, pursuant to s 21 of the Adoption Act, should not be required in the case of adult adoptions.

ADOPTION BY STEP-PARENTS AND OTHER RELATIVES

4.23 A parent's¹⁴ partner, in either a marriage or a de facto relationship, may wish to adopt his or her step-child. This type of adoption is referred to as a "step-parent adoption".

4.24 Adoptions of relatives other than step-children are referred to simply as “relative adoptions”. “Relative” is defined in the Adoption Act as meaning:

in relation to a child ... a grandparent, uncle or aunt of the child, whether the relationship is of the whole blood or half-blood or by affinity, and notwithstanding that the relationship depends upon the adoption of any person.¹⁵

4.25 Much of the literature on adoption combines the treatment of step-parent adoptions and relative adoptions in one category, termed intrafamily adoptions. There is a significant amount of overlap between the two categories: issues arise common to both types of adoption and many provisions in the Adoption Act apply to both equally. However, there are also distinct considerations attaching to each which require separate treatment.

4.26 Step-parent and relative adoptions differ from other types of adoptions in that agencies do not select the adoptive parents. Instead, the issue is whether the existing care arrangement should be transformed into an adoption.

Current law and practice

4.27 Pursuant to s 18(2) of the Adoption Act, the applicants in either a step-parent adoption or a relative adoption may apply directly to the Court for an adoption order without the need to obtain first the consent of the Director-General or without the application needing to proceed through an agency.¹⁶

4.28 Section 51(2) of the Adoption Act excludes step-parent and relative adoptions from the operation of s 51(1), which makes it an offence for a person other than the Director-General or the principal officer of a private adoption agency, or someone authorised to act on their behalf, to arrange an adoption.

4.29 The role of DOCS in step-parent and relative adoptions is limited to providing the applicants with the name of an accredited social worker who can prepare a report for the Court¹⁷ or, where DOCS considers it appropriate, appearing in the adoption proceedings to oppose the application. It is still possible for the Court to require the Director-General to make a report in a step-parent or relative adoption,¹⁸ although in practice there are very few instances of the Court exercising this discretion.

Step-parent adoptions

4.30 In step-parent adoptions, though not in relative adoptions, it is also necessary to apply to the Family Court for leave to commence the adoption proceedings.¹⁹ If leave is not obtained from the Family Court, the parental responsibilities of the non-custodial parent are not brought to an end by the making of the adoption order and the child continues to be a child of the former marriage for the purposes of the *Family Law Act 1975* (Cth) (“the Family Law Act”).²⁰

4.31 Under s 60G of the Family Law Act, the Court has a discretion as to whether or not to grant leave. In exercising its discretion, the Court must consider whether granting leave would be in the child’s best interests. The Family Court has held in *Fogwell v Ashton*²¹ that leave should be granted if the Court is satisfied that there is a real possibility that an adoption order would be made if the parties were to apply for such an order and that there are no circumstances which would lead the Court to doubt that allowing the adoption application to be made would be likely to promote the child’s welfare. A later judgment of the Family Court, *In the Adoption of X*,²² which did not consider *Fogwell v Ashton*, held that the granting of leave is not to be seen as an equal alternative to the granting of a guardianship/custody order; there must be some additional significant reason, consistent with the child’s welfare being paramount, which persuades the Court to encourage the path towards adoption.

4.32 The decision of *In the Adoption of X* furnishes an example of when the Family Court considered it appropriate to grant leave for a step-parent to adopt. In that case the step-father was a citizen of Ireland and, under Irish law, the step-child would suffer an inferior legal status in comparison with the step-father’s birth child. In particular, the child would be disadvantaged in relation to succession rights on the

death of the step-father and inheritance tax. The Court was also influenced in that case by the fact that the whereabouts of the birth father were unknown and had not been able to be ascertained for the past six years.

4.33 The effectiveness of s 60G, 60F(4), 61E and 65J of the Family Law Act and issues relating to Federal-State cross-vesting legislation are discussed in Chapter 3.

4.34 Subject to certain exceptions, pursuant to s 19(1) of the Adoption Act an adoption order can be made only in favour of a husband and wife jointly.²³ This restriction, and the exceptions to it, are applicable to all adoptions, including step-parent and relative adoptions. Pursuant to s 35 of the Adoption Act, upon the making of an adoption order, the adopted child ceases to be a child of any previous parent. The curious effect of s 19 and 35 of the Adoption Act in step-parent adoptions is that the parent must adopt his or her own child in a joint application with the step-parent. This is discussed further below.

4.35 Also under s 35, where a step-parent adopts a child and the child's prior parent has died, any property of any collateral or lineal next-of-kin of the deceased parent who dies intestate devolves in all respects as if the child had not been adopted.²⁴

Discussion Paper 34

4.36 DP 34 raised for consideration the appropriateness of an adoption order for step-children and relatives. It was suggested that an adoption order may be too strong a measure where the only purpose is to change a child's name or secure guardianship. The *National Minimum Principles in Adoption*, drafted by the Council of Social Welfare Ministers, reflect the argument that the law should ensure that adoption is only used in step-parent and relative cases where it is clear that other measures are insufficient to ensure the proper care of the child:

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.²⁵

4.37 The Commission's proposal in DP 34 was that 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.

4.38 In relation to the present need for a joint application in step-parent adoptions, the Commission's provisional view was that it should be possible for the Court to make an adoption order in favour of the step-parent singly without any change in the parental status of his or her spouse, being the child's birth or adoptive parent.

Submissions and response

4.39 In its submission to the Commission, DOCS drew attention to some particular issues posed by step-parent adoptions. DOCS pointed out that:

[w]hile some applications for adoption are brought with the intention of excluding the non-custodial birth parent from the child's life, others wish only to secure the child's relationship with the new spouse and express dismay that as a consequence of the adoption the child loses his/her legal membership of the relinquishing parent's family and the birth parent is removed from the amended "birth" certificate. The Department does not support a different form of adoption to resolve this dilemma, rather the use of guardianship orders.²⁶

4.40 In relation to relative adoptions, DOCS stated that:

[t]he distortion of family relationships in grandparent adoptions, in effect removing a generation from a family's history, is not generally supported by the Department.²⁷

4.41 Whilst DOCS acknowledged that adoption by a step-parent or relative may be appropriate for some children, it feels that adoption should only be considered where it can be demonstrated that an alternative care order would not meet the child's needs. In this, DOCS supported the Commission's proposal.

4.42 DOCS also agreed with the Commission's provisional view that step-parents should be able to make a single application for adoption, without the custodial parent losing parental status. DOCS argued that no application should be made until the step-child has been in a parent/child relationship with the applicant for at least five years, thereby demonstrating the stability of the relationship and enabling participation of the child in the decision.

4.43 The NSW Committee on Adoption and Permanent Family Care "strongly supports" the Commission's proposal, with the addition that the law should ensure that "the child acquires full membership of the adoptive family".²⁸ Presumably, this addition is intended to refer to situations where orders alternative to adoption are considered appropriate. Both the Anglican Adoption Agency and Barnardos Australia also supported the Commission's proposal.²⁹ The Anglican Adoption Agency added that counselling for both relinquishing and adoptive parents should be made available.³⁰

4.44 The National Children's and Youth Law Centre submitted that step-parent and relative adoptions should not be encouraged and that each case should be considered "separately, from the viewpoint of the child". It submitted that in most cases step-parents should secure a status in relation to the child through guardianship or a parenting order or parenting agreement.³¹ In relation to other relative adoptions it submitted:

Grandparent and sibling adoptions can result in family secrets, deception and genealogical distortions and should not be granted other than in exceptional circumstances.³²

4.45 A number of submissions addressed the issue of the custodial parent in a step-parent adoption having first to relinquish and then adopt his or her child. All the submissions objected to this, with some finding it anachronistic, inappropriate and even insulting.

Legislation in other States

Step-parent adoptions

4.46 Adoption legislation in all other States and territories of Australia permit an adoption order to be made in favour of a step-parent solely.³³ The Australian Capital Territory legislation adds the proviso that the step-parent and the custodial parent must have lived together, whether married or not, in a heterosexual relationship for at least three years. Whilst the formulations differ from Act to Act, each one achieves the result that the relationship between the child and the parent with whom the adopting step-parent is cohabiting is not affected by the adoption order.³⁴ This overcomes the problem of the custodial parent having to relinquish his or her own child and then adopt jointly with the step-parent.

4.47 Pursuant to the legislation in the Australian Capital Territory, South Australia and Queensland, an adoption order will only be made in favour of a step-parent if, in effect, this is preferable or more appropriate than orders for custody or guardianship of the child.³⁵

4.48 The legislation in Victoria, the Northern Territory and Tasmania takes this requirement further by providing that the Court must not grant an adoption order unless it is satisfied that:

an order for guardianship or custody would not make adequate provision for the welfare and interests of the child;

exceptional circumstances exist which warrant the making of an adoption order; and

an order for adoption would make better provision for the welfare and interests of the child than an order for guardianship or custody.³⁶

4.49 The Commission is not convinced of the necessity for all three conditions to be satisfied before an order can be granted. If the Court is satisfied that an adoption order would better serve the welfare and interests of the child than orders for guardianship or custody, then it is proper that an adoption order should be made. If, for example, the Court is satisfied as to the first and third requirements but not satisfied that there are exceptional circumstances, the Court would surely be doing the child an injustice not to grant the adoption. In fact, it is difficult to envisage a case where only one or two of the conditions are present.

4.50 The Western Australian legislation does not require the Court to be satisfied that a step-parent adoption order would better serve the child's interests than alternative orders or no order.

4.51 The South Australian legislation also deals with step-parent adoption and inheritance rights by providing that if the non-custodial parent dies, an order in favour of a step-parent cohabiting with the surviving parent does not affect the child's rights of inheritance from or through the deceased parent.³⁷

Relative adoption

4.52 Pursuant to the South Australian and Queensland legislation an adoption order will only be made in favour of a relative if, in the former Act, the Court is satisfied that adoption is clearly preferable to guardianship in the interests of the child³⁸, or, in the latter Act, if a guardianship or custody order is not more appropriate.³⁹

4.53 Pursuant to the legislation in Victoria, the Northern Territory and Tasmania the Court must not grant an adoption order in favour of a relative of a child unless it is satisfied of the same three provisos as it must be satisfied of in relation to step-parent adoptions.⁴⁰

4.54 The Western Australian legislation makes no specific reference to "relative" but gives the Court the power to make an order for adoption in favour of a "carer" of a child.⁴¹ There is no requirement that the Court has to be satisfied that an adoption order in favour of a "carer" would better serve the child's interests than alternative orders or no order.

4.55 Under the Australian Capital Territory legislation, the requirements which have to be satisfied before an adoption order can be made in favour of a relative include the same requirements as those for step-parent adoptions. However there is a further requirement to be met in relative adoptions. There must be circumstances why the relationships within the family of the child should be redefined as such an order would do.⁴²

Adoption or other orders?

4.56 In considering step-parent and relative adoption it is important to bear in mind that the child is already, and will remain, in the care of the applicants. The purpose of seeking an adoption order, therefore, is not to place the child in the permanent care of a family. Seen in this light, the crucial question is whether there are any circumstances in which an adoption order in favour of a step-parent or relative will serve the child's interests better than any alternative order or better than maintaining the status quo, so as to justify retaining legislative provision for these adoptions.

Step-parent adoption

4.57 Step-parent adoption applications are usually for the following reasons:

to give permanency to the new parenting relationship;

to confer full parental rights and obligations on the step-parent, of particular relevance if the custodial parent dies;

to give the same status to all children within the new family;

to strengthen relationships within the new family;

to enhance normality and stability within the new family;

to express the step-parent's commitment to the child;

to change the child's surname to that of the step-parent;

to ensure maintenance rights for the child;

to give the child automatic inheritance rights from the step-parent;

to exclude the non-custodial parent and his or her extended family;

to break links with the past; or

to give an ex-nuptial child legitimacy.⁴³

4.58 Some of these purposes will be satisfied by orders for guardianship, custody or change of name. Other purposes may in fact not be in the child's best interests, particularly exclusion of the non-custodial parent and his or her family. Yet other reasons are more complex and may affect the child's sense of security or identity. Whether or not an adoption order is the preferred path needs to be examined in the context of all the consequences of such order and bearing in mind that it is the best interests of the child that is the paramount consideration.

4.59 Roughley, previously a consultant social worker specialising in adoption, now employed by DOCS, was initially convinced by her experiences with intrafamily adoptions that

the reasons for most adoption applications could be easily satisfied by a combination of guardianship, custody, legal change of name and inclusion of the child in wills. I am now not so dogmatic in my approach and can accept that in some circumstances no other form of arrangement would completely satisfy the reason for the adoption application, or be in the best interests of some children.⁴⁴

4.60 Roughley sees the main reasons for preferring an adoption order to guardianship orders as relating to:

permanence;

changing the birth certificate; and

inheritance rights.⁴⁵

4.61 As to the first reason, guardianship orders come to an end when the child turns 18 years of age. The desire to secure a legally permanent parent/child relationship which will last beyond the child turning 18 is the prime reason applicants seek adoption orders. Some custodial parents also want to assure themselves that, in the event of their death, the child retains a secure and permanent place in the step-family. Roughley argues:

Adoption provides the only mechanism for a child to permanently and publicly claim and be claimed by a family. This undeniable and everlasting symbol of belonging can enable some adolescents to claim an identity with which they are secure before moving on to adult identity tasks.⁴⁶

4.62 In relation to birth certificates, the changing of the original birth certificate on the making of the adoption order to reflect the name of the step-parent as the “father” or “mother” is a public recognition of the parental role of that step-parent. It may even complete a blank on the certificate where previously the birth father was unknown or unnamed for some other reason.

4.63 On the other hand, the exclusion of the non-custodial, or deceased, parent from the child’s birth certificate and the distortion of the child’s birth history is a factor to be given serious consideration.

4.64 In relation to inheritance rights, the child, although not adopted by his or her step-parent, can benefit from the estate of his or her step-parent or a member of the extended step-family by being named specifically as a beneficiary in the will. Roughley argues that this may not always be satisfactory for a child if he or she feels that specific inclusion as opposed to being included generally as a child or other relative of the deceased highlights his or her “difference”. Roughley also reports that

many non-adopted adolescents wonder if their custodial parents have thought to include them in their wills - to ask would be impudent.

4.65 Under the *Family Provision Act 1982* (NSW) a person who has been, at any particular time, wholly or partly dependant upon the deceased and who was a member of the deceased’s household may be entitled to provision out of the deceased’s estate.⁴⁷ A step-child, even though he or she has not become a child of the deceased under an adoption order, could make an application under the Act. However, this would obviously entail costs, time delays and stress and may even provoke ill feeling in the family.

4.66 In considering securing the right to benefit automatically from the step-parent’s estate, the loss of rights to benefit from the relinquishing parent’s estate, and possibly the estates of other members of the relinquishing parent’s family, has to be taken into account. The adults involved should attend carefully to the consequences of this for the child and, where appropriate, the child should be counselled on these consequences.

4.67 The Commission sees the potential exclusion of the non-custodial parent and extended family from the child’s life as one of the most serious consequences of a step-adoption. As discussed above, pursuant to s 61E of the Family Law Act the relinquishing parent’s parental responsibilities come to an end on the making of an adoption order. Parenting orders made under the Family Law Act also come to an end on the making of an adoption order.⁴⁸ Such parenting orders can include contact between the child and the non-custodial parent.

4.68 It is true that any person concerned with the care, welfare or development of the child may apply for a parenting order, such as an order for contact with the child.⁴⁹ It is possible, then, that a non-custodial parent who has relinquished his or her child could obtain an order for contact with the child. However, the outcome of such application under the Family Law Act is not certain, nor is continuing contact with other members of the relinquishing parent’s family. The child may have developed significant relationships with grandparents, aunts and uncles but the continuance of these relationships may depend upon a successful application to the Family Court or the goodwill of the custodial parent and the step-parent.

4.69 Pursuant to the Adoption Regulation the relinquishing parent can request, at the time of giving consent to the adoption or prior to the expiry of the revocation period, the continuation of an order for access to the child.⁵⁰ However, this does not create a right in the relinquishing parent for access. It is a request which the Court takes into consideration when hearing the application for an adoption order.

4.70 Research has found that children's self-esteem and their ability to cope with the divorce of their parents is promoted by having continuing positive contact with both parents.⁵¹

4.71 A report of the Step-Families Sub-Committee of the Family Law Council recommended that:

the "absent" natural parent should still retain rights in relation to the child with respect to those matters in which a non-custodial parent has rights where the other parent has sole custody, eg consent for passport applications; a change of name; etc.⁵²

4.72 This Report commented that:

increasing attention has been focused ... on the inappropriateness of using adoption to clarify or establish the legal status and relationships of the step-child in the new step-family.⁵³

4.73 The Report also noted a comment on this issue by the Magistrates' Family Law Committee, Victoria that:

adoption as a solution seems to militate against flexible and responsive relationships between parents, step-parents and children.

4.74 Many of the recommendations of the Family Law Council Report were taken up in the *Family Law Amendment Bill 1990* (Cth). In the second reading speech in relation to this Bill then Attorney-General, the Hon Michael Duffy, stated:

[i]t has long been an accepted principle in family law that continuing contact with both natural parents is usually desirable in the interests of the long-term development of a child.⁵⁴

4.75 A United Kingdom report of the Departmental Committee on the Adoption of Children in considering step-parent adoption concluded that:

the legal extinguishment by adoption of a legitimate child's links with one half of his own family was inappropriate and could be damaging.⁵⁵

4.76 Harper argues that step-parent adoption is inappropriate in almost any circumstances:

It is not in the child's best interests that his new relationship with a step-parent should be established at the expense of severing his existing ties with his natural family.⁵⁶

4.77 Where siblings have been separated and the step-parent is not adopting all siblings, the severing of legal ties and the potential severing of contact between the siblings is of serious concern. Sibling bonds are valuable and important to children.⁵⁷

4.78 Whether or not the relinquishing parent is actually excluded from participating in the child's life by a step-parent adoption, the fact of a step-parent adoption may be perceived by a child in a way that may be disturbing to the child. DOCS have observed some undesirable emotional effects on a child of a step-adoption including:

a feeling of being rejected by the relinquishing parent;

a fear of losing the relinquishing parent;

divided loyalties between the relinquishing parent and the step-parent;

confusion about relationships as a result of the amended birth certificate; and

anxiety to please the custodial parents and difficulty expressing their true feelings.⁵⁸

Relative adoption

4.79 Granting adoption to relatives creates legal relationships which differ from, and distort, the natural relationships not only of the adoptive parents to the child but also of the child to his or her own parents.⁵⁹ For example, when maternal grandparents adopt their grandchild, the child's mother becomes his or her sister. When a maternal aunt and uncle adopt their niece or nephew the child's mother becomes his or her aunt.

4.80 The Commission agrees with the opinion of the Adoption Legislative Review Committee of Western Australia that such distortion of relationships through adoption is confusing and very often damaging to the child.⁶⁰ Where the real circumstances are hidden from the child, his or her own discovery of them later may be particularly disturbing.

4.81 The main reason why relative adoptions are sought is to give permanency to an existing care arrangement. As was discussed above, guardianship orders come to an end when the child turns 18. Roughley's arguments in relation to the benefit of permanence, set out above, are equally applicable here. However, simply to confer permanence on the care arrangements, without some further special circumstance, seems an insufficient reason to effect a legal change in birth relationships.

4.82 The arguments set out above in relation to inheritance rights, and the alternative solutions available, are also applicable to relative adoptions.

4.83 As with step-parent adoption, the Commission sees the greatest disadvantage of relative adoption as its potential to militate against flexible and regular access between the child and his or her birth parents. Particularly where relative adoption is sought in order to conceal true familial relationships, such as concealing a child's illegitimacy, the ability for natural birth parent/child relationships to develop and flourish is stifled. Similarly, the child's relationships with other members of the extended family may be distorted.

4.84 Relative adoption often involves separating siblings which, as argued above, is unlikely to be in the child's best interests.

4.85 The emotional effects on a child of a step-parent adoption noted by DOCS and set out above are likely to arise in relative adoptions as well.

Conclusion

4.86 The Commission agrees with the thinking in other States and overseas that an order for adoption in favour of a step-parent or a relative is often an inappropriate way to promote a child's best interests and generally should not be encouraged.

4.87 In most step-family and relative situations, appropriate parenting orders obtained under the Family Law Act in favour of the step-parent or relative can confer on the step-parent or relative whatever rights and responsibilities will promote the best interests of the child. Alternatively, or in addition to parenting orders, legally changing the child's surname to that of the step-parent or relative, and making specific provision in a step-parent's or relative's will, may be all that is necessary. Nevertheless, there can be circumstances in which a step-parent or relative adoption is in the child's best interests.

4.88 Adoption by a step-parent or other relative will normally be appropriate only if:

other care orders would not make adequate provision for the child and an order for adoption would be in the particular child's best interests;

the child has an established relationship of at least five years duration with the step-parent or other relative;

the child has knowledge of and contact with his or her non-custodial birth parent and family;

the child has an understanding, commensurate with his or her age, of the reasons why the adoption might take place;

requirements as to the birth parents' and child's views, wishes and consent as recommended in this Report have been complied with; and

other requirements recommended in this Report have been complied with.

RECOMMENDATION 30

The legislation should permit an adoption order to be made in favour of step-parents and relatives providing that

the child has an established relationship of at least five years' duration with the applicant to adopt;

consent to the proposed adoption has been specifically given by the "appropriate persons" in accordance with, and as defined in, s 26 of the Adoption Act; and

an order for adoption would make better provision for the best interests of the child than parenting orders under the Family Law Act or any other order for the care of the child.

Joint applications in step-parent adoptions

4.89 There is no apparent justification for requiring the *parent*, as distinct from the step-parent, to adopt his or her own child.

4.90 The requirement for a parent to relinquish his or her child may be offensive and, for some, may even be deeply disturbing. All other States of Australia have removed this requirement from their adoption legislation and the Commission agrees with this approach.

RECOMMENDATION 31

An order for adoption should be permitted in favour of a step-parent solely. An order for adoption in favour of a step-parent should not have legal effect on the parental relationship between the child and the parent with whom the step-parent is cohabiting.

The process of applying for a step-parent or relative adoption order

4.91 As referred to above under the heading "Current law and practice", applications for a step-parent or relative to adopt can be made by the applicant directly to the Court. This is an exception to the general rule that adoption applications should be made by an agency.⁶¹ The question which arises in relation to this practice is whether the interests of the child and other parties to the adoption are safeguarded to the same degree as adoptions proceeding through an agency.

4.92 Under the present system, there are safeguards intended to ensure that applications are made thoughtfully and that the best interests of the child are protected. An accredited social worker interviews the applicants and the child and prepares a report for the Court. Presumably, also, the solicitor preparing the application and supporting affidavits gives the applicants some advice in relation to the merits of the application and the chances of it being successful. Through both the social worker and the solicitor, the applicants are likely to have their attention focused on the consequences of the adoption, their motives and the benefits for the child.

4.93 Although the issue was posed in DP 34, the Commission received very little comment on this topic. However, Roughley has expressed concern about whether the present system sufficiently protects the interests of those involved, especially the child. She has prepared a useful chart comparing adoption practice in relation to step-children and other relative children with adoption practice in relation to non-relative children, already in the care of the applicants.⁶² The latter applications must proceed through an agency. Roughley's assessment is that, in applications proceeding through an agency there is:

- dispassionate evaluation of the child's needs prior to commencement of the adoption;
 - informed exploration of options to meet the identified needs;
 - preparation of applicants in regard to the consequences of adoption;
 - full exploration with the child of the consequences of adoption;
 - establishment of the views of the child independently of the applicants;
 - independent establishment of the views of the relinquishing parent;
 - independent informed advice given to the relinquishing parent in regard to the consequences of adoption and the alternatives;
 - if the child is over 12 years of age, service on the relinquishing parent of the child's intention to consent to his or her adoption;
 - notification to the relinquishing parent of an adoption order being made;
 - application of criteria, in addition to eligibility criteria contained in the Adoption Act, to assess the suitability of the applicants to adopt; and
- where the Director-General has become the guardian of the child upon the taking of a consent to adoption, reporting to the Court if the child has not been adopted within one year of the date of the consent.⁶³

4.94 Roughley asserts that in step-parent and relative adoption applications the views of the child are established to a limited extent, but otherwise there are none of the safeguards listed above.

4.95 As pointed out above, adoption applications by step-parents and relatives can be made in inappropriate cases. Further, the procedures need to be based on the principle that the best interests of the child are paramount. The Commission is concerned that, having regard to the matters raised by Roughley, the existing requirement of a social worker's report may not afford sufficient protection. For these reasons, the exemption of step-parent and relative adoptions from the normal requirements relating to the bringing of applications cannot be justified.

4.96 Requiring relative adoptions to be supported by an agency would also remove an anomaly which currently exists. Where the applicants are relatives of the child, other than grandparents, uncle or aunt of the child, and not therefore "relatives" within the definition of s 6 of the Adoption Act, the application must proceed as a "non-relative" adoption. In that case, the Director-General must consent to the adoption.

RECOMMENDATION 32

Applications for adoption by step-parents or relatives should, like other adoptions, be made with the consent of the Director-General or on behalf of the applicants by the Director-General or by the Principal Officer of an authorised adoption agency.

RECOMMENDATION 33

The Court should not be able to dispense with the making of a DOCS report in step-parent and relative adoptions.

ADOPTION OF CHILDREN IN CARE

4.97 In this category, the Commission refers principally to children who are wards of State,⁶⁴ or otherwise under the guardianship of the welfare authorities, and who are in foster⁶⁵ or institutional care either arranged through DOCS or through a private agency such as Barnardos.⁶⁶ These placements occur within the regulatory scheme applying to the adoption of non-related persons. They are described generally here as authorised care.

4.98 The legal guardianship of children in care may have been placed with DOCS,⁶⁷ with a private agency, or with foster carers. In some cases guardianship may remain with the parents. Children whose parents place them in the care of relatives are discussed above.

4.99 It should be noted, however, that the *Children (Care and Protection) Act 1987* (NSW) (“the Children (Care and Protection) Act”) defines a relative of a child as being parent, step-parent, grandparent, sibling, step-sibling, aunt, uncle, nephew or niece. Foster care of a relative is deemed not to be unauthorised fostering.⁶⁸ In contrast, the Adoption Act defines a relative much more narrowly as being a grandparent, uncle or aunt only. The effect of this is that where a child is in the care of a relative other than grandparent, uncle or aunt, even though the placement is authorised under the Children (Care and Protection) Act, under the Adoption Act the application is treated as if the child were in a private placement.

4.100 Generally, children come into care because their parents are unable or unwilling to look after them. Some have been abandoned by their parents, some voluntarily given to the welfare agencies, and some have come into care as a result of court proceedings. Most have had some contact with their parents or other members of their birth families, and many remain in communication with them. It is not uncommon for children to be returned to their parent’s care, perhaps for a trial period, if this is considered feasible.

4.101 With children in care, the desire to keep open the possibility of a return to the birth parents is one of the factors which tends to lead agencies to defer an irrevocable alternative care decision such as adoption.⁶⁹ Alternatively, adoption may sometimes be seen as the best outcome for those children in care who cannot return to their birth family as it effects the most complete and permanent transfer of responsibility for the care of a child. It may provide such a child with the opportunity for long-term security and stability within another family and prevents the possibility of a child “drifting” from one placement to another.

Current law and practice

4.102 Children in care can be adopted by their foster carers. The adoption is usually arranged through the agency which provided the foster care. Private arrangements to adopt are not allowed.⁷⁰ DOCS must consent to, or an agency must make, a court application⁷¹ on behalf of the applicants for the adoption of a non-related child in foster care. The relevant agency must also provide a report to the Court.⁷²

4.103 Legal requirements discussed elsewhere in this report also apply, such as consent of the birth parents or guardian (or its dispensation) and those requirements relating to persons who may adopt.

4.104 Children of 12 years and older must consent to their own adoption.⁷³ The guardian of a child in care must also consent to the adoption as well as the parents.⁷⁴

4.105 Consent to the adoption of a child in care by parents and guardian is a *general* consent to the adoption of the child by any persons; that is, not nominating identified adoptive parents.⁷⁵ By contrast, a child of 12 years or older, in consenting to his or her adoption, nominates who are to be his or her adoptive parents.⁷⁶

Discussion Paper 34

4.106 DP 34 proposed the active participation of children in care and their birth families in the planning process for the child's alternative care. The Commission's view was that foster parents should be allowed to adopt where such an adoption would be in the best interests of the child. Adoption should be considered only after careful examination of all possible placements. This entails an assessment of children and their existing relationships and an assessment of the alternative placements available, immediately and in the future. Contact with the birth family should be encouraged and maintained throughout the child's life. When older children are to be adopted the situation should be explained to them and perhaps a period should be arranged during which they get to know the proposed adoptive family before moving in to live with them.

4.107 The Commission also considered that if allowed to make adoption applications directly, foster parents might use foster care as a "back door" to adoption. However, this was less likely in an era of open adoption, where older children have an opportunity to express their views on the proposed adoption. Consequently, it may be desirable to relax the existing rules relating to adoption applications. For example, 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 would be no question of selecting adoptive parents. Instead the question would be whether the child's existing placement should be made permanent by adoption. In this respect the situation is similar to one where a step-parent or relative seeks to adopt.

4.108 In considering these matters, the Commission took the provisional view that foster carers should be able to initiate an application for adoption themselves⁷⁷ as long as the Court receives a report on the proposed adoption or a preliminary hearing is held. The birth parents should be able to consent either to the adoption by the foster parents (specific consent) or the adoption of the child by any persons (general consent).

Submissions and response

4.109 Although submissions supported the Commission's proposals, some had reservations in allowing foster carers to make an independent application to Court without the approval of an agency. Such private applications could unfairly place the child in a difficult position of having to choose between the birth family and the foster family.⁷⁸ A child in care often defers to his or her foster parents' authority.⁷⁹

4.110 Another submission argued that agencies should continue to be involved in proposed adoptions by foster carers because the two roles, foster parent and adoptive parent, are very different:

[F]oster parents should be engaged in preparation and procedures of assessment as do [sic] other adoptive parents not for the purposes of establishing them as unsuitable/suitable carers but for the purposes of assessing whether the transition from being foster parents to adoptive parents is appropriate and in the best interests of the child.⁸⁰

4.111 Centacare recommended that adoption should be seen as only one option for children in long-term foster care where permanent placement with the foster parents is part of the case plan. It should not be seen as a matter of course in long-term foster placements. Any application should be based on an agency's assessment that the adoption would serve the best interests of the particular child.⁸¹

Conclusion

4.112 Foster care should not be used as a means of gaining “back door” access to adoption. However, in some cases of long-term foster care, with the passing of time and with changes in circumstances, foster carers might see themselves fulfilling the role of parents, while the child comes to consider the carers as parents and identifies as belonging to the foster family.⁸² If the birth parents and child are willing for the adoption by the foster carers to proceed, then the agency should not prevent this outcome without reasonable grounds for doing so.

4.113 However, the agencies have an important role in screening proposed adoptions by foster carers for several reasons. Firstly, for example, DOCS may have been delegated guardianship functions over a ward.⁸³ In its delegated capacity DOCS would have to provide the Minister’s consent to the ward’s adoption. Secondly, the irrevocable legal changes in the parent/child relationship which occur when moving from fostering to adoption requires the social work skills and expertise of the agencies who, in most cases, arranged the foster care placement and have been monitoring it since. This expertise can assist the Court in assessing whether a change of legal status between all three parties is in the best interests of the child, including whether all other options have been carefully considered. Also, the agency officer can best convey the views of the child with whom he or she has been in contact.⁸⁴

4.114 Adoption of foster children will normally be appropriate only if the same conditions as those set out in para 4.88 in relation to the adoption of step-children and relatives are satisfied.

4.115 On balance, the Commission has concluded that an agency should continue to approve any application by foster carers to adopt a child who has been placed with it. Notwithstanding this conclusion, it should be possible for the Court, at a preliminary hearing, to permit an adoption application to proceed without the agency’s support. However, before the preliminary hearing could be requested, the consent of all relevant persons would have to be given⁸⁵ or dispensed with by the Court.⁸⁶ In any case, the relevant agency would still be required to make a report to the Court concerning the proposed adoption.⁸⁷

RECOMMENDATION 34

In relation to applications to adopt children in care:

(a) Section 18(2) of the Adoption Act (which requires applicants to obtain agency support for the making of an adoption application) should be retained.

(b) The Court should not make an order for adoption in favour of the child’s foster parents unless:

the Director-General and/or the agency have made a report to the Court; and

the order makes better provision for the best interests of the child than parenting orders under the Family Law Act or any other order for the care of the child.

4.116 The issue of an agency selecting adoptive parents does not arise in foster care because the child is to be adopted by carers with whom he or she has been satisfactorily placed for, in most cases, a long time. Consequently, in most cases it would be appropriate for the birth parents’ or guardian’s consent to the adoption not to be a general one, but rather a consent to specific applicants. The exception to this is where the child has been with the foster carers for only a short time.

4.117 DOCS has expressed a concern arising out of its experience with temporary foster care. Both the birth and foster parents may be happy with the placement and one or both parties may be pressing for an adoption to go ahead. In that scenario, the birth parents may want to give specific consent to those carers adopting. DOCS’s concern is that the parties may not be seeing the long-term issues clearly. It may even be possible that the carers are exerting pressure, however well-meaning, on the

birth parents. If the placement has only been for a short time, any likely areas of difficulty may not have arisen and been resolved.

4.118 The Commission agrees with DOCS's concern. The solution to this is to ensure that there is an established relationship between the child and the foster carers before specific consent to those carers adopting can be given. Recommendations as to consent are made in Chapter 5.

ADOPTION OF CHILDREN IN PRIVATE PLACEMENTS

4.119 A private placement is referred to here as a long-term care placement of a child with non-related carers made outside the regulatory scheme applying to non-related persons. As such, it could be described as an unauthorised placement. The private placement may have been arranged with the child's parents or through a third party. It breaches child welfare legislation⁸⁸ and normal placement procedures. However, sometimes a private placement may be approved retrospectively by DOCS⁸⁹ or by a court order approving the carers' custody of the child.

4.120 Surrogacy of a non-related child is one type of private placement. Surrogacy, or a surrogate motherhood arrangement, is one in which a woman agrees to bear a child for a couple, conceives and carries the child through the pregnancy, and agrees to transfer all her parental rights and responsibilities to the couple on the birth of the child.⁹⁰ This transfer may involve adoption if the commissioning couple want to utilise the adoption legislation to formalise the relationship. The child may or may not be related to one of the commissioning partners. Adoption law issues in relation to surrogacy cover both intrafamily and private placements. Chapter 11 examines adoption and surrogacy in detail.

4.121 Adoption law becomes relevant to a private placement when, after an interval of time, the carers decide to adopt the child. The child is often well-established in the carers' household and may be unaware that the carers are not his or her birth parents. Many reasons might prompt the carers to seek an adoption order; in particular, to resolve the uncertain legal status of the child within their household.⁹¹

Current law and practice

4.122 Where the child has been previously privately placed with his or her non-related carers, the law on adoption is similar to that for children in care in terms of the approvals required and reports to be obtained in order to adopt. However, due to the unauthorised nature of the private arrangement, it is more likely than in other types of adoption that offences might have been committed.⁹² For example, a private placement leading to adoption would breach the Adoption Act if the arrangement involves payments,⁹³ advertising,⁹⁴ adoption negotiations or the transfer of a child with a view to adoption without the permission of the Director-General of DOCS or the principal officer of a private adoption agency.⁹⁵ These offences apply to birth parents, prospective adoptive parents, and intermediaries who breach them.

4.123 An application by private carers to adopt a non-related child must be with the consent of the Director-General or on behalf of the applicants by an agency.⁹⁶ Birth parents, any other guardian, and an older child must also consent to the adoption.⁹⁷ Provisions in the Adoption Act as to persons in whose favour adoption orders can be made also apply.⁹⁸ Before making an adoption order, the Court also requires a report from the relevant agency on the proposed adoption.⁹⁹

4.124 In practice, DOCS would not usually support applications for adoption by unauthorised carers. However, it may decide to do so because of the length of time the child has lived with the carers and the perceived benefits to the child of being adopted when compared with other formal care arrangements or merely remaining with an uncertain status within the household.¹⁰⁰ The views of the child and birth parents, the motivation of the applicants for the adoption, and any breaches of law would also be considered. In assessing the application, adoption must be seen to be in the child's best interests.

4.125 DP 34 proposed generally that the law should not permit individuals to make their own adoption arrangements, either personally or through intermediaries.¹⁰¹ This is a focal characteristic of adoption law throughout Australia.¹⁰²

Submissions and response

4.126 Submissions were overwhelmingly in favour of the continued government regulation of adoption placements.¹⁰³

Conclusion

4.127 Private placements leading to adoption should continue to be regulated under adoption legislation. To do otherwise may compromise the child's best interests. Agency supervision of adoption selection and placement procedures is particularly important in adoption, providing a safeguard against possibly ill-considered or even exploitative practices.

4.128 Agency selection and placement procedures are circumvented in private placements leading to adoption. These procedures allow the vetting and matching of adults and child by appropriately qualified professionals, promoting practices to ensure the child is placed with the most suitable adoptive parents. A regulated system of selection and placement assists in preventing undue pressure being placed on the birth parents or child to proceed with an adoption. It assists in ensuring that the wishes of the birth parents and child are respected with regard to future contact between them.

4.129 Consequently, if a child has been privately placed for a period of time with non-related carers before the carers apply for adoption, adoption should not automatically follow because the social parent-child relationship already exists. Nor should the presence of a private placement be an automatic bar to an application to adopt such a child. An agency should always assess the appropriateness of any adoption order to the child's needs. It should ensure that all legislative requirements as to the consent and wishes of the birth parents and child, and the suitability of the adoptive parents, have been complied with. In so doing, the agency should investigate whether any offences have been committed in the private arrangement.

4.130 As well, the agency would first have to approve any application to the Court by non-related carers seeking to adopt a child.¹⁰⁴ However, a preliminary hearing into the agency's refusal to support an application could be held at the Court's discretion.¹⁰⁵ The Court would then make appropriate orders.

4.131 If adoption is considered the most appropriate long-term alternative care order for the child, the agency should provide the prospective adoptive parents with suitable education and training.

4.132 Adoption of children by private carers will normally be appropriate only if the same conditions as those set out in paragraph 4.88 in relation to the adoption of step-children and relatives are satisfied.

RECOMMENDATION 35

In relation to applications to adopt children in private placements:

(a) Section 18(2) of the Adoption Act, which requires applicants to obtain agency support for the making of an adoption application, should be retained.

(b) The Court should not make an order for adoption in favour of the applicants unless:

**the Director-General and/or the agency have made a report to the Court;
and**

the order makes better provision for the best interests of the child than parenting orders under the Family Law Act or any other order for the care of the child.

4.133 Where the Director-General, after assessing the individual circumstances of a private placement, consents to the child being adopted by carers with whom he or she has been satisfactorily living for a period of time, the birth parents' or guardian's consent to the adoption should not be a general one, but rather a consent to specific applicants. Recommendations as to consent are made in Chapter 5.

ADOPTION OF CHILDREN WITH SPECIAL NEEDS

4.134 "Special needs" adoptions refer to the adoption of children whose needs require special qualities in the adopting parents. These needs arise from the fact the child is intellectually disabled or has a substantial physical, emotional or sensory disability.¹⁰⁶ Barnardos includes older-aged adoptees in the category of "special needs". DOCS is also tending to treat the adoption of older-aged (over two years) children and children from overseas as special needs adoptions.

Current law and practice

4.135 Legal requirements discussed elsewhere in this Report apply, such as consent to adoption by the birth parents and guardian (or its dispensation).¹⁰⁷ However, special needs children are treated differently under the law in two main respects. First, to promote the interests of a special needs child, an agreement providing for financial or other assistance may be entered into between the Director-General of DOCS and the prospective adoptive parents effectively subsidising the adoption.¹⁰⁸ Secondly, the gazetted criteria for selecting prospective adoptive parents is more flexible with regard to age,¹⁰⁹ spacing of children in the family,¹¹⁰ and fertility.¹¹¹

4.136 In practice, agencies have separate placement programs to recruit, prepare and assess prospective adoptive parents for special needs children. The primary requirement agencies look for in selecting applicants in a special needs adoption is the applicants' ability to meet the specific needs of the child. An obvious feature of these adoptions is that it is often difficult to find suitable and willing adoptive parents. As such, these programs may involve actively recruiting applicants by way of advertising¹¹² for suitable applicants for the particular children an agency has or is likely to have available for adoption, such as in newsletters to interested persons on agency mailing lists. The selection of the adoptive parents for a special needs child reflects the specialised parenting skills required and does not tend to follow local adoption processes.¹¹³

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4.137 In special needs adoptions, the Commission considered that the child's unique needs may not relate so much to the general requirements of adoptive parents,¹¹⁴ but rather require special parenting skills. Consequently, with special needs adoptions, the law should ensure that every reasonable effort is made to find, assess and support suitable adoptive parents rather than rigidly applying general selection guidelines and practices. The needs of the particular child might justify measures which would be unacceptable in other forms of adoption, such as circulating advertisements seeking to recruit adoptive parents, and dispensing with some selection criteria.

Submissions and response

4.138 Submissions supported the Commission's approach in DP 34.¹¹⁵ Several submissions by agencies emphasised that being able to advertise for suitable families is essential in special needs adoptions. Agencies only use this public method of recruitment, that is, using identifying information such as a photograph and the child's first name, after all other efforts to find a family have failed.¹¹⁶ However, one agency submission indicated opposition exists to advertising.¹¹⁷ It was argued in these

submissions that legislation should include a provision allowing recruitment of adoptive parents for special needs children through advertising.¹¹⁸

Conclusion

4.139 The legislation should continue to give the Director-General a discretion to enter into agreements providing financial or other assistance to applicants for certain categories of children, where such extra assistance is considered necessary to promote the child's best interests.¹¹⁹ These categories of children should be determined from time to time by the legislation. This allows for possible changes to the types of children requiring additional assistance in the future. At present, the prescribed categories relate to special needs children.

4.140 Selection procedures should ensure that the best possible parents are recruited for each special needs child. This may involve advertising where the agency determines it necessary to find applicants with the capacity to provide the standard of care required to fulfil the particular needs of the child. However, the discretionary use of advertising in appropriate cases, although supported as a recruitment procedure, should not be set out in legislation. It should be determined by the agencies based on their experience.

RECOMMENDATION 36

Section 68A of the Adoption Act (which gives the Director-General power to provide financial or other assistance to prescribed children) should be retained.

FOOTNOTES

1. Australian Institute of Health & Welfare Child Welfare Series: Adoptions Australia 1992-93 No. 7 (AGPS Canberra).
2. Australian Institute of Health & Welfare Child Welfare Series: Adoptions Australia 1993-94 No. 11 (AGPS Canberra).
3. Australian Institute of Health & Welfare Child Welfare Series: Adoptions Australia 1994-95 No. 14 (AGPS Canberra).
4. *Adoption of Children Act 1965* (NSW) s 18(2).
5. Awkwardly, the legislation uses this word for adult adoptees.
6. *Re K and the Adoption of Children Act 1965* (1988) 12 FLR 263 at 264.
7. *Re K and the Adoption of Children Act 1965*.
8. *Re K* [1949] SC (Scot) 140.
9. *Re L* [1951] SC (Scot) 605.
10. P G Bobbin *Submission* (27 May 1994); J McInerney *Submission* (5 August 1996).
11. P G Bobbin *Submission* (27 May 1994).
12. *Adoption of Children Act 1965* (NSW) s 18(4).
13. Note that the *Child Welfare Act 1939* (NSW), referred to in s 18(1)(b)(ii) of the *Adoption of Children Act 1965* (NSW), was repealed by the *Miscellaneous Acts (Community Welfare) Repeal and Amendment Act 1987* (NSW).

14. "Parent" is used to refer to either birth or adoptive parent.
15. *Adoption of Children Act 1965* (NSW) s 6.
16. For the purposes of this discussion, "agency" will refer to both DOCS and the private adoption agencies unless the context otherwise requires. It is possible for the application to be made by the Director-General pursuant to s 18(3).
17. Required by Pt 73 r 7A of the *Supreme Court Rules* (NSW). The Court has dispensed with the requirement for the Director-General to make a report in step-parent and relative adoptions pursuant to s 21(1A)(c) of the *Adoption of Children Act 1965* (NSW). Where an accredited social worker is not available in the applicants' geographical area, DOCS provides the report.
18. *Adoption of Children Act 1965* (NSW) s 21(1C).
19. *Family Law Act 1975* (Cth) s 60G.
20. *Family Law Act 1975* (Cth) s 61E(2) and s 60F(4). R Chisholm and O Jessep argue that these provisions, as they relate to adoption, could be challenged as constitutionally invalid. At the very least, "their application is rather unpredictable, but all the possibilities seem unsatisfactory. Unapproved adoptions will produce obscure and awkward results that could lead to difficulties for the child as well as the adults": "Step-parent Adoptions and the Family Law Act" (1992) 6 *Australian Journal of Family Law* 179 at 186.
21. [1993] FLC 92-429.
22. 17 FamLR 594.
23. For example, one of the exceptions is that an order may be made in favour of a de facto couple whose relationship is of not less than three years standing and who have had the joint care of the child for not less than two years: *Adoption of Children Act 1965* (NSW) s 19(1A).
24. *Adoption of Children Act 1965* (NSW) s 35(3): that is, where the adoption order is made after the death of the prior parent but before distribution of the deceased's estate.
25. Council of Social Welfare Ministers *National Minimum Principles in Adoption*, June 1993 para 2(2); *Draft National Minimum Principles in Adoption*, July 1995 Para 2(2) at 6.
26. New South Wales Department of Community Services *Submission* (5 September 1994) at 11.
27. New South Wales Department of Community Services *Submission* (5 September 1994) at 11.
28. NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 11.
29. Barnardos Australia *Submission* (26 July 1994); Anglican Adoption Agency *Submission* (26 August 1994).
30. Anglican Adoption Agency *Submission* (26 August 1994) at para 4.3.
31. The National Children's and Youth Law Centre *Submission* (28 July 1994) at 7.
32. The National Children's and Youth Law Centre *Submission* (28 July 1994) at 7.
33. *Adoption Act 1984* (Vic) s 11(5); *Adoption of Children Act 1994* (NT) s 15(3); *Adoption Act 1988* (Tas) s 20(7); *Adoption Act 1994* (WA) s 67; *Adoption Act 1993* (ACT) s 18(2); *Adoption Act 1988* (SA) s 9; *Adoption of Children Act 1964* (Qld) s 12(3).

34. *Adoption Act 1984* (Vic) s 11(7); *Adoption of Children Act 1994* (NT) s 15(4); *Adoption Act 1988* (Tas) s 20(8); *Adoption Act 1994* (WA) s 75(2); *Adoption Act 1993* (ACT) s 43(1)(c); *Adoption Act 1988* (SA) s 9(2); *Adoption of Children Act 1964* (Qld) s 28(1A).
35. *Adoption Act 1993* (ACT) s 18(2); *Adoption Act 1988* (SA) s 10; *Adoption of Children Act 1964* (Qld) s 12(5).
36. *Adoption Act 1984* (Vic) s 11(6); *Adoption of Children Act 1994* (NT) s 15(3); *Adoption Act 1988* (Tas) s 20(7).
37. *Adoption Act 1988* (SA) s 9(3).
38. *Adoption Act 1988* (SA) s 10.
39. *Adoption of Children Act 1964* (Qld) s 12(5).
40. *Adoption Act 1984* (Vic) s 12; *Adoption of Children Act 1994* (NT) s 15(3); *Adoption Act 1988* (Tas) s 21.
41. *Adoption Act 1994* (WA) s 67.
42. *Adoption Act 1993* (ACT) s 18(5).
43. P Harper "Children in Stepfamilies: Their Legal and Family Status" (1984) *Institute of Family Studies Policy Background Paper No 4* Institute of Family Studies, Melbourne.
44. A Roughley "Intra Family Adoption in NSW" in Proceedings of the Fifth Australian Adoption Conference *Has Adoption a Future?* (Sydney, 29-31 August 1994) at 527.
45. A Roughley "Intra Family Adoption in NSW" at 529; A Roughley "Intra Family Adoption in NSW - Issues and Realities" in CLE Seminar Papers *Developments in the Law of Adoptions* (Sydney 1994) at 56-57.
46. Roughley "Intra Family Adoption in NSW - Issues and Realities" at 57; Roughley "Intra Family Adoption in NSW" at 529.
47. *Family Provision Act 1982* (NSW) s 7.
48. *Family Law Act 1975* (Cth) s 65J.
49. s 65C.
50. *Adoption of Children Regulation 1995* (NSW) Schedule 1, Form 9.
51. J S Wallerstein and J B Kelly *Surviving the Break-up: How Children and Parents Cope with Divorce* (Grant McIntyre, London, 1980); E M Hetherington "Divorce: A Child's Perspective" 34 *American Psychologist* 851.
52. "Cinderella Revisited" *Report of the Step-Families Sub Committee of the Family Law Council*, (Victoria, June 1986), para 4.2 quoted in *In the Adoption of X* (1994) 17 FLR 594 at 597.
53. "Cinderella Revisited" para 3.3 quoted in *In the Adoption of X* at 597.
54. Australia - *Parliamentary Debates (Hansard)* House of Representatives, 16 May 1990 at 665.
55. United Kingdom - HMSO "Adoption of Children" *Working Paper of the Departmental Committee on the Adoption of Children* (1970) at para 105.

56. P Harper "Children in Stepfamilies: Their Legal and Family Status".
57. P Amato *Children in Australian Families: The Growth of Competence* (Prentice Hall, Sydney, 1987).
58. New South Wales Department of Community Services (Adoption Branch) "Information About Adoption" (pamphlet) at 6.
59. United Kingdom - HMSO "Adoption of Children" *Working Paper of the Departmental Committee on the Adoption of Children* at para 111.
60. Western Australia - Adoption Legislative Review Committee *Final Report: A New Approach to Adoption* at 121, para 7.21.
61. "Agency" is used in this discussion to refer to both DOCS and a private adoption agency, unless the context requires otherwise.
62. A Roughley "Intra Family Adoption in NSW - Issues and Realities" at 63.
63. *Adoption of Children Act 1965* (NSW) s 34(3).
64. And therefore under the guardianship of the Minister for Community Services: *Children (Care and Protection) Act 1987* (NSW) s 90. Children can be declared wards by court orders pursuant to the *Children (Care and Protection) Act 1987* (NSW) and the *Adoption of Children Act 1965* (NSW).
65. "Foster parent" is defined in s 6 of the *Adoption of Children Act 1965* (NSW) as a person who has care of a child in accordance with the *Children (Care and Protection) Act 1987* (NSW).
66. Long-term foster care of a non-related child cannot be privately arranged. It must be arranged by DOCS or an authorised private fostering agency: *Children (Care and Protection) Act 1987* (NSW) s 42 and 44. However, there may be some cases where the long-term care arrangement is exempted (s 42(4)) or allowed by an order of a court, such as the Family Court. It should be noted, though, that with respect to care of a related child, the definition of "related persons" under the *Children (Care and Protection) Act 1987* (NSW) is wider than that of "relative" under the *Adoption of Children Act 1965* (NSW). Consequently, there is a residual number of private long-term foster care arrangements by relatives under the *Children (Care and Protection) Act 1987* (NSW) provisions falling outside the *Adoption of Children Act 1965* (NSW) definition of relative. This section of the chapter on "adoption of children in care" applies to those arrangements. Foster care by relatives who also fit within this description is discussed under "relative adoption" above.
67. The Minister for Community Services can delegate functions pertaining to his or her guardianship of a ward to the Director-General: *Children (Care and Protection) Act 1987* (NSW) s 11.
68. *Children (Care and Protection) Act 1987* (NSW) s 42(2)(c).
69. For example, a court order giving guardianship or custody to the person having care of the child could be revoked as appropriate at a later stage.
70. *Adoption of Children Act 1965* (NSW) s 51 sets out the offence. It might lead to the prosecution of all those assisting the unauthorised arrangement: s 50, 51 and 52.
71. s 18(2).
72. s 21(1). In respect of private agency applications, the Court may dispense with the additional DOCS report: s 21(1A).

73. s 33. However, the Court may disregard this if the child has not turned 18 years of age: s 33(1). In the case of a child who has attained the age of 12 years, but not the age of 18 years, and who has been brought up, maintained and educated as the child of the applicants for the period of five years before the making of the application, only the consent of that child is required to the adoption: s 26(4A). However, the Court may dispense with the child's consent: s 33.
74. *Adoption of Children Act 1965* (NSW) s 26. For the adoption of a ward, the Minister for Community Services, being the legal guardian of the child under the *Children (Care and Protection) Act 1987* (NSW), must consent to the adoption as well as the parents of the child. The exception to this is in the case of a ward of 12 years or over who has been in the applicants' care for the five years prior to the application: s 26(4A). See *Adoption of Children Regulation 1995* (NSW) cl 21(b) and Schedule 1, Form 2.
75. *Adoption of Children Act 1965* (NSW) s 27(1). Specific consent can only be given to an adoption of a child by a relative of the child or by a step-parent: s 27(2).
76. Specific consent of the child is required: *Adoption of Children Act 1965* (NSW) s 33 and *Adoption of Children Regulation 1995* (NSW) Schedule 1, Form 5.
77. Similar to step-parent or relative adoption: New South Wales Law Reform Commission. *Review of the Adoption of Children Act 1965* (NSW) (Discussion Paper 34, 1994) at para 4.83.
78. DOCS was not convinced that the role of "open adoption" as a safeguard against "back door" adoptions balanced the concerns raised by extending the right to bring an adoption application to non-relative foster parents. For example, the child may defer to the authority of his or her foster parents and reflect their views; or, the foster parents may wish to exclude the birth parent from contact: New South Wales Department of Community Services *Submission* (5 September 1994) at 12. The Anglican Adoption Agency considered that while the child should be actively involved in the adoption plan, it is important that the child not be responsible for the decision for adoption or be put in a position of deciding against his or her birth family: *Submission* (26 August 1994) at para 4.3.
79. The National Children's and Youth Law Centre was cautious about allowing carers to adopt at all arguing that "the possibility of adoption sometimes creates pressure on the child and competition between the birth family and the child's current carers": *Submission* (28 July 1994) at 7.
80. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 14.
81. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 14.
82. For example, A Marshall *Submission 207* (1 August 1994) at 3.
83. Delegated by the Minister for Community Services under the *Children (Care and Protection) Act 1987* (NSW) s 11.
84. However, A Davey questioned "[h]ow could a child possibl[y] express his or her feelings about adoption unless they have complete confidence and trust in their [DOCS] district officer?" This requires continuity in contact between ward and officer over a period of time. Regular changes to such officers are detrimental to the development of this confidence and trust: *Submission* (13 June 1994) at 5.
85. Including, for wards, the consent of the Minister for Community Services as guardian: *Children (Care and Protection) Act 1965* (NSW) s 90.

86. This is in accordance with the recommendation in Chapter 3. The Court's power to dispense with consents is pursuant to the *Adoption of Children Act 1965* (NSW) s 32(1A). The dispensation of the Minister's consent as guardian of a ward would be unlikely.
87. *Adoption of Children Act 1965* (NSW) s 21(1)(a) and (b).
88. Unless the long-term carer is related to the child or has been given permission to care for the child by an authorised agency, such as DOCS, or is exempted, such an arrangement is prohibited: *Children (Care and Protection) Act 1987* (NSW) s 42 and 44.
89. *Children (Care and Protection) Act 1987* (NSW) s 42.
90. See New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965* (NSW) (Issues Paper 9, 1993) at para at 8.2.
91. For example, inheritance rights. See further discussion on inheritance and adoption in para 4.64-4.66 of this chapter.
92. These could include: *Adoption of Children Act 1965* (NSW) s 50, 51, 52, 54, 55, 56, 57 and 58.
93. *Adoption of Children Act 1965* (NSW) s 50(1) (unless authorised under s 50 (2)).
94. s 52.
95. s 51.
96. s 18(2).
97. s 26 and 33. See Chapter 5.
98. *Adoption of Children Act 1965* (NSW) s 19, 20 and 21. See Chapter 6.
99. *Adoption of Children Act 1965* (NSW) s 21(1). In respect of private agency applications, the Court may dispense with the additional DOCS report (s 21(1A)).
100. D Smith "Special Case Adoptions" CLE Seminar Papers *The Law of Adoptions* (Newcastle, NSW, May 1995) 99 at 100.
101. NSWLRC DP 34 at 42 and at para 4.5.
102. NSWLRC DP 34 at para 4.4.
103. See paras 2.14-2.15.
104. As presently required under the *Adoption of Children Act 1965* (NSW) s 18(2).
105. This could be held after the consents of all relevant persons were given (or dispensed with by the Court).
106. See *Adoption of Children Regulation 1995* (NSW) cl 42, and criterion 1 pursuant to the *Adoption of Children Regulation 1995* (NSW). The New South Wales Department of Community Services' "Criteria for Assessment of Adoption Applicants" is published in the *New South Wales Government Gazette* No 58 (8 May 1992) at 3264.
107. Although, to give an example of a divergence from this, DOCS's practice is not to take the consent of birth parents of a child born with a disability for two to three months after the birth to allow the birth parents time to come to terms with the situation.

108. *Adoption of Children Act 1965* (NSW) s 68A; *Adoption of Children Regulation 1995* (NSW) cl 42. The Director-General may also determine that other children with special circumstances fit into this category.
109. "Criteria for Assessment of Adoption Applicants" criterion 6.
110. "Criteria for Assessment of Adoption Applicants" criterion 7.
111. "Criteria for Assessment of Adoption Applicants" criterion 9. Other agencies also relax similar selection requirements for special needs children.
112. The birth parents' permission is usually sought for any publicity.
113. For example, in special needs adoptions DOCS circulates information on small groups of children available for adoption to a list of interested persons who are invited to attend education and training seminars. Contrast this with the usual practice whereby there are "pools" of approved applicants awaiting the placement of a child.
114. See Chapter 6.
115. Barnardos Australia *Submission* (26 July 1994); Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 13; NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 12; New South Wales Department of Community Services *Submission* (5 September 1994) at 15.
116. Anglican Adoption Agency *Submission* (26 August 1994) at para 4.4.
117. Anglican Adoption Agency *Submission* (26 August 1994) at para 4.4. However, the Commission did not receive submissions criticising recruitment by advertising for special needs children.
118. Anglican Adoption Agency *Submission* (26 August, 1994) at para 4.4; New South Wales Department of Community Services *Submission* (5 September 1994) at 12.
119. Other states have similar legislation, such as the *Adoption Act 1994* (WA) s 140(2); the *Adoption Act 1984* (Vic) s 105; the *Adoption of Children Act 1994* (NT) s 85; and the *Adoption Act 1988* (SA) s 26.

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

5. Consent to Adoption

5.1 Many of the criticisms of adoption procedures relate to consent to an adoption. It is fundamental that consent to relinquish a child for adoption is voluntary, informed and given when the birth parent is in a fit mental and emotional state. In light of the recent developments in adoption practice, namely open adoption and the participation of birth parents in the selection of adoptive parents, it is increasingly necessary to ensure that birth parents who consent to relinquish a child for adoption fully understand the effects of the decision they are making.

ENSURING INFORMED AND VOLUNTARY CONSENT

5.2 The adoption legislation contains provisions designed to ensure that parental consent is given freely. This is examined under the following headings: timing of consent, form of consent, witnessing consent and revocation of consent.

5.3 For reasons explained in Chapter 9, the adoption of Aboriginal and Torres Strait Islander children should be treated separately in the legislation. Recommendations in relation to taking consent from birth parents or guardians for the adoption of Aboriginal and Torres Strait Islander children are made in that chapter. Chapter 10 discusses the need for fully informed and voluntary consent in intercountry adoption.

Timing of consent

Current law and practice

5.4 Under the current legislation, consent cannot be given before the birth¹ or until the completion of three clear days after the birth.² This calculation does not count the day of the birth and therefore consent cannot be taken until the fifth day after the birth, at the earliest.

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5.5 The Commission proposed that the birth mother should not be allowed to consent to adoption until 30 days after the birth.

Submissions and response

5.6 Submissions generally supported the Commission's proposal to extend the time before the taking of a consent to 30 days after the birth of the child.³ The Law Society believed the Commission's proposal on the timing of consent to be an improvement on the current law.⁴

5.7 As paragraph 7.44 of DP 34 observed, time periods for taking consent and revocation of consent are an attempt to balance a number of competing considerations. One is to ensure that the birth parent's consent is truly voluntary. The other is that the child's best interests require a reasonably expeditious placement with the adoptive parents. Submissions acknowledged that any period of time chosen in these circumstances would be arbitrary. It was suggested, and the Commission agrees with this, that what is required is a set of procedures which can be clearly followed and which cannot be misconstrued, as well as the provision of counselling throughout the process.⁵

5.8 The Australian Association of Social Workers ("the AASW") "fully endorse[d] the new proposed timeframe for consent to adoption" and went on to say:

In our original submission we stated that we believed birth mothers to be too vulnerable and too much in shock during the immediate *post partum* period. Lengthening this entire period, while it may be uncomfortable for some women who have envisaged a "clean break", will mean that birth mothers are able to truly experience the impact of separation from their baby, and to make a more informed and reality-based decision in the end.⁶

5.9 However, Centacare believed that the Commission's proposal to require birth parents to wait 30 days to sign a consent would destroy the flexibility and other advantages of the current system, which allows birth parents to choose when they are ready to sign a consent.⁷ Centacare viewed the signing of the consent as a strong test of the birth parent's resolve regarding the decision, and did not see consent in the context of committing a birth parent to adoption, as it was in the past. While the Commission appreciates the value of this approach, the fact remains that on signing a consent a birth parent has entered into a legal arrangement to place the child in the permanent care of others, which becomes irrevocable within a relatively short period of time.

5.10 Centacare also observed that the signing of the consent is not only a legal process but also an important part of the emotional process for birth parents.⁸ It believed that delaying the taking of consent may leave many birth parents in a state of indecision for too long. The taking of consent brings into sharp focus the reality of the decision.⁹

Conclusion

5.11 The Commission has considered the arguments put by Centacare and weighed these against arguments put by birth parents requesting more time. The Commission is influenced by the fact that it may take a birth parent some time to evaluate his or her situation after the child is born. This is one of the main reasons why consents cannot be taken before the birth of the child. Birth parents need to test their decision in relation to an actual baby.

5.12 As was put by the AASW, providing for a 30 day hiatus after the birth of the child will mean that birth parents are truly able to experience the impact of separation from their babies, and ultimately to make a more informed and realistic decision. Accordingly, a birth parent or guardian should not be allowed to consent to an adoption until 30 days after the birth of the child.

Form of consent

Current law and practice

5.13 The current law provides that the form of consent must be general and in writing.¹⁰ Only consents to adoption where the child is to be adopted by a relative,¹¹ or by two persons, one of whom is a parent or relative, are specific in that they state that the child is being relinquished in favour of a particular person.¹²

5.14 Schedule 1 of the Adoption Regulation contains several forms of consent, two of which are for parental consents.¹³ It also contains two Statement of Requests forms, one of which covers access in intra-family adoptions.¹⁴ The other Statement of Requests form is presently used in conjunction with the general consent form, and it allows birth parents, at any time before the end of the revocation period, to express their wishes for the placement of the child.¹⁵ Such wishes include the race or ethnic background of the adoptive parents, their marital or other status, and whether or not the birth parent wishes to receive future information about the child or meet with the adoptive parents. The birth parent can also make a choice as to whether he or she wishes to be involved in the selection of suitable adoptive parents and express any other additional requests. The form also contains a declaration that the birth parent understands his or her wishes are not binding on the agency but that they will be taken into account in the development of a placement plan, where practicable.

5.15 The Statement of Requests form also provides the birth parent with several choices as to receipt of information following relinquishment. The birth parent can choose to be informed of the placement of the child with the adoptive parents, the making of the adoption order, and whether the child is no longer in the care of the adoptive parents or has died.¹⁶

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5.16 The Commission held the provisional view that the form of consent should permit the birth parents to express any views relating to the selection of the adoptive parents or the child's upbringing.

The Commission also welcomed comments on whether or not provision should be made for conditional consents.¹⁷

Submissions and response

5.17 Several submissions considered that consents to adoption (except for a relative or step-parent adoption) should continue to remain “general”, that is, not nominating identified adoptive parents.¹⁸ Many submissions took the view that the Director-General of DOCS should become the child’s guardian after the consent is signed as under the present law.¹⁹

Conclusion

5.18 In relation to the effect of the form of consent, consents to adoption should continue to remain “general”, that is, not nominating identified adoptive parents. The exceptions to this are where the child is to be adopted by a step-parent or relative, in which case the consent should be “specific”, that is, nominating the step-parent or relative.

5.19 In relation to adoptions by foster parents, Chapter 4 discusses under the heading “Adoption of Children in Care” whether specific or general consent is more appropriate. The discussion under that heading outlines a concern expressed by DOCS in relation to temporary foster care. The birth parents may be happy with the placement and the foster carers may be pressing for an adoption to go ahead. In that scenario the birth parents may want to give specific consent to those carers adopting. DOCS’s concern is that the parties may not be seeing the long-term issues clearly. It may even be possible that the carers are exerting pressure, however well-meaning, on the birth parents. If the placement has been for a short time only, any areas of difficulty may not have arisen and been resolved.

5.20 The Commission agrees with DOCS’s concern. The solution to this is to ensure that there is an established relationship between the child and the foster carers before specific consent to those carers’ adopting can be given.

5.21 Chapter 4 also discusses the adoption of children in private placements and in what circumstances an order for adoption would be appropriate. Where the Director-General, after assessing the individual circumstances of a private placement, consents to the child being adopted by carers with whom he or she has been satisfactorily living for a period of time, the birth parents’ or guardian’s consent to the adoption should not be a general one, but rather a consent to specific applicants.

5.22 As to the content of the consent form, it should convey information relevant to consent and ensure that such information has been understood. Specifically, it should

be written in plain language;

clearly state the legal effect of signing;

include information as to who has guardianship of the child after the consent has been given, but prior to the adoption order;

state the last date up until which the consent can be revoked;

give clear instructions as to how to revoke consent and make clear that the process can be begun again at any time;

include information on the ability of the birth parent or guardian to exercise access to the child in the period between giving consent and the time consent becomes irrevocable;

provide for the consent to be witnessed; and

state that the birth parent or guardian must be provided with a copy of all forms signed by him or her.

5.23 The recent consent forms go a considerable way to achieving these aims.²⁰ The Statement of Requests form,²¹ presently used in conjunction with the general consent form, offers birth parents the opportunity to express their views relating to the selection of the adoptive parents or the child's upbringing and have these wishes considered in the adoption placement plans. However, it is anachronistic that the only wish expressed on the consent form itself should be as to the child's religious upbringing or the religion of the adoptive parents. All birth parent wishes should be contained on the one form, which should be the Statement of Requests form.

5.24 Further, the consent form for step-parent and relative adoptions should clarify who has guardianship after the consent has been given.²²

5.25 A related issue is provision to the person giving consent of a copy of the consent form he or she has signed. A number of birth parents told the Commission they had never received a copy of the consent form they had signed. Persons giving consent should always receive copies of any forms they have signed.

Witnessing consent

Current law and practice

5.26 Only certain people can witness a consent.²³ If the instrument of consent is signed in New South Wales, the witness to a consent can be drawn from a number of occupations. These are: clerk of a Local Court; commissioner for affidavits; Director-General of the Department of Community Services ("DOCS"); principal officer of a private adoption agency; member of the AASW; or lawyer.²⁴ In order to protect birth parents from undue pressure at the time consent is taken, the consent must not be witnessed by an officer of DOCS or an employee of a private adoption or foster agency who is the case worker for the applicants to adopt.²⁵ If a lawyer witnesses the consent, as is common in step-parent adoptions, that lawyer must not be the legal representative of the applicants or a partner or employee of that representative.²⁶ The range of witnesses differs slightly for instruments of consent signed interstate or overseas.²⁷

5.27 A witness to a birth parent consent²⁸ must certify a number of matters on the instrument of consent. He or she has to be satisfied of the identity of the person giving the consent; that the consent giver received the form and certain written information not less than 72 hours prior to consent; and that the consent giver has had sufficient opportunity to read the consent form. In particular, the witness must be satisfied that the consent giver understands the effect of signing the consent form. This understanding covers the legal but not the emotional effects of consenting to an adoption. The witness must also attest that he or she has explained, and is satisfied that the consent giver understands, the procedures for revoking the consent.²⁹

5.28 In the case of a general birth parent consent, the Adoption Regulation includes an additional requirement that the witness certify that:

in the case of a person giving consent who is under 16 years of age - [he or she] has obtained a report, prepared by a registered psychologist or other appropriate expert, stating that, in the opinion of the expert, the person is capable of understanding the effect of signing the instrument.³⁰

5.29 This provision aims to protect a very young person from being coerced into consenting to an adoption by a well-meaning adult.

Discussion Paper 34

5.30 The Discussion Paper did not make specific provisional proposals for reform in relation to the witnessing of consents. However issues arose in the general discussion on consent which were taken up by submissions, as outlined below.

Submissions and response

5.31 Two interrelated issues arise in relation to the witnessing of consents:

Beyond affirming the identity of the signatory and witnessing the signature, what other matters should the witness certify, if any?

What is an appropriate class of person to witness a consent?

5.32 *Informing and counselling birth parents.* In relation to the first issue, two fundamental policy considerations underpin any requirement for the independent witnessing of consent. One is the need for appropriate counselling of the birth parent before he or she signs the consent form. The second is the need for the birth parent to understand exactly what he or she is doing when signing the consent form.

5.33 The Commission received a number of submissions from birth mothers claiming that consents had been taken in situations where they could not be considered voluntary, either because the birth parent was given inaccurate or inadequate information or because she was not in a state of mind to make the decision. Many signed the consent form without understanding its effect and often without information about the possibility or the method of revoking it at a later date.

5.34 Birth mothers identified the need for the following:³¹

information to be provided in writing so that women have a chance to think about all the issues in their own time;

regulation of the process of taking consent to prevent a consent being obtained where the birth mother is not in a fit state of mind to consider her options and make the decision to relinquish; research indicates that some birth mothers may not have an adequate state of mind to make the decision to relinquish their child for some time after the birth;³² the suggestion was made that it should be the obligation of the agency to ensure that a birth parent is in a fit state of mind before signing a consent to adoption; this would seem to be particularly relevant where a birth mother wishes to sign a consent as soon as possible after the birth of the child; and

better information about the legal effects of signing a consent form and alternatives to adoption rather than pressure about the material advantages of adoption for the child;³³ many birth mothers submitted that they felt pressure from social workers to relinquish their child and were made to feel that they were disempowered to parent their child.³⁴

5.35 The Commission agrees that written information should be provided to birth parents. How this should be implemented and what areas should be covered are discussed in paragraphs 5.72 to 5.82 below. The Commission has also considered, at paragraphs 5.84 to 5.86, whether the taking of consents should be videotaped.

5.36 *Who should be able to witness a consent?* If the conclusion is reached that the consent form should certify that the signatory was fit to consent and that consent was voluntary and informed, the witness must be competent to attest to these matters. Submissions raised the following criticisms of the present categories of persons who qualify as witnesses:

The signing of a consent can be witnessed by a person, such as a clerk of the Local Court, who does not necessarily know anything about the long term consequences of adoption and therefore it is questionable whether he or she has the skills to ensure that a birth parent fully understands the document he or she is signing.

Even if the witness makes an attempt to clarify the understanding of the birth parent, there is no obligation on the witness to ensure that the birth parent has been offered adequate counselling or is medically fit to make such a decision.

5.37 Several alternatives to address these issues have been proposed. Some submissions suggested appointing a particular category of person to witness all consents to adoption:

An officer of the District Court could be available as an independent witness at the time of the consent taking at the District Court where the officer could also witness the mother's written wishes regarding placement which were not flexible.³⁵

5.38 An alternative to this approach is to allow one of a selected group of people to witness the consent, while placing the obligation to ensure that a birth parent is adequately prepared and able to sign a consent with the agency who undertakes to support the adoption application before the Court. The Adoption Legislative Review Committee in Western Australia took this approach.³⁶ It recommended that an appropriate person witnessing the signing of the consent would also certify, among other things, that he or she has sighted an affidavit from the agency. The agency would provide an affidavit to the effect that the birth parents:

- (a) have received written and verbal information;
- (b) have fully understood the implications of adoption;
- (c) have been offered counselling;
- (d) are medically fit to make such a decision;
- (e) understand the procedures for revocation.³⁷

5.39 The strength of this approach is that the agencies possess the expertise and facilities to undertake the necessary preparation of birth parents. This kind of preparation often takes time and may require counselling regarding associated issues.

Conclusion

5.40 The Commission agrees, with two qualifications, with the range of matters to which the witness must presently certify under both the prescribed general consent form³⁸ and under the prescribed step-parent or relative consent form.³⁹ However, the requirements do not go far enough. The witness to the consent form only has to attest that he or she is satisfied that the birth parent understands the *legal* effects of the adoption and not, for example, the emotional effects.⁴⁰ Furthermore, this limitation is not made clear in the witness's statement.

5.41 Secondly, the range of matters which should be certified are better seen as independent requirements. The witnessing of a consent is a very simple matter which merely entails some person stating that they have seen the person whose consent is required signing the relevant document. It has nothing to do with the person's understanding of what he or she is signing. For this reason, the Commission recommends that the witnessing of consent be dealt with in a simple way. The witness should state that he or she witnessed the consent-giver sign the instrument of consent and that he or she had sighted proof of identity of the consent-giver.

5.42 The certifying of matters relevant to giving an informed and voluntary consent should be the responsibility of an independent counsellor. This is discussed below.

5.43 *Independent Counsellor.* Although the witness only has to certify an understanding in the signatory of the legal effects, the agencies follow the practice of counselling the birth parents generally. This practice needs to be elevated to a legislative requirement.

5.44 The use of an independent counsellor prior to any consent taking was strongly endorsed by the National Children's and Youth Law Centre:

We believe that no parent should be asked to sign a consent to adoption unless previously offered free counselling by an independent trained counsellor who will explain the forms of support and assistance available to the parent or to members of their extended family if the child is cared for within the family groups.⁴¹

5.45 Accordingly, the witness should certify on the consent form that he or she has attached a report prepared by an independent counsellor stating that the independent counsellor:

has explained to the consent-giver the legal effects of an adoption and procedures including the procedure for revoking the consent to adoption, and is satisfied that the consent-giver understands these procedures and the effect of signing the consent;

has counselled the consent-giver on the emotional effects of adoption and the alternatives to adoption, including the feasibility of keeping the child; and

that the independent counsellor is not aware of any mental, emotional or physical unfitness of the consent giver to provide consent.

A copy of this report should then be annexed to the consent form.

5.46 It would be preferable, for continuity in an adoption case, if the statement by the independent counsellor was contained on the consent form itself, rather than annexed, so that the independent counsellor could witness the signature and attest to the above matters. However, there may be practical difficulties, particularly in rural areas, for a consent-giver to receive counselling, go away and consider the advice, then return to the same person to sign the consent form in front of him or her. Annexing the counsellor's report to the instrument of consent gives the consent-giver greater flexibility but does not compromise his or her interests in any way.

5.47 The independent counsellor should be neither the caseworker for the applicants nor for the birth parent.⁴² He or she should be a social worker or psychologist accredited by DOCS. To address practical problems with the availability of an accredited social worker or psychologist in rural areas, the Director-General of DOCS should have the power to make an *ad hoc* approval of a social worker or psychologist for the purposes of giving the independent counsellor's report in a particular case.

5.48 Taking consent overseas for an adoption within Australia rarely occurs but, in that case, again, the Director-General should have the power to approve a social worker or psychologist for the purposes of the particular matter. It is likely that in such circumstances DOCS would liaise with a significant adoption body in the foreign country.

5.49 As the witness would no longer have the responsibility of explaining the effects of adoption, it is not necessary that he or she be a person belonging to one of the categories presently set out in clause 22 of the Adoption Regulation. The witness could be any one at all capable of witnessing a signature and being satisfied as to the identity of the signatory.

5.50 The consent forms for the guardian of a ward under the *Children (Care and Protection) Act 1987* (NSW)⁴³ and guardian of a non-citizen child awaiting adoption under the *Immigration (Guardianship of Children) Act 1946* (Cth)⁴⁴ should continue to be attested by a witness prescribed by clause 22 of the Adoption Regulation in the manner set out in the present Forms 2 and 3.

Revocation of consent

Current law and practice

5.51 Consent to the adoption of a child by a person other than the child can be revoked by delivering to the Court written notice of the revocation before the expiration of 30 days from the date on which the instrument of consent was signed or before an adoption order is made, whichever is earlier.⁴⁵ Accordingly, at present it is possible for the Court to make an order for adoption before the expiration of 30 days from the date on which the instrument of consent was signed.

5.52 The Director-General of DOCS must give written notice of the birth parent's right to withdraw the consent at least seven days before the day on which the revocation period expires.⁴⁶ The general and step-parent or relative consent forms provide details on revocation including a form for the revocation of consent.⁴⁷

5.53 Agency practice varies as to how much access a birth parent is allowed to his or her child during the revocation period. Some agencies do not place any restrictions on access, while others limit access to a weekly visit, believing that this provides the birth parent with an illustration of the experience of separation.⁴⁸

Discussion Paper 34

5.54 The Commission proposed that consent should become irrevocable 30 days after consent was signed and that it should be made clear to birth parents that consent can be revoked within the 30 days and the consent process begun again at any time. It was proposed that counselling should be provided shortly before the expiration of the 30 day period, to ensure that the birth parent understands his or her position.⁴⁹

5.55 The latter proposal was particularly directed at birth mothers and was 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 what is the appropriate adjustment of the various interests and policies involved. In particular, it recognises that in many cases the birth parent's experience of adoption will not be the sudden and complete separation envisaged in earlier times, but rather a gradual (and sometimes only partial) withdrawal from the child's life, with some continuing participation in the selection and preparation of the child's adoptive placement.

Submissions and response

5.56 Several submissions suggested extending the time for revocation of consent either up until a date (before the making of the order for adoption) nominated by the birth parents or up until the making of the adoption order.

5.57 DOCS suggested allowing an extension of the revocation period upon application, rather than allowing the parent to revoke consent then consent again.⁵⁰ The difficulty with this suggestion is that it increases the complexity of the consent procedure and removes the advantages of the set period of time for revocation. The power to control the decision-making process is taken away from the birth parent whose application for an extension of time is refused.

5.58 There was some concern in submissions that giving birth parents the opportunity to revoke a consent during the revocation period and then later sign another consent attracting a further revocation period could be open to misuse, with birth parents possibly consenting, revoking consent and signing again indefinitely. The Law Society suggested a limitation of one opportunity to revoke and consent again.⁵¹ It argued for a "60 day" limitation on the grounds that the limitation addresses the eventual need of the child to be with his or her adoptive parents and does not overlook the rights of the adoptive parents. As the Commission is not proposing that the child be placed with the adoptive parents until the revocation period is complete, the adoptive parents would actually have no rights in relation to any particular child during the period in question.

5.59 DOCS and the NSW Committee on Adoption and Permanent Family Care supported the proposal of providing counselling to the birth parents prior to the revocation period expiring.⁵²

5.60 On the issue of access by the birth parent to the child prior to consent and revocation, one submission argued that since the mother is the legal guardian of the child up until the signing of the consent, she should have the same rights as any other mother to have access to her child and make any decisions concerning the child at this time:

Refusing the mother permission to see or handle her child prior to signing the consent, or putting obstacles in her way of asserting this right, may readily be interpreted as duress if the validity of the consent is being contested ... In the same context any comments or actions by staff members which the mother could see as pressure to persuade her to place her baby for adoption run the risk of later bearing the legal interpretation of duress.⁵³

5.61 The Anglican Adoption Agency has also found that its provision of access to birth parents during the revocation period has two important purposes. If the parent revokes the consent and the child is restored to his or her care, access will facilitate the re-establishing of the bond between parent and child. If the adoption goes ahead, the birth parent will be able to grieve more readily, having a clear image of the child.⁵⁴

Conclusion

5.62 The point at which the consent to adoption becomes irrevocable marks a complete change in the parental rights and responsibilities of birth parents and, therefore, requires careful regulation.

5.63 To extend the time for revocation to a date nominated by the birth parent or until the making of the adoption order, as suggested in submissions, has several problems. First, having consents with different revocation periods attached may well lead to confusion by all parties to the adoption process, including uncertainty by birth parents as to when their parental responsibilities towards the child might irrevocably change. Secondly, if the child is not to be placed with the prospective adoptive parents until the revocation period expires, the child could be with interim foster carers for up to 12 months. The child would be bonding with those short term carers and not with the adoptive parents selected for him or her as the best long term carers. If, on the other hand, the child is placed with the applicants to adopt, it would be difficult to expect those applicants to bond with a child who may be removed from their care at any time in the first 12 months. There may be some applicants who are prepared to enter into such an arrangement but most may find that this is too traumatic. Holding back from bonding with the child in the first 12 months does not meet the best interests of the child.

5.64 Possibly the strongest argument for not extending the time for revocation is that if a birth parent is not sure about the decision to relinquish, before signing a consent there is always the choice of temporary care while time is taken to explore all the options, develop mothercraft skills, test out a decision to continue to parent, or explore means of support within the extended family, especially in the case of a new-born baby. If adequate counselling is provided, there should be very few birth parents signing consents who need a further 12 months to reach a decision.

5.65 In relation to the suggested limiting of opportunities to revoke consent, a better solution to prevent a birth parent consenting and revoking frequently is to delay the taking of consent in the first place until the birth parent has made an informed decision. Birth parents should be provided with adequate and correct information and support during the decision-making process, both before the giving of consent and after it. Such information would include the alternatives to adoption and the consequences of open adoption, as discussed below. Support would include counselling, advice and assistance with housing, respite care and other temporary care arrangements, and generous access, if requested.

5.66 The Anglican Adoption Agency has found that the provision of temporary care by the agency has worked well in providing time and space after the birth for parents to consider their options.⁵⁵ If proper counselling services are provided and birth parents have a full understanding of the decision they are making and given a reasonable amount of time in which to make it, there will be very few circumstances in which birth parents revoke a consent only to sign another one.

5.67 In the rare cases where birth parents have consented, revoked consent and consented again, agency social workers have suggested a pause in the consent and revocation process in order to explore the reasons for the birth parent's indecision.

5.68 Accordingly, consent should become irrevocable 30 days after it is signed and an adoption order should not be made before the revocation period expires. This represents a departure from the current law which allows an adoption order to be made within 30 days after consent is given.

5.69 Independent and impartial counselling should be provided throughout the consent-taking process and shortly before the expiration of the 30 day revocation period to ensure that the birth parent understands his or her position.

5.70 In line with the present law,⁵⁶ it is important that the birth parent or guardian is sent written notice at least seven days before the last day on which consent can be revoked reminding the birth parent that he or she has a right to withdraw consent by a day specified in the notice. The person giving consent should be able to revoke that consent as often as he or she requires. He or she should be made aware at the time of consent that revocation of consent is not a bar to consenting again at a future time.

5.71 The Commission supports the practice that birth parents be given, and be encouraged to utilise, access to the child if the child is placed in temporary care during the process of consent and revocation. Access during this period would need to be controlled only to the extent that it did not become an unmanageable burden on temporary or foster carers.

Further issues

Written information

5.72 Under the heading "Witnessing consent" attention is drawn to a need for the provision to birth parents of written information as a way of ensuring informed consent. Submissions proposed that an information kit should be supplied to birth parents at a set period before the signing of consent. It was thought to be beneficial for birth parents to be able to take this information home and consider it in their own time.⁵⁷ It would also provide an opportunity to reiterate legal rights. As one submission commented:

In making their decision, all birth parents should have access to written information about their legal rights, the legal process of relinquishment, the long term implications of the decision both for themselves and the child, alternatives to adoption and family support services.⁵⁸

5.73 Each of the agencies currently provides its own written information for birth parents at the initial enquiry stage. The content of the information varies between agencies. DOCS's pamphlets are a good example of this type of information.

5.74 In late 1995, DOCS released a series of pamphlets entitled *Information About Adoption* to take into account the Adoption Regulation. Three of the pamphlets are addressed to birth parents and each covers different areas, namely: adoptions generally, intra-family adoption, and the adoption of wards. These pamphlets constitute the written information provided to birth parents by DOCS as required in the consent forms. While the discussion below focuses on these, the comments apply to the provision of all agencies' written information.

5.75 These pamphlets answer some of the criticisms of the earlier written information provided to birth parents. However, focusing on the pamphlet provided to birth parents about adoptions generally, the information provided in it could be expanded in several areas.

5.76 The birth parents' pamphlet should place more emphasis on the psychological effects the relinquishment can have on birth mothers both in the short term and, more particularly, the long term.

Serious attention is now being given to the link between relinquishment and the development of post-traumatic stress disorder in birth mothers.⁵⁹ The range of psychological effects of relinquishment could be detailed specifically. The written information should direct birth parents to contact numbers for counselling and birth parent support groups, members of which have experienced relinquishment.

5.77 The pamphlet contains information on the alternatives to adoption, but more detail should be provided on the main differences between them and how to obtain more information on each alternative. The information might include a summary of the assistance and support available to undertake the care of the child if the birth parent chooses to bring up the child, as well as contact details. This would cover the types of financial assistance obtainable, such as single mothers' benefits and rental assistance, and how to apply for them, as well as a list of accommodation details. The information could be expanded to refer to practical information (including contact details) on the assistance offered by parenting support organisations, baby health clinics, child care and respite care, mothercraft classes, crisis care, local job programs and education opportunities for sole parents.

5.78 The information should include a summary of the legal consequences of the birth mother either disclosing or withholding information about the birth father.⁶⁰ In particular, any information given should clearly distinguish between rights and obligations under adoption legislation.

5.79 In relation to self-help organisations, the pamphlet contains the contact details for several alternative counselling services. This information might be expanded to include, for example, sources of free legal advice provided by community legal centres.⁶¹

5.80 Any written information should clearly set out that a birth parent must receive notice of revocation at least seven days before the day on which the revocation period expires. All information would need to be updated regularly to take into account changes to adoption law and practice and contact details, support services and financial assistance. The information could be developed with assistance and practical information provided by groups such as birth parent associations, local councils, the NSW Women's Information and Referral Service,⁶² and community centres, such as charitable organisations. Copies of the written information should be available in community languages.

5.81 Written information relevant to all birth parents in the expanded form suggested above should be provided to every consenting birth parent at least 14 days before a consent is taken from that person.⁶³ All agencies' written information should provide a similar standard of information. In summary, information should include:

information on the alternatives to adoption;

information on financial and other support services available to a birth parent who wants to raise his or her child;

information on the possible emotional effects, both short and long term, of relinquishing a child for adoption;

a warning that it may not be possible to grant all or any of the birth parent's wishes in relation to the proposed adoption;

information relating to the legal effect of giving consent and of an adoption order;

information on the ability of the birth parent to exercise access to his or her child after consent and prior to the end of the revocation period; and

information on the ability to revoke consent.

5.82 As well as being provided with general birth parent information, other more specialised written information on, for example, intra-family adoption or adoption of wards, should be provided to those birth parents contemplating these types of adoption.

5.83 The witness should state on the form of consent that he or she is satisfied that the written information was supplied to the person giving consent not less than 14 days prior to signing the consent form.

Video taping the giving of consent

5.84 One submission suggested that in order to ensure that the consent of a birth mother was not made under duress, the signing of the consent, including the verification by the witness that the birth mother is aware of her rights, should be recorded on video tape, in much the same manner as police interviews are currently recorded. Video-taping of interviews was introduced as a means to ensure that the person being questioned was properly advised of his or her rights and was not subjected to undue pressure during the questioning process.

5.85 The Commission does not support video taping the giving of consent. An explanation of rights to the birth parent at this point is too late to be effective. Birth parents need time to consider fully the issues well before they contemplate signing a consent. The consultation process has shown that birth parents who feel dissatisfied with the consent taking procedures are angry and frustrated about the fact that they were allowed to enter into a legally binding arrangement without fully understanding the legal, emotional or social consequences.

5.86 Provision of the written information discussed above would adequately inform birth parents about adoption and alternatives well before the moment of signing the consent. Other recommendations, regarding the timing of consents and the procedures for witnessing consents, would also provide proper protection to birth parents.

Timing and revocation of consent

RECOMMENDATION 37

Legislation should provide that:

consent to adoption of a child cannot be given until 30 days after the birth of that child;

thirty days after consent has been given, consent becomes irrevocable;

at least seven days before the last day on which consent can be revoked, the person or child giving consent must be notified in writing by the relevant agency that he or she has a right to revoke consent by a day specified in the notice; and

an adoption order cannot be made before the revocation period expires.

Form of consent

RECOMMENDATION 38

Consents to adoption should continue to remain “general,” that is, not nominating identified adoptive parents, except where the child is to be adopted by a step-parent or relative or where consent is given by a child to his or her own adoption. In those cases the consent should be “specific”, that is, nominating the applicants to adopt.

RECOMMENDATION 39

Where the child to be adopted is in foster care or in a private placement, the birth parents or guardians of a child may give consent to either the adoption of the child by any persons (general consent) or, the adoption of the child by the child’s foster

parents or carers (specific consent), providing those foster parents or carers have had care of the child for not less than two years.

RECOMMENDATION 40

The prescribed forms of consent for a general consent, a step-parent or relative consent or consent by a child who has attained the age of 12 years should:

be written in plain language;

clearly state the legal effect of signing;

include information as to who has guardianship of the child after the consent has been given, but prior to the adoption order;

state the last date up until which the consent can be revoked;

give clear instructions as to how to revoke consent and make clear that the process can be begun again at any time;

include information on the ability of the birth parent or guardian to have access to the child in the period between giving consent and the time consent becomes irrevocable;

provide for the consent to be witnessed; and

state that the person giving consent must be provided with a copy of all forms signed by him or her.

RECOMMENDATION 41

The Statement of Requests form (Form 6) prescribed under the *Adoption of Children Regulation 1995 (NSW)* should be used in taking general consent and consent from a child who has attained the age 12 years. A statement of wishes as to the religious upbringing of the child and the religion of the adoptive parents should be removed from the general consent form (Form 1) and included in Form 6.

Witnessing consent

RECOMMENDATION 42

The witness to a general, step-parent or relative consent or consent by a child who has attained the age of 12 years must complete a separate statement on the instrument of consent attesting that he or she:

witnessed the birth parent, guardian or child give consent;

sighted documents of identity of the person or child giving consent;

is satisfied that at least 14 days before the date on which consent was given, the person or child giving consent was provided with a copy of the consent form and with written information about the adoption by the Director-General of DOCS or the principal officer of a private adoption agency, including information on the legal implications of adoption, the alternatives to adoption and the legal consequences of signing the consent;

has attached a report prepared by a social worker or psychologist accredited by the Director-General of DOCS (who is not the caseworker for the applicants

and is not the agency case worker for the birth parent or child) being the independent counsellor stating that the independent counsellor:

- (a) has explained to the person or child giving consent the legal effects of an adoption and procedures including the procedure for revoking the consent to adoption, and is satisfied that the person or child giving consent understands these procedures and the effect of signing the consent;
- (b) has counselled the person or child giving consent on the emotional effects of adoption and the alternatives to adoption, including, in relation to birth parents, the feasibility of keeping the child; and
- (c) that the independent counsellor is not aware of any mental, emotional or physical unfitness of the person or child giving consent to provide consent.

RECOMMENDATION 43

The witness to a general, step-parent or relative consent or consent by a child who has attained the age of 12 years may be any person capable of witnessing a signature and being satisfied as to the identity of the signatory. It is not necessary that the witness be a person belonging to one of the categories presently set out in clause 22 of the Adoption Regulation.

RECOMMENDATION 44

The consent forms for the guardian of a ward under the *Children (Care and Protection) Act 1987 (NSW)* and guardian of a non-citizen child awaiting adoption under the *Immigration (Guardianship of Children) Act 1946 (Cth)* should continue to be attested by a witness prescribed by clause 22 of the Adoption Regulation in the manner set out in the present Forms 2 and 3 in Schedule 1.

RECOMMENDATION 45

Legislation should provide that the Court must not make an adoption order unless it is satisfied, among other things, that it has received the instrument of consent in the prescribed form.

BIRTH FATHER'S CONSENT

Current law and practice

Consent

5.87 Under the Adoption Act, consent to the adoption of a child is generally required from a birth mother and father who are married or who live in a "common household".⁶⁴ Where the child is ex-nuptial⁶⁵ and the birth mother and father do not live together after the child's birth, consent is generally only required from the mother.⁶⁶

5.88 Consequently, it could appear that consent is not required from any birth father who does not have an established relationship with the mother. However, the Adoption Act also states that consent to an adoption is required from any person who is the child's *guardian*.⁶⁷ A guardian includes a birth father, although not married to and not living with the mother, having custody of the child or who is deemed a guardian of the child under any State or Federal law.⁶⁸ The Family Court of Australia held in *Hoye v Neely*⁶⁹ that an unmarried father is a "guardian" whose consent is required under the Adoption Act.⁷⁰ On the authority of this decision,⁷¹ the present position is that the unmarried father's consent is

required even where he has not lived with the mother and child in a common household - unless the father has specifically been refused custody and guardianship by a court order. Amendments to the Family Law Act,⁷² subsequent to *Hoye v Neely*, which introduce the language of “parental responsibility” rather than “guardianship”, are unlikely to change this analysis.⁷³

5.89 Despite the interpretation in *Hoye v Neely*, in practice it appears that the consent of a birth father has not usually been sought if the child is ex-nuptial and the parent-child relationship falls outside the “common household” test. However, some agencies⁷⁴ try to obtain the agreement of the birth father to the adoption.⁷⁵

5.90 In DP 34, the Commission pointed out that present variations in agencies’ policies regarding the involvement of birth fathers may lead to birth mothers selecting an agency on the basis of the extent to which they will put pressure on her to identify the birth father. The Commission suggested that it may be preferable to have more uniformity in policies in this area.

5.91 With step-parent adoptions, the consent of the birth parent who is also an applicant to the adoption is not required.⁷⁶ However, the consent of the other birth parent is required. See further, Chapter 4.

Notice of consent

5.92 Although the consent of a birth father to the adoption of an ex-nuptial child may not be required depending on whether he has an established relationship with the child or the child’s mother,⁷⁷ the Adoption Act still requires an agency to *notify* such fathers of the birth mother’s consent or the impending adoption before the adoption order is granted by the Court.⁷⁸ The requirement to give such notice is limited to those men who are registered as the birth fathers or are legally presumed to be the birth fathers.⁷⁹ The agency is required to make reasonable inquiries to ascertain whether any person fits into these categories.⁸⁰ If such a man can be identified, a notice is to be served on him, informing him that the birth mother has consented to the adoption or that an application for adoption has been made in relation to the child.⁸¹ The father may then, within two weeks, file an application “relating to the care, custody and guardianship” of the child and the Court may determine such an application. If the father fails to do so within the specified two weeks, the Adoption Act provides that he “may not ... do anything that is inconsistent with the making of the adoption order”.⁸²

5.93 Where such notice is neither given to the father nor dispensed with by the Court, the father cannot do anything inconsistent with an adoption order, apart from being joined as a party to the adoption proceedings in order to oppose it.⁸³

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5.94 The Commission took the provisional view in DP 34 that consent should be obtained from those persons who already have parental rights and responsibilities in relation to the child, since those rights and responsibilities will be removed by adoption.⁸⁴ Consent would therefore be required from both parents regardless of their marital status.⁸⁵ This view accords with Federal legislation, such as the Family Law Act and child support legislation, in that birth fathers of children acquire parental responsibilities,⁸⁶ including the obligation to provide financial support, regardless of their relationship with the mother of the child. Such responsibilities can only be displaced by court orders.

5.95 DP 34 therefore suggested that consent should be required from all birth fathers (or formally dispensed with), except those who have lost their custody and guardianship rights and responsibilities by court orders.⁸⁷ Under the Family Law Act custody and guardianship rights and responsibilities are now referred to as “parental responsibility”.

5.96 The Commission also proposed that adoption legislation provide that notice should normally be served on birth fathers so they could, if they chose, apply for parenting orders, 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,⁸⁸ would not be retained.⁸⁹ In the Commission's provisional view, there was 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.⁹⁰ It was sufficient for the adoption legislation to refer simply to fathers.⁹¹

5.97 In DP 34, the Commission also highlighted the importance of information and openness for the child and the fact that open relationships with birth fathers can be as beneficial for adoptees and their adoptive families as relationships with birth mothers. The relationship between the birth father and the birth mother is not always an indication of the kind of relationship that a birth father wishes to have or is capable of having with the child of that relationship.

Submissions and response

5.98 One of the issues canvassed in submissions was the circumstances in which the consent of a birth father of an ex-nuptial child should be required. Involvement of the birth father may raise problems 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 not wish the birth father to be involved. Her wishes must be balanced against the interests of the child in knowing, or at least having information about, both his or her biological parents.

5.99 Submissions generally agreed with the Commission's view that birth fathers have a right to be informed of a proposed adoption and be given an opportunity to participate in the decision. Some disagreed on the extent of this right. There were objections to the proposal that most birth fathers be notified of the proposed adoption of their child, and consent to it, on the ground that it failed to address the situation where a child is conceived as the result of a casual encounter or where a casual relationship has broken down after conception but well before birth. Other submissions acknowledged that a father in any of these situations was still the legal father of the child and would therefore have some rights to have notice of the adoption and the right to be heard at the adoption hearing. The Law Society of New South Wales ("the Law Society") was concerned that the Commission's suggestion that most birth fathers must give consent would nurture the perception of such a "right":

[T]his fails to address the reality that such parents may be properly seen as only of passing relevance to the birth-mother (in the case of a casual encounter) and of perhaps even less relevance to the child (other than perhaps, at a later time, as an object of curiosity).⁹²

5.100 The Law Society also disagreed with the Commission's argument that there should be consistency with Federal legislation, on the grounds that this did not reflect public opinion namely that:

the casually encountering father should have no rights whatsoever, and probably does not even deserve either formal notice or the right of appearance at any preliminary hearing...⁹³

5.101 The Australian Association of Social Workers Ltd was of the view that paternal consent should be required only where the relationship between the birth parents was "meaningful".⁹⁴ The difficulty with this argument is that it is not clear on what criteria a relationship is to be judged meaningful. It also fails to take into account that an adoptee may have a great interest in obtaining information about his or her biological father, irrespective of the type of relationship that existed between his or her parents.

5.102 Centacare proposed that birth fathers who were aware of the mother's pregnancy should be notified where the mother had consented to the adoption, and be given 14 days in which to apply for custody of the child.⁹⁵ The consent to an adoption order should be dispensed with in certain circumstances such as where the child was the result of sexual assault or incest.⁹⁶

5.103 The Commission had proposed that consent should be obtained from those who already have parental rights and responsibilities in relation to the child. From this, the Commission had extrapolated at paragraph 7.32 of DP 34 that consent to adoption did not need to be obtained from birth fathers who had lost their custody and guardianship rights by the operation of court orders. The New South Wales Bar Association ("the Bar Association"), DOCS and the Post Adoption Resource Centre ("PARC") disagreed with this proposal in their submissions. According to the Bar Association, this statement was a:

misapprehen[sion of] the role of fathers who do not have custody and guardianship rights, but who continue to be involved in the lives of their children by way of access orders and child support and otherwise.⁹⁷

5.104 DOCS supported the Commission's proposal, but felt that it should extend to all fathers, even those who have lost custody and guardianship rights through the courts. Leaving the proposal in its current form would mean that the consent of fathers whose children become wards of the State would not be required, although there is no similar suggestion that the mothers of these children would also lose their right to consent.⁹⁸

5.105 Submissions also made the point that parental rights and responsibilities can be conferred on parties who are not the legal parent or guardian of the child. DOCS suggested that adoption legislation should only require the consent of a legal parent or guardian - with notice of the proposed adoption being served on other persons who have the legal care, custody and control of the child.⁹⁹

5.106 Several of the submissions commented upon the practical problems associated with paternal consent in the adoption process. These include the problems of obtaining information about the identity of the father from the birth mother, where the mother will not or cannot provide such information. It was suggested that birth mothers should be advised of the advantages to children of knowing the identity of both their birth parents.¹⁰⁰ Centacare believed that the birth mother should be able to refuse to disclose the identity of the father, but should be required to sign an affidavit indicating this as her decision.¹⁰¹ It would then be a matter for the Court to decide whether or not to dispense with the consent of the birth father in the particular case. The affidavit should then be made available to the child as part of the information available under the adoption information legislation.¹⁰² 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.

5.107 In general, submissions suggested there should be clarification of the rights of birth fathers and clarification of the obligations of agencies with respect to any notification to and consent by birth fathers.

Conclusion

5.108 An agency should be required to obtain the consent of the birth father or apply to have it formally dispensed with. If the birth father is not known, or represents a danger to the birth mother and child, or is withholding his consent merely to upset the birth mother, it would be appropriate for the agency to apply to the Court to dispense with the birth father's consent and approve the adoption order. The Court's decision to exercise its discretion to dispense with the father's consent would be made upon the consideration of the particular facts of the case and the best interests of the particular adoptee. If there is no apparent reason why the birth father's consent cannot or should not be obtained, the agency should be required to make reasonable efforts to locate the birth father, notify him of the proposed adoption, and provide him with information about participating in the adoption process or obtaining custody of the child.

5.109 In every case, the birth father's consent would either be obtained, or dispensed with by the Court. This would mean that there would not be any birth fathers left in the situation where their consent has not been obtained or the requirement of the agency to obtain it has not been formally removed by the Court. A birth father who cannot be reasonably located before the adoption order, who later finds out about the adoption and wishes to participate in the child's life, could apply to the Family Court for

parenting orders under the Family Law Act, although he would not be able to overturn the adoption order.

5.110 Although consent should only be required from the child's parents or guardian, the relevant agency should give notice of the proposed adoption and information concerning participation in open adoption to any person who has actual care of the child, even though he or she is not the child's parent or guardian. Such persons should also be provided with the opportunity to participate in a plan for openness.

Further issue: practical problems associated with notifying birth fathers

5.111 The obligation to seek the consent of the father to the adoption of a child raises several practical problems. As noted above, DOCS's current practice is to involve birth fathers in the adoption process by seeking, wherever possible, their consent to any proposed orders. Practical difficulties present when the father no longer has a relationship with the birth mother, even though he has been identified by the mother. If he is unaware of the pregnancy, or refuses to acknowledge paternity, or his whereabouts are simply unknown there are clearly practical difficulties in seeking his consent. At what point are attempts to locate and notify the birth father causing unreasonable delays in an adoption placement?

5.112 Previously, DOCS had at its disposal information from a wide range of government agencies which could be used to identify the whereabouts of fathers who were no longer in contact with the child's birth mother. However, as mentioned in paragraph 7.15 of DP 34, privacy legislation has considerably restricted the sources of information which can be used by DOCS. DOCS is now restricted to searching the electoral rolls (which are available to the public), the Community Tracing Section of the NSW Police Service, and reliance upon the last known address of the father according to DOCS's own records. These are considerably less successful methods of locating the father.

Conclusion

5.113 The legislation should state that the relevant agency need only make reasonable efforts to locate and notify the birth father, using any of the resources currently legally available to it in order to locate him. This approach does not diminish the requirement to obtain the consent of a birth father to the adoption of his child. If a birth father cannot be located after all reasonable attempts have been made, then it is for the Court to decide whether or not his consent should be dispensed with in the particular case. This enables a balance to be struck between the right of birth fathers to be informed about the existence of their children and to participate in their lives; the ability and resources of the agencies to conduct searching processes; and the interests of the adoptee in not having a beneficial placement unduly delayed by lengthy searches for a birth father.

5.114 Birth fathers who cannot be located before an adoption order is made and who subsequently learn of the adoption are not precluded from participating in the child's life. Under the Family Law Act they can apply for parenting orders, such as an order for contact with the child.¹⁰³

RECOMMENDATION 46

Legislation should provide that consent to the adoption of a child under 18 years should be obtained from every person who is a parent or guardian of a child or who has parental responsibility for the child, except in the following circumstances:

where the child in respect of whom an adoption application is made has attained the age of 12 years, in which case consent is only obtained from the child;

the parent or guardian or person who has parental responsibility for the child is the applicant for the adoption order; or

the consent has been dispensed with by a Court order.

RECOMMENDATION 47

The legislation should require the agency to make reasonable efforts to locate the birth father and notify him of the proposed adoption and his rights in relation to his child.

RECOMMENDATION 48

The legislation should require the agency to give notice of the proposed adoption and information concerning participation in open adoption to any person who has actual care of the child.

CONSENT OF THE CHILD

Current law and practice

5.115 An order for adoption of a child who has attained 12 years of age cannot be made unless the child has consented to the adoption. In that way, the child's consent is specific although this is not spelt out in s 27 (which provides that consents are to be general except where they are in favour of a parent or relative).¹⁰⁴

5.116 The Court can make an adoption order for a child aged between 12 and 17 years even if the child has refused to consent to the adoption or his or her consent has not been sought "if the Court is satisfied that there are special reasons, related to the welfare and interests of the child, why the order should be made".¹⁰⁵ A child cannot revoke his or her consent.¹⁰⁶

5.117 The child's consent is the only consent required where the child is from 12 to 17 years of age and has been brought up, maintained and educated by the applicants for a period of 5 years before the making of the application.¹⁰⁷ The adoptee's consent is the only consent required where the adoptee is 18 years or older.¹⁰⁸

5.118 An appropriate witness¹⁰⁹ must attest to the child's consent, the identity of the child, the receipt by the child of written information on the legal implications and consequences of adoption not less than three days prior to the giving of consent, and his or her satisfaction that the effects of signing the consent have been explained to and understood by the child. As for birth parents, this refers to an understanding of the legal effects only.

5.119 Children of 12 years or older must consent to a change of their first names, unless the Court is satisfied that special reasons exist for a change of first name related to the child's welfare.¹¹⁰ The form of consent allows a child in giving his or her consent to the adoption to nominate the name by which the child wishes to be known after the adoption.¹¹¹ In other respects, although the child's welfare is required to be treated as the paramount consideration, the legislation makes no provision for active participation by the child in the adoption process (except in so far as the child selects his or her adoptive parents by reason of consent being specific).¹¹²

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5.120 The Commission's provisional view was that 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.¹¹³

Submissions and response

5.121 DOCS thought that requiring children to consent to the adoption placed them in a difficult position if they were unable or unwilling to make a choice. It suggested that the requirement that the child should consent to the adoption should be removed from the adoption legislation. Instead, the

legislation should ensure that a child's views are heard and that appropriate weight is given to them, commensurate with the child's age and understanding. It proposed that no adoption should proceed with respect to a child who is over the age of 10 if it is against that child's wishes, and a child aged 14 and over should be given equal status with adults in adoption proceedings.¹¹⁴

5.122 A number of submissions similarly argued that children should be given greater opportunities to participate in the adoption process through, for example, representation of the child's wishes in the hearing of the application for an adoption order. There was very little comment on the issue of counselling the child prior to an adoption order being made.

5.123 In relation to changing an adoptee's name, some submissions, particularly those responding in relation to intercountry adoption, suggested that rather than legislating on the naming of older children, the adoptive parents should be educated on the advantages and disadvantages of changing a child's name. The decision would then be made between adoptive parent and child.¹¹⁵ The issue of changing the names of intercountry adoptees is discussed fully in Chapter 10.

Conclusion

5.124 The Commission acknowledges DOCS's concern with placing a child in a difficult position if he or she is unwilling or unable to make a decision about his or her adoption. However, the chances of a placement succeeding where the adoptee of this age has not consented to it are slight.

5.125 Counselling should play a significant role in the adoption of a child aged 12 years or older. It is essential that a suitably qualified counsellor prepares the child, works through any issues troubling him or her and ensures that he or she understands all the ramifications of the adoption and its alternatives. Having been properly counselled, the child should then be able to consent, or not, to his or her own adoption. Merely taking into account his or her wishes is insufficient for a child of this age. Accordingly, no order of adoption should be made regarding a child who has attained the age of 12 years without the child's consent, unless there are special reasons related to the best interests of the child why the adoption order should be made.

5.126 Safeguards to ensure the child's fully informed and voluntary consent should be at least as stringent as those required in the process of taking birth parent's consent, including enabling the child to revoke consent. The recommendations made above in relation to timing and revocation of consent, the form of consent and witnessing consent apply equally to the consent of children and the consent of adults.

5.127 In addition, where a child is giving consent, he or she should be able to nominate formally the names by which he or she wishes to be known after the adoption. Impartial guidance and counselling should be provided to the child throughout the consent-taking period. This includes providing information relating to the effect of giving consent and adoption procedures, including revocation of consent, in a way the child can understand. The child should also be given assistance in completing any documents and, where relevant, in revoking consent.

5.128 As the child's consent would be in relation to nominated applicants, the usual requests made by a birth parent on the Statement of Requests form would not be relevant. These requests largely relate to the birth parents' choice of adoptive parents. However, the child should be able to complete a Statement of Requests form setting out his or her wishes as to the names by which he or she is to be known and contact with birth parents and relatives. As with requests made by birth parents, these wishes would not be binding but should be taken into account in the making of an adoption order.

5.129 In relation to the child's names, the Commission strongly supports the agencies' educating adoptive parents on the importance of retaining given names and the integral link between a person's name and their complete sense of identity. All children of sufficient understanding and maturity should be consulted about any proposed changes to their first names and surnames, and the Court must give

careful consideration to the child's wishes on this point.¹¹⁶ Furthermore, children of 12 years or older should consent to any change in their first name.

RECOMMENDATION 49

A child who has attained the age of 12 years must consent to his or her adoption, unless the Court is satisfied that there are special reasons related to the best interests of the child why the adoption order should be made, notwithstanding that the child has refused to consent.

RECOMMENDATION 50

The consent of a child who has attained the age of 12 years to his or her adoption should be the only consent required.

RECOMMENDATION 51

The agency must provide a child who has attained 12 years of age with independent counselling prior to signing any consent and during any period of revocation of consent.

RECOMMENDATION 52

The first name of a child over the age of 12 months should not be changed on the making of an adoption order unless the Court is satisfied that there are special reasons relating to the best interests of the child that would justify a change of his or her first name.

RECOMMENDATION 53

A child who has attained the age of 12 years must consent to any change in his or her first name, unless the Court is satisfied that there are special reasons related to the best interests of the child why his or her first name should be changed, notwithstanding that the child has refused to consent.

RECOMMENDATION 54

Before the Court approves a change in the child's first names or surname, it must ascertain and give due consideration to the child's wishes and feelings on this point, having regard to the age and understanding of the child.

DISPENSING WITH CONSENT

Current law and practice

5.130 In certain circumstances, the Court has power to dispense with the consent of the birth parent or guardian. Basically, all consents can be dispensed with by the Court, except for the consent of an adoptee over 18 years of age.¹¹⁷

5.131 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 an agency, or the applicants in intra-family adoptions, are seeking to persuade the Court that the circumstances warrant making the adoption order against the wishes of the birth parents. In practice it appears, however, that fully contested matters are very rare. While it does happen that some birth parents are not willing to give consent, in most cases they tend not to appear in Court to contest the application to dispense with their consent.

5.132 There are a number of grounds on which consent might be dispensed with, so that the adoption order can be made without consent. The most obvious, and least controversial, are where the person whose consent is required cannot be found, or is incapable of giving consent.

5.133 Section 32(1) of the Adoption Act sets out the grounds on which the Court may dispense with consent of a person. These are where it appears to the Court that:

- (a) after reasonable inquiry, that person cannot be found or identified;
- (b) that person is in such a physical or mental condition as not to be capable of properly considering the question whether the person should give his or her consent;
- (c) that person is, in the opinion of the Court, unfit to discharge the obligations of a parent or guardian by reason of the person's having abandoned, deserted, neglected or ill-treated the child;
- (d) that person has, for a period of not less than one year, failed, without reasonable cause, to discharge, or to make suitable arrangements to discharge, the obligations of a parent or guardian, as the case may be, of the child;
- (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;
- (f1) the child is the subject of an adoption in a country outside the Commonwealth and the Territories of the Commonwealth, being an adoption to which s 46 would, but for the requirements specified in subsection (2)(b) of that section, apply;¹¹⁸
- (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 that person and that person has not, within 14 days after the date of service of the notice, filed, with the nominated officer, a notice of intention to oppose the making of the order.

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5.134 In DP 34,¹¹⁹ the Commission argued that s 32(1)(g) extends the Court's power too far in allowing it to dispense with the parents' consent simply by substituting its own view of the child's welfare for those of the parents. The argument concluded that legislation should ensure that consent should be dispensed with only where there is serious concern for the child's welfare, not merely where the Court thinks that adoption would, on balance, be advantageous for the child. This conclusion does not involve a compromise of the principle that the child's best interests are paramount. Rather, it reflects a view that courts and welfare authorities are not necessarily able to make better judgements about children's welfare than the parents who are initially entrusted by the law with responsibility for their children.

5.135 The Commission's proposal was that the grounds for dispensing with consent should include the existing grounds under paragraphs (a)-(d) of s 32(1). 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.¹²⁰

5.136 A decision to dispense with consent requires the Court, first, to be satisfied that one of the grounds is established, and secondly, to consider whether to exercise its discretion to dispense with consent. The second aspect should be governed by the principle that the child's best interests are to be regarded as the paramount consideration and, in determining this question, the Court should be assisted by legislative guidelines.¹²¹

Submissions and response

5.137 Submissions supported the retention of the Court's power to dispense with consent and felt that this power should be limited to extreme circumstances where the child's best interests will only be served by an order for his or her adoption.¹²² PARC's submission went further than the Commission's proposal and suggested that paragraphs (c)-(h) of s 32(1) should be abolished and replaced by the Commission's suggested 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.¹²³

5.138 PARC believed this rightly places emphasis on the child's interests rather than the Court making negative judgements about the birth parents.

5.139 Barnardos supported the abolition of the existing grounds for dispensing with consent under paragraphs (e)-(h) of s 32(1) and their replacement with the Commission's proposed new ground. However, it also thought that grounds in paragraphs (c) and (d) of s 32(1) still reflect aspects of parental fault rather than reflecting the needs of the child and might be better dealt with under the proposed new ground.¹²⁴

5.140 One submission disagreed with the Commission's approach in DP 34 and felt that the current law should be retained on the basis that the proposed amendments would not only discourage responsible actions by birth parents, but also place the rights of birth parents over the rights of the child.

5.141 The proposed grounds for dispensing with the birth father's consent varied in the submissions, and referred to issues such as whether the child was the result of sexual assault, the capacity of the parent to care for the child, and the motivations of the parent who denied consent.

5.142 The Bar Association was of the view that consent should be dispensed with when the child was the result of sexual assault or incest.¹²⁵ The AASW argued that where relations between the birth parents were brief or involved sexual assault, consent to adoption by the birth father should not be required.¹²⁶

5.143 Both the ASSW and Centacare submissions referred to the occurrence of birth fathers withholding consent simply to frustrate the wishes of the birth mother.¹²⁷ Their view indicated that in this situation, where the birth father has no wish to have any kind of parental relationship with the child, the birth father's consent should be dispensed with.

Conclusion

5.144 The grounds for dispensing with consent should include the existing grounds under paragraphs (a) and (b) of s 32(1).

5.145 The principles underlying paragraphs (c) and (d) of s 32(1) are relevant considerations in determining whether making an adoption order without parental consent will be in the best interests of the child. However, the way the provisions are presently drafted focuses on the fault of the parent involved rather than the interests of the child. The Commission's proposed new ground itself gives proper parameters for deciding whether a particular placement is in the best interests of a child and consequently whether to dispense with consent. Removing paragraphs (c) and (d) from s 32(1) removes the temptation to build the case for the adoption on a finding of fault with the birth parent and instead focuses on the positive attributes of the placement for the adoptee.

5.146 If the Commission's proposed new ground is substituted for paragraphs (c) and (d), this would also obviate the need for the specific grounds contained in paragraphs (e) to (h). The grounds under paragraphs (c)-(h) should be abolished. They should be replaced with the ground that:

the Court is satisfied that it is necessary to override the wishes of the parent or guardian in order to give effect to the best interests of the child.

5.147 The Court must have the discretion to dispense with the consent of a birth parent where he or she has not been found. In making its decision, the Court should have regard to the agency's report detailing the steps taken to locate the birth parent.

5.148 The exercise of the Court's discretion to dispense with consent must be governed by the principle that the child's best interests are to be regarded as the paramount consideration.¹²⁸ The Court would have regard to the guidelines recommended in Chapter 2 in determining the best interests of the child.¹²⁹

5.149 Applications to dispense with consent could be made at a preliminary hearing or at the application for adoption.¹³⁰

RECOMMENDATION 55

Section 32(1) of the Adoption Act should be amended as follows:

“The Court on application made in accordance with subsection (1A), may, by order, dispense with the consent of a person (other than the child) to the adoption of a child where it appears to the Court that:

- (a) after reasonable inquiry, that person cannot be found or identified;**
- (b) that person is in such a physical or mental condition as not to be capable of properly considering the question whether the person should give his or her consent;**
- (c) the Court is satisfied that it is necessary to override the wishes of the parent or guardian in order to give effect to the best interests of the child.**

RECOMMENDATION 56

The consent of a child who has attained 18 years of age prior to the making of an adoption order cannot be dispensed with by the Court.

PARTICIPATION OF THE BIRTH PARENTS

Current law and practice

5.150 Except in the case of relative or step-parent adoptions, where consent is specific, birth parents must consent to the child being adopted by any eligible person or couple selected by an agency.¹³¹ However, birth parents can express their wishes in relation to the adoptive parents and the child. These

wishes can be taken into account when considering a placement, 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.

5.151 The general consent form provides for the religious wishes of the birth parent to be recorded (and, as discussed earlier, this is presently the only birth parent wish expressed on the consent form itself). Also discussed above, a Statement of Requests form used in conjunction with the general consent form allows birth parents to express their wishes for the placement of the child at any time from when the consent is signed to before the end of the revocation period.¹³² These wishes cover a variety of placement requests including the race or ethnic background of proposed adoptive parents, their marital or other status, receipt of information about the child or involvement in the process of selecting adoptive parents. The birth parents must acknowledge on these forms that their wishes may not be met.

5.152 The Adoption Regulation requires the agencies to make all reasonable efforts to place the child in conformity with the birth parents' wishes as to religious upbringing, ethnicity or the domestic arrangements of the adoptive parents. If this is not practicable, the agency can place the child elsewhere. In that case, the birth parents must be informed, where possible, and the reasons for the alternative placement must be presented to the Court.¹³³

5.153 In relation to a general consent, apart from expressing certain wishes to the agency as outlined above, the Adoption Act does not allow the birth parents to control or influence the selection of adoptive parents or the way in which the child is raised.

5.154 In practice, when relinquishing parents express a desire to participate in the selection of adoptive parents, they are commonly invited to discuss with the agency the sort of people they would like to adopt their child. In adoptions of healthy infants, an agency usually invites relinquishing parents to make a selection from a number of non-identifying profiles of applicants that are thought to be suitable for their children. This is discussed in Chapter 7.

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5.155 The Commission proposed 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 would be taken into account in the early planning of the adoption.¹³⁴

Submissions and response

5.156 The Commission's proposal allowing birth parents and the child (where the child is capable of expressing wishes) some participation in choosing the adoptive parents was supported in the submissions.¹³⁵ Some emphasised that expressing such wishes does not make the consent "conditional", although the agency should strive to meet any requests as far as possible.¹³⁶ The needs of the child must take precedence in the placement decision.¹³⁷

5.157 DP 34 also indicated that birth parents' wishes expressed on consent forms would not be absolutely binding on agencies but should be taken into account when considering the best possible placement for the child.¹³⁸ The NSW Committee on Adoption and Permanent Family Care suggested that if the birth parent's requests could not be met, then the parent must be advised of this during the period of revocation.¹³⁹

5.158 Most submissions supported the retention of a general consent.¹⁴⁰ DOCS, however, suggested that when the child has been in the care of a relative or spouse of the birth parent or in long-term foster care, birth parents should be able to nominate those people as the adoptive parents.¹⁴¹ The Commission supports this approach (see Recommendation 39 above).¹⁴²

Conclusion

5.159 The ultimate responsibility for meeting the best interests of the child in a placement must remain with the agency. Birth parents' wishes and the reality of their expectations for adoptive parents will be discussed in the course of independent counselling before the consent is taken. If it is apparent that it will not be possible to fulfil certain requirements, the agency should discuss the matter with the birth parents, either before the consent is signed or during the revocation period, giving the birth parents the opportunity to revoke the consent or consider a change in their requests. It may be, for example, that an agency has three adoptive families in its pool, all of whom meet the needs of the child but who fail to meet one or more of the birth parents' criteria. In this situation, birth parents might be happy to select one of the three files or they may decide to approach another agency. Discussing the limitations of the pool of adoptive parents should be a part of discussions between birth parents and the agency regarding the realities of the adoption under consideration.

5.160 In the case of a child with special needs, the agency needs to make birth parents aware in counselling prior to taking the consent that the pool of prospective adoptive parents is limited and that this will need to be taken into account when trying to meet stated requests.¹⁴³ It is the agency's role to ensure that the needs of the child are met by the placement arrangement.

5.161 Birth parents should continue to be able to express a range of requests about the adoptive family and participate in its selection. Present legislation and practice support this approach with forms providing for the formal expression of birth parent wishes covering the areas described above. The recommendation is made above that all birth parent wishes, including those relating to matters of religion, should be contained on the one form, which should be the Statement of Requests form currently used in conjunction with the general consent form. Recommendations are made above as to when consents should be general and when they should or could be specific.

Intercountry adoption

5.162 Birth parents' wishes should be accorded serious regard in all adoptions. However, meeting birth parents' wishes in intercountry adoptions raises problems. Under current law, applicants obtain a New South Wales adoption order for an overseas child. However, before entering Australia the child has already been adopted by the same applicants in the child's country of origin. The complicated cross-country legal procedures and the limits on adoption policy caused by jurisdictional boundaries are examined in Chapter 10. A problem associated with obtaining birth parents' wishes in intercountry adoptions is that the birth parents' wishes may not be known and cannot be ascertained, especially if a stigma of illegitimacy surrounds the relinquishment of the child in the country of origin.

FOOTNOTES

1. *Adoption of Children Act 1965* (NSW) s 31(2).
2. s 31(3) and (4): unless, in the case of a consent on, or within three days after, the day on which the child was born it can be shown that, at the time of the consent, the mother was in a fit condition to give the consent.
3. The Australian Association of Social Workers Ltd (NSW Branch Office) *Submission* (11 August 1994); Post Adoption Resource Centre *Submission* (5 August 1994) at 10; Social Issues Committee, Presbyterian Women's Association of Australia, New South Wales *Submission* (22 July 1994) at 6; New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 27: the consensus of the Committee was to support the 30 day proposal.
4. The Law Society of New South Wales *Submission* (24 August 1994) at 7.
5. Barnardos Australia *Submission* (26 July 1994).
6. The Australian Association of Social Workers (NSW Branch) *Submission* (11 August 1994).

7. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 22. This view was also shared by Centacare (Newcastle) *Submission* (29 July 1994) at 2. Centacare's own research into consents taken by them between July 1993 and June 1994 showed that equal numbers of birth parents decided to continue to parent their children having made the decision within the first 10 days after birth as did those who needed more time, that is 25-60 days: see Centacare *Submission* (11 August 1994) at 24.
8. Centacare *Submission* (11 August 1994) at 24.
9. Centacare *Submission* (11 August 1994) at 24.
10. *Adoption of Children Act 1965* (NSW) s 27 and 29.
11. "Relative" as defined in s 6 means a grandparent, uncle or aunt of the child.
12. *Adoption of Children Regulation 1995* (NSW) cl 21(d).
13. *Adoption of Children Regulation 1995* (NSW) Schedule 1, Forms 1, 2, 3, 4 and 5. Form 1 is a general birth parent consent form, while Form 4 is a birth parent consent form specifically for relative or step-parent adoptions.
14. Schedule 1, Form 9. In intra-family adoptions, the consenting parent can indicate on a Statement of Requests form whether he or she wants access to the child to continue after the adoption.
15. Schedule 1, Form 6.
16. Pursuant to the *Adoption Information Regulation 1996* (NSW) once the adopted person is 18 years or older, the birth parent is entitled to receive from DOCS or a private adoption agency various pieces of information including as to the marriage or death of the adopted person: cl 8.
17. New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965* (NSW) (Discussion Paper 34, 1994) at para 7.62.
18. Anglican Adoption Agency *Submission* (26 August 1994) at 7.2; New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 28.
19. Compared with the Commission's view in NSWLRC DP 34 at para 7.62 that the giving of consent should not have the effect of transferring guardianship to the Director-General. See New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 29; Barnardos Australia *Submission* (26 July 1994). See Chapter 3 of this Report for the Commission's recommendation.
20. *Adoption of Children Regulation 1995* (NSW), Schedule 1, Forms 1 and 4.
21. Schedule 1, Form 4.
22. Schedule 1, Form 4.
23. The categories of witnesses to the five types of consent forms are the same, depending on whether the consent form is signed in New South Wales, interstate or overseas. See *Adoption of Children Regulation 1995* (NSW) cl 22.
24. cl 22(1).
25. cl 22(2).
26. cl 22(3).

27. cl 22(1)(b) and (c).
28. See cl 23 and Schedule 1, Forms 1 and 4.
29. Schedule 1, Forms 1 and 4: statement of person qualified to witness an instrument of consent (i).
30. cl 23(1) para (e).
31. For example, J Burrows *Submission* (9 May 1994).
32. J Condon "Psychological Disability in Women who Relinquish a Baby for Adoption" (1986) 144 *Medical Journal of Australia* at 117.
33. One submission added that women should be warned of the possibility of secondary infertility following relinquishment, i e that this child may be the only child that they have.
34. E Cahill *Submission* (26 July 1994): the issues of long term, unresolved grief, the loss of grandchildren and the loss of meaningful bonding with immediate family were never discussed with this birth mother.
35. LDS Social Services Australia (Sydney Agency) *Submission* (5 October 1994) at 6.
36. Western Australia - Adoption Legislative Review Committee *Final report: A New Approach to Adoption* (February 1991) Recommendation 66 at 96.
37. *Final report: A New Approach to Adoption* Recommendation 66 (ii) at 96.
38. See *Adoption of Children Regulation 1995* (NSW) cl 23 and Schedule 1, Form 1.
39. Schedule 1, Form 4.
40. *Adoption of Children Regulation 1995* (NSW), witnesses statements in Schedule 1, Forms 1 and 4.
41. National Children's and Youth Law Centre *Submission* (29 July 1994) at 2.
42. R McGowan of the TRIAD Society for Truth in Adoption of Canada believed birth parents should receive counselling during pregnancy and after delivery independent of anyone involved in the placement of infants: *Submission* (29 July 1994).
43. *Adoption of Children Regulation 1995* (NSW) Schedule 1, Form 2.
44. Schedule 1, Form 3.
45. *Adoption of Children Act 1965* (NSW) s 28. In addition, upon the Director-General ceasing to be the guardian of the child by placing the child in the care of a parent or guardian, the consent is deemed to be lawfully revoked: s 28(3).
46. *Adoption of Children Regulation 1995* (NSW) cl 26. The letter of revocation must reach the Supreme Court by 4 pm on the 30th day after the signing of consent. If this falls on a weekend or public holiday, then the 30th day is taken to be the following working day (see New South Wales Department of Community Services, *Information about Adoption* (for birth parents) at 9).
47. See *Adoption of Children Regulation 1995* (NSW) Schedule 1, Forms 1 and 4.
48. A Roughley *Identifying Adoption Practice and the Problems in Relation to the Local Adoption of Infants* Project prepared at the request of the New South Wales Law Reform Commission (September 1993) at 11.

49. NSWLRC DP 34 Chapter 7, Proposal 5.
50. New South Wales Department of Community Services *Submission* (5 September 1994) at 32.
51. The Law Society of New South Wales *Submission* (24 August 1994) at 7-8.
52. New South Wales Department of Community Services *Submission* (5 September 1994) at 35; New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 28.
53. D Welfare *Submission* (9 May 1994).
54. Anglican Adoption Agency *Submission* (26 August 1994) at para 7.1.
55. Anglican Adoption Agency *Submission* (26 August 1994) at para 7.1. The Agency does not seek temporary care orders but uses voluntary care. However, Centacare would use temporary care orders in 20% of cases: A Roughley *Identifying Adoption Practice and the Problems in Relation to the Local Adoption of Infants* at 6.
56. *Adoption of Children Regulation 1995* (NSW) cl 26.
57. For example, L Harvey *Submission* (2 August 1994).
58. New South Wales Department of Community Services *Submission* (5 September 1994) at 31.
59. S Wells "Post-Traumatic Stress Disorder in Birth Mothers" (1993) 17 *Adoption and Fostering* 30. One survey of 300 British birth mothers suggested that the trauma experienced at the loss of their child may be lifelong. Almost 50% felt that their physical health had been affected and almost all felt their mental health had been affected and that this has in turn affected other personal relationships. Intensive traumatic responses were linked to feelings of not having participated actively in decision-making and having no information about the child after relinquishment.
60. L D S Social Services Australia (Sydney Agency) *Submission* (5 October 1994) at 18-19 suggested that prior to any counselling, information should be formally provided to each birth mother setting out her options and the legal consequences of either disclosing or withholding information about the birth father.
61. L Harvey supported an information kit as a means of giving birth parents information about alternative counselling and services that are provided by representative groups who are separate from the adoption agencies: *Submission* (2 August 1994). R McGowan of the TRIAD Society for Truth in Adoption of Canada indicated that legal advice should also be provided independently so that birth parents can be well informed of their legal rights both now and in the future: *Submission* (29 July 1994).
62. A "first stop" contact point for women seeking up-to-date and accurate referral information on a range of issues established by the New South Wales Department of Women.
63. In comparison, the current law requires a witness to the consent to certify that, at least 3 days before giving the consent, the birth parent was given written information on the legal effects of the adoption and the consent and the alternatives available: *Adoption of Children Regulation 1995* (NSW) cl 23(b) and Schedule 1 forms.
64. "Common household" is shorthand for the *Adoption of Children Act 1965* (NSW) s 26(3)(b)(iii) text of a child whose parents are unmarried but "... 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 ..."

65. "Ex-nuptial child" is shorthand for the s 26(3)(a)(ii) and (b)(ii) text: "a child ... whose parents were not married to each other at the time of the child's conception and have not subsequently married each other."
66. *Adoption of Children Act 1965* (NSW) s 26(3)(a).
67. See definition of "guardian" in s 6 and also s 26(2) and 26(3)(b).
68. s 26(3A).
69. (1992) 107 FLR 151.
70. s 6 contains a definition of "guardian" which includes somebody who is a guardian under a law of the Commonwealth. In *Hoye v Neely*, the Family Court held that the *Adoption of Children Act 1965* (NSW) s 26(3A) did not apply because the father of an ex-nuptial child was his or her guardian under the *Family Law Act 1975* (Cth) and hence his consent to the adoption was required as a guardian under s 26(3).
71. In the Supreme Court case of *C v Director-General of the Department of Youth and Community Services* (1982) 7 Fam LR 816 at 819, Waddell J held that the *Adoption of Children Act 1965* (NSW) s 26(2) and (3) provided a context in which "guardian" is not to be given its full legal meaning and hence the consent of the father to the adoption of an ex-nuptial child was not required. 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 Adoption Act accordingly.
72. See *Family Law Act 1975* (Cth) Part 7 Division 2. Under the amended Act each parent is no longer a "guardian" but has "parental responsibility" for the child.
73. *Family Law Act 1975* (Cth) s 61C(1) provides that the father of a child (whether or not ex-nuptial) has parental responsibility for the child. "Parental responsibility" is defined in s 61B as "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children."
74. For the purposes of this Chapter, "agencies" refers to both DOCS and the private adoption agencies, unless the context otherwise requires.
75. NSW Department of Community Services *Submission* (5 September 1994) at 30. DOCS generally expressed concerns about the ambiguous standards in the current legislation for the presumption of paternity and provisions for paternal consent, which require the agencies to make their own interpretations of the requirements for birth fathers' consents in most adoptions. Acknowledging father's rights under other legislation, DOCS's practice has been to recognise a father's right to participate in an adoption decision and, should he support the proposal, accord him the right to consent. Where the birth mother wished the child to be adopted, and the father withheld consent, DOCS's practice has been to place the child in the care of the father. This practice was subject to the father taking steps to acknowledge his paternity and the absence of any "care and protection" concerns. See also Anglican Adoption Agency *Submission* (26 August 1994) at para 7.1 which commented that in some cases, fathers who have not been involved have preferred to sign a supportive affidavit rather than a formal consent.
76. *Adoption of Children Act 1965* (NSW) s 26(5).
77. See s 26(3).
78. s 31A and 31E.
79. This is a summary of s 31A. See also s 31E.
80. s 31A.

81. s 31A(4). Under s 31B notice to the father may be dispensed with by the Court if DOCS or the agency is unable to locate the father, the physical or mental condition of the father warrants it, or other circumstances exist where dispensing notice will promote the interests and welfare of the child.
82. s 31D.
83. s 31D(2) and 23(2).
84. NSWLRC DP 34 Chapter 7, Proposal 1.
85. NSWLRC DP 34 Chapter 7, Proposal 4.
86. Unless other legal presumptions of parentage apply. For example, see *Family Law Act 1975* (Cth) s 60H on legal presumptions of parentage of children born as a result of artificial conception procedures.
87. See NSWLRC DP 34 at para 7.32.
88. See D Hambly and J Chart "The *Adoption of Children (Amendment) Act 1980*" [1980] *Australia Current Law* 39; R Chisholm "End of Uniformity: New Adoption Laws for New South Wales" (1980) 5 *Legal Services Bulletin* 49.
89. NSWLRC DP 34 Chapter 7, Proposal 2.
90. *Family Law Act 1975* (Cth) Part 7; *Children (Equality of Status) Act 1976* (NSW) and *Artificial Conception Act 1984* (NSW), both intended to be repealed by the *Status of Children Bill 1996* (NSW). See *Status of Children Bill 1996* (NSW) cl 37.
91. NSWLRC DP 34 Chapter 7, Proposal 3.
92. The Law Society of New South Wales *Submission* (24 August 1994) at 5-6.
93. The Law Society of New South Wales *Submission* (24 August 1994) at 6.
94. The Australian Association of Social Workers Ltd (NSW Branch Office), *Submission* (11 August 1994).
95. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 27.
96. The New South Wales Bar Association *Submission* (16 September 1994) at 2.
97. The New South Wales Bar Association *Submission* (16 September 1994) at 2. Support is given to the Bar Association's view by Cervera's study which indicated that many unmarried fathers remained involved in the life of the baby both during and after the mother's pregnancy. See N Cervera "Unwed Teenage Pregnancy: Family relationships with the Father of the Baby" (1991) 29 *Families in Society: The Journal of Contemporary Human Services* 1.
98. New South Wales Department of Community Services *Submission* (5 September 1994) at 30.
99. New South Wales Department of Community Services *Submission* (5 September 1994) at 30.
100. A Roughley *Identifying Adoption Practice and the Problems in Relation to the Local Adoption of Infants* at 10.
101. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 27. This accords with the Commission's suggestion in NSWLRC DP 34. If birth mothers do not

identify the birth father to adoption workers they are asked to sign an affidavit, which forms part of the adoption application information, declaring their decision not to inform the birth father: see Roughley at 10.

102. Roughley at 10.
103. *Family Law Act 1975* (Cth) s 64B, 64C, 65C and 65D.
104. Also, *Adoption of Children Regulation 1995* (NSW, Schedule 1, Form 5 provides for the child to consent to the making of an adoption order in favour of the applicants named in the consent form.
105. *Adoption of Children Act 1965* (NSW) s 33. Note that the birth parents' and guardian's consent is also required, except in certain circumstances, for example, s 26(4) and (6).
106. *Adoption of Children Act 1965* (NSW) s 28.
107. s 26(4A). However, s 33(2) allows the Court to make an adoption order for such a child where the child's consent has not been given.
108. s 26(6).
109. Prescribed witnesses are set out in cl 22 of *Adoption of Children Regulation 1995* (NSW) and are the same categories as for birth parent consent.
110. *Adoption of Children Act 1965* (NSW) s 38(2A).
111. *Adoption of Children Regulation 1995* (NSW) cl 28 and Schedule 1, Form 5. This includes both the child's first name(s) and surname: see New South Wales Department of Community Services *Information About Adoption* (for children) at 6. The form also requires a witness to the child's consent to state that he or she has explained the effects of an adoption and its procedures and is satisfied the child understands these procedures and the effect of signing the consent.
112. For example, for children younger than 12 years, upon adoption children take such first names as the Court approves on the application of the adoptive parents. All children automatically take the surname of their adoptive parents, unless a child has been generally known by a particular surname and the Court decides to retain it: *Adoption of Children Act 1965* (NSW) s 38.
113. NSWLRC DP 34 at para 7.81.
114. New South Wales Department of Community Services *Submission* (5 September 1994) at 34.
115. For example, Haley *Submission* (24 July 1994) at 2.
116. For example, *Adoption Act 1988* (SA) s 23(2) states that before a Court orders a change in the name of a child, any wishes of the child should be taken into account. The Court cannot change the name of a child who is over 12 years unless the child consents or is intellectually incapable of consenting: s 23(3). The *Adoption of Children Act 1994* (NT) s 48(3) requires the Court, before approving a change in a child's first name or surname, to ascertain and give due consideration to the child's wishes and feelings on this point, having regard to the child's age and understanding.
117. *Adoption of Children Act 1965* (NSW) s 32, 33. Another exception would be the consents of the Ministers of the Crown for obvious practical reasons: see D Smith "The Law of Adoptions" a paper presented for Continuing Legal Education Department College of Law (Newcastle, NSW, 31 May 1995) at 33.
118. In essence, s 46 provides for the recognition of a foreign adoption order in New South Wales as long as the applicants have been resident in that country for at least 12 months or domiciled

there: s 46(2)(b). The foreign adoption order has a similar effect to a local adoption order: s 46(2)(c) and (d). The process of obtaining a foreign adoption order must also be a substantially just process for it to be recognised in New South Wales: s 46(3).

119. NSWLRC DP 34 at paras 7.63 - 7.76.
120. See NSWLRC DP 34 at para 7.75.
121. NSWLRC DP 34 Chapter 7, Proposal 7.
122. For example, E Berzins *Submission* (27 July 1994) at 13.
123. Post Adoption Resource Centre *Submission* (5 August 1994) at 10.
124. Barnardos Australia *Submission* (26 July 1994); See also New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 29.
125. The New South Wales Bar Association *Submission* (16 September 1994) at 2.
126. The Australian Association of Social Workers Ltd (NSW Branch Office) *Submission* (11 August 1994).
127. The Australian Association of Social Workers Ltd (NSW Branch Office) *Submission* (11 August 1994); Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 27.
128. This recommendation addresses the potential problem highlighted in NSWLRC DP 34 at para 7.67, that a mere Court finding that an adoption benefits a child could make any grounds for dispensing with consent unnecessary and be open to exploitation of, for example, poor or disadvantaged birth parents.
129. Recommendation 4.
130. See further, Chapter 3.
131. *Adoption of Children Act 1965* (NSW) s 27. For step-parent and relative adoption, see Chapter 4.
132. *Adoption of Children Regulation 1995* (NSW) Schedule 1, Forms 1 and 6.
133. *Adoption of Children Regulation 1995* (NSW) cl 32 and 33.
134. NSWLRC DP 34 Chapter 7, Proposal 6.
135. For example, Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 4 and 5; New South Wales Department of Community Services *Submission* (5 September 1994) at 27; Anglican Adoption Agency *Submission* (26 August 1994) at para 7.2; New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 19 and 28.
136. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 28.
137. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 28.
138. NSWLRC DP 34 at paras 7.61-7.62. An American court rejected the notion that the guardian of a child could only consent to the child's adoption if the adoptive parents agreed to permit continued contact between the child and the birth family. An appellate court subsequently ruled that a lower

court lacked the power to attach this condition to the consent and that doing so would inappropriately elevate the importance of allowing contact above all the other factors to be considered when deciding if the adoption was going to be in the child's best interests: *In re M M* 619 N E 2d 702 (Ill, 1993); discussed by T Hafemeister in "Current Legal Issues in Adoption" (1994) 18 *State Court Journal* 11(4).

139. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 28.
140. For example, New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 28.
141. New South Wales Department of Community Services *Submission* (2 September 1994) at 33.
142. See further, Chapter 4.
143. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 28.

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

6. Selection of Adoptive Parents

INTRODUCTION

6.1 This Chapter deals with one of the more difficult and controversial aspects of adoption law, namely the selection of adoptive parents. This topic generated more response than any other area of DP 34¹ and is clearly a focal point of community interest in adoption.

6.2 The following will be looked at:

an overview of the present law and practice;

specific eligibility characteristics; and

selection practice.

OVERVIEW

Current law and practice

6.3 The following is a brief examination of three areas of present law and practice in relation to the selection of adoptive parents:

control of the eligibility requirements and selection processes;

eligibility requirements; and

selection processes.

Control of the eligibility requirements and selection process

6.4 The agencies² oversee the administrative procedures of selection, being the assessment of applicants for their suitability to adopt and the allocation of children to approved applicants. Before granting an order for adoption, the Court must be satisfied that the adoption will promote the welfare and interests of the child.³

Eligibility requirements - Introduction

6.5 Eligibility requirements are set out in the Adoption Act and in more specific eligibility criteria formulated by the Director-General of DOCS or the principal officer of a private adoption agency under powers contained in the Adoption Regulation.⁴

6.6 In relation to DOCS, these criteria are published in the *Government Gazette*.⁵ The Adoption Act and the gazetted criteria generally limit selection to married couples of good character and repute who are under a specific age, healthy, and for local adoptions, infertile. Certain non-prescribed eligibility requirements also exist.

6.7 For most of the requirements on eligibility, however, there is a degree of flexibility. The requirements 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.⁶

Eligibility requirements under the Adoption Act

6.8 *Age.* Under the Adoption Act, 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.⁷

6.9 *Marital status.* Subject to various qualifications, the Court may only make an adoption order in favour of a married couple. In restricted circumstances, a single applicant or de facto applicants may adopt a child.⁸

6.10 *Character.* Each applicant must be of “good repute” and “a fit and proper person to fulfil the responsibilities of a parent.”⁹

6.11 *Religion and education.* 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.¹⁰ 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”.¹¹ The Adoption Act requires the Court to consider whether the applicants are suitable to adopt the particular child having regard to, among other things, any wishes of the parent or guardian in consenting to the adoption as to the religious upbringing of the child.¹²

6.12 The Court must also consider the education (if any) of the applicants.¹³ This seems to refer to the educational similarities between the applicants and the child, rather than, for example, a preference for well-educated applicants.

6.13 *Health.* The Court must also consider the health of the applicants and child.¹⁴ In practice, this has been interpreted as requiring that the applicants’ state of health should not interfere with their ability to care for the child.

Eligibility requirements under the Adoption Regulation

6.14 Pursuant to the Adoption Regulation, DOCS has published in the *Government Gazette* more specific criteria for the assessment of adoption applicants.¹⁵ These criteria include an applicant having “the capacity to be a loving parent to an adopted child and to meet the social, cultural and special needs” of the child.¹⁶ They also require an applicant 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 must be between 21 and 55 years and must not be more than 41 years older than the first child to be adopted and 46 years older than subsequent children.¹⁸ At a minimum, couples (both married and unmarried) must have a relationship of at least three years continuous duration.¹⁹ Applicants for local adoptions must also be infertile.²⁰ If the applicants already have a child, the child must be at least two years older than the child to be adopted.²¹

6.15 The private agencies, in determining their own criteria pursuant to the Adoption Regulation, generally reflect the gazetted criteria of DOCS. However, the private agencies have also developed their own criteria which applicants to those agencies must meet. Some criteria include a lower maximum age limit, the acceptance of open adoption, a limit on the number of children already in the family, religious affiliation or the removal of an infertility requirement for applicants.²²

6.16 In addition to the eligibility requirements prescribed in legislation, the agencies usually require in practice that applicants meet an undertaking for one parent to be a full-time carer of the adopted child for a certain period after adoption.

Selection processes

6.17 Prescribed selection procedures for the agencies are set out in the Adoption Regulation. These administrative procedures include: agencies supplying information to prospective adopters about the selection process, criteria and fees; agencies permitting approvals of applicants to be made subject to

certain conditions; agencies being required to give reasons for declining an applicant or approving an applicant subject to conditions; and the agencies' procedures for the review of assessments.²³

6.18 In practice, applicants normally go through an initial process of registering their interest in adoption with an agency and providing certain information and also attending information sessions.²⁴ This initial process is intended to serve an educational purpose. Those who remain applicants after this preliminary phase are then assessed for their suitability.²⁵ Since there are usually far more people wishing to adopt than children available for adoption,²⁶ 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.

6.19 The placement of a child with particular applicants is not governed by set rules, but essentially results from 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. The birth parents may also be involved in selecting suitable adoptive parents.²⁷

6.20 The selection procedure differs in the case of the adoption of "special needs" children, intra-family adoptions, intercountry adoptions and adoption of children in foster care.²⁸ In the case of intra-family and foster care adoptions, the suitable adoptive parents are already known, so the only question is whether the child's legal relationship with the persons having his or her care should be changed by adoption. In the case of "special needs" adoptions, there tend to be fewer potential applicants available, and so the agencies often seek out applicants for the particular needs of the child awaiting adoption. This may involve co-operation among the agencies to find the most suitable applicants.

6.21 The final endorsement of the applicants is the order for adoption made by the Court. The Court can make this order only if it is satisfied as to certain matters, such as the state of health of the applicants, or any wishes expressed by the birth parents.²⁹ In particular, the Court has to be satisfied that the welfare and interests of the child will be promoted by the adoption.³⁰ The Court invariably relies on the agencies for their assessment of the choice of adoptive parents.³¹ A submission by a Supreme Court judge commented:

Where the Department or an agency makes the application [to the Supreme Court] it has chosen the proposed parents, using whatever criteria and methods are involved. The appropriateness of the choice is set out in the report which accompanies the application. As there is no opposition, a judge has no way of testing whether the choice made is the correct one and must rely on the integrity of the organisation concerned. To this extent the court does act on decisions made by others...

In considering what is in the best interests of the child a judge can only rely on the evidence which is filed. If there is only one party before the court then there would have to be a clear inadequacy in that evidence for any doubts to arise as [to] whether, for example, a particular couple are the proper parents for the child involved.³²

Discussion Paper 34

6.22 The Commission proposed several changes in approach to the present eligibility requirements. One was that where the child is capable of expressing wishes relevant to the selection of adoptive parents, those wishes should be given weight in accordance with the child's maturity and understanding. A further proposed change was that applicants should not be disqualified on the ground of sexual orientation. The Commission also considered that infertility of the applicants should no longer be a requirement for suitability to adopt.

6.23 With respect to the maximum age of adoptive applicants, contact with and information about the birth family, health, the age gap between children in a family, and the involvement of birth parents in the selection process, the Commission's view more closely accorded with the present legislation and practice with respect to eligibility requirements. The Commission's proposal for the procedures on the operation of the "pool" is largely a clarification of present practice.

6.24 The Commission also invited comments in DP 34 on whether a full-time home carer for the child should be required in the first six months after the child is placed with a family.

General response to Discussion Paper 34

6.25 The Commission's proposals on eligibility requirements in DP 34 generated much public response. Submissions generally agreed with the Commission's proposals, except for those relating to same-sex adoptions and the age of prospective adopters. Submissions also agreed with the Commission's proposals on the method of "pooling" adoption applicants. Submissions and response are dealt with more specifically under the various headings below.

SPECIFIC ELIGIBILITY CHARACTERISTICS

6.26 DP 34 raised the question of whether the following matters should be treated as relevant to eligibility to adopt:

interaction with discrimination legislation;

full-time carer;

infertility;

religion;

cultural issues;

issues of non-marginalisation and continuity;

age;

wishes of birth parents and child;

health;

spacing of children and examination of family relationships; and

marital status and family structure;

6.27 The Commission, having reviewed these characteristics, sets out its conclusions below. In essence, there should be few specific legislative requirements relating to eligibility. Step-parent adoptions are considered separately in Chapter 4. Reviews and appeals on decisions made in the adoption process, including selection, are discussed in Chapter 3.

Interaction with discrimination legislation

6.28 To discriminate in the general sense of the word, that is, "to make a distinction, as in favour of or against a person or thing" or to "differentiate",³³ is an integral part of adoption selection. Some people will be chosen as suitable to adopt and some will not be. However, a more specific use of the word refers to discrimination under the various State and Federal anti-discrimination laws.³⁴ State and Federal legislation set out *unlawful* forms of discrimination.

6.29 A person can discriminate as long as the decision does not impinge upon any of the prohibited grounds and areas under the legislation. Grounds of discrimination include sex, physical impairment, marital status, age, sexual preference and race. The main areas protected against discrimination are in public life, principally those of the administration of organisations, employment, housing, and the provision of goods and services. For example, State and Federal legislation prohibit discrimination in the provision of services on the grounds of sex, marital status, pregnancy, race or disability.

6.30 Both State and Federal anti-discrimination legislation do not prohibit discrimination where requirements are imposed which are reasonable in the circumstances.³⁵

Relationship between adoption laws and the Anti-Discrimination Act 1977 (NSW)

6.31 As DP 34 noted in para 6.33, adoption could be construed as a “service” by a service provider under the *Anti-Discrimination Act 1977* (NSW) (“the ADA”). The NSW Anti-Discrimination Board submits it should be, with the service provided to the relinquishing and the adopting or fostering parents.³⁶ The service provider would be the agencies.

6.32 If so, one interpretation of the ADA is that the failure to supply a service on one of the prohibited grounds including sex, marital status or age could be discriminatory to relinquishing and adopting parents. Another interpretation is that while adoption could involve the provision of a service, it is a service provided only for children and is not, for example, a service for adults wishing to extend or complete their families. Alternatively, it could be argued that adoption should not be seen as the provision of a service at all, and therefore the discrimination legislation does not apply.³⁷

6.33 At present, the ADA is limited in its application to adoption by section 54(1) of the ADA. This provision allows discrimination which occurs in compliance with the adoption legislation.³⁸

Discussion Paper 34

6.34 In DP 34, the Commission proposed that the assessment of applicants should be conducted in a way that is consistent with the ADA and with similar Commonwealth laws and international agreements to which Australia is a party. However, the principle that the child’s best interests are paramount means it must be remembered that in any assessment, the purpose of adoption is not to provide children to fulfil the needs of adults who wish to create or complete their families.³⁹ The purpose of adoption is to provide a child who cannot be cared for by his or her birth family with a permanent home.

Submissions and response

6.35 Submissions to DP 34 supported the Commission’s proposal that assessment should be consistent with discrimination laws, providing the child’s best interests are paramount.⁴⁰ Submissions strongly emphasised that adoption is a service to children and not to adults.⁴¹ It is now well established that the child’s best interests come foremost, and that the main concern of decision-makers is to find homes in order to benefit children, not to supply children for the benefit of intending parents.

Conclusion

6.36 The process of selecting adoptive parents and the need to avoid unlawful discrimination are fundamentally in harmony.⁴² Both considerations require that the law be based on grounds that relate to the best interests of the child (being the essential consideration), rather than on stereotypes or grounds that are otherwise unrelated to the child’s welfare. For instance, the child’s “best interests” requirement should discourage any actions under discrimination legislation which seek to use adoption to achieve some other social ends. The assessment of applicants should be conducted in a way that is consistent with the ADA and with similar Commonwealth laws and international agreements to which Australia is a party, so long as it is also applied consistently with the principles that the child’s best interests are paramount and adoption is a service to children and not to adults.

Full-time carer

6.37 The question has been raised whether an adopted child in the first months of placement needs a full-time carer. This issue has risen to prominence because the proportion of families with dependent children where both parents are working has increased.⁴³

Discussion Paper 34

6.38 The Adoption Act, Adoption Regulation and gazetted criteria do not specifically require that an adoptive parent needs to be a full-time carer. In DP 34, the Commission invited comments on the issue of whether one adoptive parent should be required to stay at home for the first months after the child is placed.

Submissions and response

6.39 Submissions were on the whole in favour of one adoptive parent staying at home in the first few months of placement as being in the best interests of an adopted child,⁴⁴ although not necessarily as a requirement prescribed in legislation.⁴⁵ Several argued that a full-time carer for at least one year was needed.⁴⁶ DOCS noted that similar agencies, both interstate and overseas, require longer periods of full-time care from 18 months to 24 months.⁴⁷

6.40 A submission by Concern NSW Inc, whilst acknowledging the desirability of a full-time carer in the first months of a placement, considered the policy out-of-step with normal practice in our culture. The submission observed that some people make better parents when they are not full-time carers. It considered that the policy of one full-time carer fails to take into account individual differences in families and is difficult to enforce. The policy encourages dishonesty in the relationship between the adoptive parents and the agency.⁴⁸

6.41 *Similarities and differences between natural and adoptive family formation.* Should the formation of an adoptive family be singled out for special treatment in the area of a full-time carer? Some submissions considered the answer requires a preliminary understanding of what are the similarities and differences between adoption and biological parenthood and the formation of families by these two methods. On the similarities, one submission observed:

The community has acknowledged the importance of the initial months of a child's entrance into a family through the provision of maternity leave and adoption leave for pre-school aged children ... these provisions recognise the impact of a child on new parents and the need to establish relationships between parents and child - factors which are just as critical for adoptive parents as birth parents.⁴⁹

6.42 However, another submission noted that adoptive parenthood also involves the additional tasks of bonding to "someone else's child".⁵⁰ Reasons given for the need for a full-time carer in adoption centred on two issues in submissions: to overcome previous disrupted placements in the child's life, and the need for parents and child to bond and attach quickly.

6.43 An adopted child has experienced disrupted placements in his or her life, including the fact that the child has already had at least one, possible two or more separations, one from the birth mother and usually one or more from pre-adoptive foster parents.⁵¹ For a child who has already experienced a separation, the prospect of a further separation shortly after placement is not beneficial.⁵²

6.44 The first year of adoption is a time of bonding and considerable learning and adjusting for the parents.⁵³ They have not experienced pregnancy or the first important developmental weeks and have become parents virtually overnight. These features place considerable stress on parents to know a child and become competent parents quickly.⁵⁴

6.45 A full-time carer in the first few months of an adoption placement maximises the child's opportunity to form attachments.⁵⁵ Issues of bonding and identity are subtly different in family formation by adoption. This is especially so in intercountry and cross-cultural adoptions where the child has additional adjustments to make, such as a new language and culture, and needs extra emotional support.⁵⁶ Older children with behavioural difficulties and developmental delays caused by abuse, neglect, rejection or multiple carers, benefit from a full-time parent for the first few months of an adoption placement.⁵⁷

6.46 *Lessening of financial impact.* Submissions offered suggestions on ways to minimise the possible financial drawbacks of a full-time carer in the first months of placement. Loss of income is particularly a concern in intercountry adoptions where adoptive parents have already incurred substantial sums in the process of adoption.⁵⁸ Industrial awards in work places now provide maternity, paternity and adoption leave for up to 12 months, although the Barnardos submission recommended that the adoption leave entitlement be extended to school age children.⁵⁹ This leave entitlement follows community recognition of the value of the role of parents and the need for a parent and child to bond and adjust.⁶⁰ Couples with part-time or flexible jobs may be able to accommodate both their jobs and their primary caring role.⁶¹ The primary carer can be either parent or alternatively, either parent at some stage of the period can take time off work and the primary caring can be shared.⁶²

6.47 However, submissions considered prospective adoptive parents had to be aware of two important issues in developing a successful adoption plan for a child. These were a willingness by prospective adoptive parents to plan ahead financially for the time when a full-time carer is required,⁶³ and an understanding of the importance to the adopted child of quickly attaching to his or her new family during this dedicated time.⁶⁴

6.48 *Non-prescribed practice.* As noted above, submissions strongly supported the practice of one full-time carer in the first months of a child's adoption placement. However, submissions also indicated that the decision should be one made by an agency and its professional staff based on an individual child's needs⁶⁵ and not prescribed in legislation.⁶⁶ Flexibility in developing the most appropriate case plan for each child in discussion with potential families is essential. For example, one submission pointed out the condition could be waived where the child has already been established with the family, prior to the adoption, as in a previous fostering of the child by that family.⁶⁷ Parents with part-time or flexible work arrangements might be able to accommodate both their jobs and their primary caring role for the child.⁶⁸

Conclusion

6.49 One of the adoptive parents should normally give full-time care to the child at least for the first six months, and up to twelve months. The length of this period should be governed by the facts of each case and the decision is more appropriately encouraged in practice rather than enforced by legislation. That is, this matter should be assessed by the relevant agency and its professional staff in relation to each child's needs. For example, flexible work arrangements of one parent might suffice in the circumstances of one child, but not in the case of another. The decision would be made on the professional judgment of staff at the agency and could possibly evolve over the time period in discussions between the agency and the family. Whether or not a full-time carer was available for a child in the first months of his or her adoption would be one facet of the placement decision for that child.

6.50 In all standard work place practices and awards, consideration should be given to adoption leave being extended to school-age children who are adopted.

Infertility

6.51 The present gazetted criteria treat infertility as an eligibility criterion in the case of all local adoptions, except "special needs" adoptions. Infertility is not a requirement in the case of intercountry adoption.⁶⁹

Discussion Paper 34

6.52 DP 34 asked for further comments on the issue of whether or not infertility should be among the matters taken into account in assessing applicants for adoption who are otherwise indistinguishable in terms of suitability to adopt children. This would give a preference to infertile applicants.

Submissions and response

6.53 Submissions indicated that it is difficult to assess the respective merits of fertile and infertile persons as adopters. For example, are infertile couples more committed to the welfare of adopted children than fertile couples because they cannot have their own biological children? Perhaps, as some submissions proposed, fertile adopters might find it easier than infertile adopters to acknowledge the importance of the child's biological links, and to have a relationship with birth parents in the context of open adoption.⁷⁰

6.54 However, submissions also observed that fertile couples who have children and apply to adopt could confront a different, yet onerous set of issues. The attitudes and feelings of the biological children of applicants must be considered. In some families, the adopted child feels different by virtue of his or her adoption.⁷¹ On occasions, the adopted child might feel he or she has a lesser or greater status in the family.⁷² These raise parenting issues and the capacity of the applicants to help all the children to feel equally valued and accepted in the family.⁷³

6.55 As one submission commented, a strict approach to the principle of the child's best interests as being paramount would suggest that infertility, being at best irrelevant to a child's best interests, should not be considered at all.⁷⁴ In theory, it could further be argued that it is contrary to the child's interests to give preference to infertile individuals or couples because to do so limits the choice of adoptive parents for that child. Applicants' attitudes to their own infertility or fertility would seem relevant only to the extent of the likely impact of those attitudes on a child's well-being. One submission observed:

If adoption is to be clearly seen as a service to children, the nexus between infertility and suitability to adopt should be broken ... "infertility" is only relevant as a motivating factor in an application, the criterion being the readiness of the applicant to adopt, a criterion which relates equally to fertile or infertile applicants.⁷⁵

6.56 Another submission approached the issue from the viewpoint of the infertile couple. While recognising that adoption is not a service for infertile couples, the submission considered that infertile couples have special needs and it would make sense to choose parents for a child from the huge pool of couples who do not have other means of creating a family.⁷⁶ Another submission argued that although infertility should not be a requirement to adopt, if two sets of applicants were both suitable adoptive parents, one fertile and the other infertile, preference should be given to the infertile couple.⁷⁷

6.57 Query whether removing the present infertility requirement would impact significantly in practice. A submission by one agency noted that although it had removed the criterion for several years, in its experience infertile applicants are still the majority of applicants.⁷⁸

Conclusion

6.58 It is questionable whether parental fertility or infertility affects the child's best interests one way or the other. There should not be a requirement that prospective adopters be infertile or a preference given to infertile adopters in either legislation or as a standard practice for eligibility. No preference should be given on the basis of applicants' ability or inability to have their own biological children. This applies equally to all local and intercountry adoptions. In relation to intercountry adoption, it should be noted, however, that some adoption programs in the overseas countries have their own fertility requirements.⁷⁹

Religion

6.59 At present, the suitability of adoptive parents to meet any wishes of birth parents for the religious upbringing of a child is just one factor in the placement decision.⁸⁰ The Adoption Act indicates that 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.⁸¹ However, the suitability of applicants having regard to any religious upbringing or convictions of the child, or any express wishes of a birth parent as to religious upbringing of the child, does require the Court's consideration before an order for adoption is given.⁸²

6.60 Article 20 of the *United Nations Convention on the Rights of the Child* states that when considering alternative forms of care for children (such as adoption) due regard must be paid to the desirability of continuity in a child's upbringing *and* to the child's ethnic, *religious*, cultural and linguistic background.⁸³

Discussion Paper 34

6.61 The Commission proposed that the religious beliefs or practices of applicants should not be taken into account except where the child or birth parents have such beliefs or wishes.

Submissions and response

6.62 Submissions supported the Commission's proposal without much comment. Most submissions treated religious preference as one element of a birth parent's desire for the child's upbringing.⁸⁴ As pointed out in some submissions, birth parents often select a particular agency in the belief that it will more readily cater for their wishes as to religious beliefs or practices for their child.⁸⁵

Conclusion

6.63 The religious beliefs or practices of applicants should not be taken into account, except where they can reasonably be regarded as useful in determining an applicant's suitability to adopt a particular child. They are also relevant 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. The importance of birth parents' wishes in the selection of adoptive parents is discussed more generally in Chapter 5. Religion can also arise where the child is older and already has certain religious beliefs and practices. The question of religion may also arise as part of a broader cultural heritage. The desirability of cultural continuity in an adoption placement is discussed in Chapter 8.

Cultural issues

6.64 Issues relating to the culture and race of a child when assessing prospective adoptive parents, and to the selection of adoptive parents for Aboriginal and Torres Strait Islander children are discussed in Chapters 8 and 9 respectively.

Issues of non-marginalisation and continuity

Discussion Paper 34

6.65 The Commission's two proposals in DP 34 derived from the premise that in assessing the child's best interests, the possibility of the child having to deal with important and visible differences between himself or herself and the adoptive parents and family should be taken into account when assessing the suitability of prospective adoptive parents.

Submissions and response

6.66 Both proposals were very strongly supported in submissions as the basis for the assessment of prospective parents and the placement decisions about children.⁸⁶

Conclusion

6.67 First, maintaining continuity in children's lives is desirable. 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. The issue of cultural continuity is examined in Chapter 8 and specific recommendations made in that chapter.

6.68 Secondly, adoption placements should not be based on a preference for a particular sector or class of the community.⁸⁷ They 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, also 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.

Age

6.69 The Adoption Act currently states that an applicant for adoption must be at least 21 years old, with a minimum age difference between child and applicant of 18 years for a male applicant and 16 years for a female applicant, unless one of the applicants is related to the child or the Court otherwise decides.⁸⁸ This has been retained in the Adoption Act since 1965.

6.70 No upper age limit is set out in the Adoption Act or Adoption Regulation, but the agencies have established their own age limits for their adoption programs.⁸⁹ The upper age limit for an applicant under the DOCS's gazetted criteria is no more than 41 years older than the child, unless the child has special needs.⁹⁰ This age limit increases to 46 years older than the child if the applicant already has a child. There is an overall age limit on the adoption of children of 55 years, unless the child has special needs.⁹¹

6.71 Prior to 1987, when the gazetted criteria for assessment were introduced, an upper age limit was not a prescribed criterion in the selection of adoptive parents.⁹² However, DOCS practice has traditionally imposed an upper age requirement. For example, from 1975 to the mid-1980s, the upper age limit of "preferred applicants" for healthy newborn infants was 37 years at the time of application.⁹³ *National Minimum Principles in Adoption* refer to a maximum age difference of 40 years for a first child and a maximum age difference of 45 years for later children.⁹⁴

Discussion Paper 34

6.72 The Commission proposed that an upper age limit for adoptive parents be maintained. It proposed that 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.⁹⁵

6.73 Reasons behind an upper age limit were canvassed in DP 34.⁹⁶ Concerns existed among professionals working in adoption that older parents may find it difficult to adjust to the demands of modern parenting. Another concern is based on a belief that an adopted child should be placed with parents who are not markedly different from the parents of peers. Being a parent is a lengthy process and usually continues past childhood into the adult-parent relationship. Other concerns, therefore, centre on longevity, health and the physical vitality of older parents. These characteristics can create additional stress factors in the life of an adopted child from childhood through to adulthood.⁹⁷ On the other hand, one submission noted that many older parents have indicated that their experience of life and greater maturity have greatly improved their ability to cope with the demands of child rearing.⁹⁸

6.74 These concerns are valid considerations in the selection of parents for a child. However, do such concerns require a formal prescriptive ceiling on parental age or should such issues be examined in the particular case of applicants?⁹⁹

Submissions and response

6.75 The Commission received many submissions criticising its proposal in DP 34 that an adoptive parent be no more than 41 years older than the child. These criticisms are summarised in the following paragraphs 6.76 to 6.81.

6.76 The limitation of applicants being no more than 41 years older than the child is arbitrary, subjective, inflexible and unfair. It can be used as an expedient to curtail would-be parents from applying to adopt, rather than a limitation based on any rational grounds. One submission commented:

We are concerned that couples are being denied the opportunity to parent an adopted child from infancy simply because the age of one partner puts them outside of someone's subjective notion of what constitutes "normal".¹⁰⁰

6.77 Judgment of each case should be on its merits, such as the adoptive parent's ability to meet the child's interests, rather than by "magic numbers".¹⁰¹ An age limit does not reflect the wider impetus to remove discrimination in legislation and in public policy.¹⁰²

6.78 To impose a specific age limit is anomalous in the context of the Commission's wider proposals in DP 34.¹⁰³ Some submissions argued that there is an inconsistency between the upper age limitation proposal and the Commission's proposed policy on other eligibility characteristics. The Commission should be consistent in its policy on eligibility characteristics.¹⁰⁴

6.79 Patterns in the social "norms" of motherhood have changed. Trends indicate that women are delaying having their first child.¹⁰⁵ In the past 30 years the average age of first-time mothers has risen from 24 to 29 years.¹⁰⁶ As well, recent technological advances in the field of obstetrics have provided greater opportunities for fertility treatments. The combined effect of delaying child-bearing and investing years in unsuccessful fertility treatment is that many couples find themselves too old to adopt under the current age limits.

6.80 The Commission's provisional view could lead to incongruous results in practice. A single parent under 41 years could adopt, while a couple would have to be under 41 years to adopt a new-born child. In this scenario, a single parent of 35 years would be eligible to adopt an infant, whereas a couple wishing to adopt, where the younger partner was 35 years but the older partner was just over 41 years, would be excluded under eligibility requirements from applying to adopt.

6.81 Social trends in the last 30 years have been towards an increase in divorces and subsequent marriages.¹⁰⁷ In a later marriage, at older ages than in an earlier marriage, one or both partners might find they are infertile. In addition, for many couples one partner is several years younger than the other. Again, the age gap can preclude such couples from adopting, if one is over 41 years, even if the other is well within the prescribed age limits. If one of the primary criteria for substitute care for children is to follow community norms and trends, then having one parent above 41 years and one below could not be considered "unusual" by present community standards.¹⁰⁸

Further issues

6.82 Is the "best interests of the child" so clearly linked to age *per se* so as to exclude all other considerations? If not, should the judgment of adoption professionals be unfettered by age restrictions, allowing them to consider a wide variety of would-be parents, so that the wide range of children relinquished for adoption find the best families to suit their individual needs, experiences and circumstances?

6.83 These tensions can be clearly seen in relation to the adoption of "special needs" and older children, and in relation to numbers of applicants to adopt.

6.84 *"Special needs" and older children.* Under the gazetted criterion, applicants must not be more than 41 years older than the child to be adopted and no more than 55 years of age.¹⁰⁹ In relation to "special needs" children, under the gazetted criterion there is no upper age limit for parents to adopt, although DOCS does prefer placements within "normative guidelines".¹¹⁰ The rationale behind setting an upper age limit on adoptive parents of healthy children seems to be that it is in the best interests of a child to have parents falling within certain ages considered "normal" in society and who are not too old when the child grows up. On that basis, excepting children with special needs from age restrictions

under the gazetted criterion seems anomalous. If the rationale for this exception is that older parents possess better parenting skills for “special needs” children than for healthy newborn infants, then this must be questioned. In so far as an applicant of 55 years of age may only adopt a child of 14 years or older (complying with the maximum 41 year age gap), the question must also be asked whether older parents necessarily possess better parenting skills for older children, and conversely, whether they would not be suitable to parent young children.

6.85 Children with special needs and older children come to their adoptive family with distinct needs and longer separate personal histories. DOCS has recognised that “special needs” adoptions are demanding placements.¹¹¹ Such adoptions require commitment, stamina, significant adjustment and different skills in their adoptive parents than those required for healthy newborn infants - all qualities which do not necessarily correlate to age and ageing.

6.86 The present gazetted age restrictions also allow for the risk that some parents, who want, but are too old to adopt, a healthy newborn infant, will accept instead a child who would not otherwise have been chosen by them. The 1991 Western Australian Adoption Legislative Review Committee expressed concern on this point:

Welfare personnel in Australia and overseas are recognising the need to find permanent families for children with special needs, whether these needs are psychological, physical or social. The tendency of adoption workers to match “marginal” applicants with “marginal” children is rightfully criticised by many commentators and identified as a probable cause of later difficulties in the adoption, often leading to breakdown (Zwimpfer, 1983). Placing a child with special needs (whether for reasons of ethnicity, handicap or age) with adoptive parents who had really wanted to adopt a healthy newborn child as similar to themselves as possible is significantly associated with adjustment difficulties (Fanshel, 1972). The answer appears to be recruitment of adoptive parents directed specifically at the needs of the actual children who require adoption.¹¹²

6.87 *Numbers of applicants.* It could be argued that the present ineligibility of would-be parents to be considered for adoption is based on an arbitrary age limit in gazetted criteria based to some extent on controlling the number of applicants.¹¹³

6.88 However, any decision as to the selection of an adoptive parent must remain focused on the adopted child’s best interests and not on that of the adult wishing to adopt. Although there is a need for greater flexibility in using age as an eligibility requirement, it does not mean that the age of a would-be parent is irrelevant in adoption. All the concerns raised above about older parents should be assessed in relation to the individual application as they relate directly to the child’s best interests. A prospective adoptive parent’s physical or mental capabilities, attitudes to child rearing and life expectancy might relate to age and ageing. Such attributes might be reason enough for the application to adopt to be declined.

6.89 A flexible age requirement has its disadvantages. Agencies with limited resources may find it difficult to administer effectively the potentially increased number of applications. A criticism of the less restrictive approach is that legislative or administrative silence on upper age limits misleads applicants who are unlikely to pass the initial assessment because of obvious factors relating to age. The potential of a large number of reviews and appeals is also a consideration.

Conclusion

6.90 First, the minimum age of both male and female applicants should be the same.¹¹⁴ Secondly, with respect to an upper age limit, the assessment of applicants 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. However, the selection process should be flexible enough to allow placements with older applicants where this is shown to be appropriate for particular children. This principle should apply equally to local and intercountry adoptions and to all types of children. However,

these decisions should be made in practice and an upper age limit should not be arbitrarily prescribed in legislation. Age is simply one factor to be considered in relation to the child's interests.

6.91 The assessment should also 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.

6.92 The Commission endorses the following approach to age set out in a guidance note on intercountry adoption by the Department of Health and Social Services, Northern Ireland:

Arbitrary rules should not be applied regarding the age of prospective adopters. However, age is one of several important factors, among others, in considering the suitability of prospective adopters. Each application should be considered individually, bearing in mind that both partners should be sufficiently young and fit to have a reasonable expectation of retaining health and vigour to bring up a child until adulthood, and especially during the demanding years of adolescence.¹¹⁵

Wishes of birth parents and child

6.93 The present law does, to some extent, accommodate the wishes of the birth parents as to the type of adoptive parents.¹¹⁶ In practice, they can also participate in the selection process.¹¹⁷ The legislation does not presently acknowledge a child's wishes as to the type of adoptive parent, beyond requiring children of 12 years and older to consent to the adoption.¹¹⁸

Discussion Paper 34

6.94 The Commission's provisional view was that any 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.¹¹⁹ It also proposed that 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 and understanding, and other relevant considerations.¹²⁰

Submissions and response

6.95 The Commission's proposal allowing birth parents and children, who are capable of expressing wishes, input into the choice of adoptive parents was supported in the submissions.¹²¹

Conclusion

6.96 Any assessment should take into account the applicants' attitudes to possible contact between the child and members of the birth family during the child's life and to the obtaining of information under adoption information laws. Issues relating to the wishes of birth parents and those of the child are discussed in Chapters 5 and 3. Contact between the birth parents and child is examined in Chapter 7.

Health

6.97 The health of applicants is presently a gazetted criterion for assessing applicants to adopt.¹²² It is provided for in the Adoption Act and the Adoption Regulation.¹²³ Parental health has a strong and obvious correlation with the child's best interests. Physical and mental health is a relevant issue to the long-term financial and emotional care of a child.¹²⁴ The Commission's approach in DP 34, that the applicants' health is a relevant assessment criterion,¹²⁵ was generally supported in the submissions.¹²⁶

Conclusion

6.98 An assessment should take into account the applicants' health in assessing their suitability to adopt a child and at the time of placement.¹²⁷

Spacing of children and examination of family relationships

6.99 The spacing of children is a gazetted assessment criterion.¹²⁸ The Adoption Regulation prevents a child being placed with a pregnant applicant.¹²⁹

Discussion Paper 34

6.100 The Commission proposed that any consideration of an applicant's suitability to adopt a particular child would involve an examination of his or her family and other relationships.¹³⁰ It also proposed that the assessment should give consideration to the effect on the child of any other children of the applicants. It was proposed that 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 applicants are suitable to adopt the child.¹³¹

Submissions and response

6.101 Many submissions supported the Commission's proposals on the spacing of children and the examination of family relationships.¹³² These standards derive from agencies' experiences in adoption practice.

Further issues

6.102 A related issue brought to the Commission's attention is whether the adopted child should be "slotted" into a family, that is, placed above or between existing children. Research has shown that a child's ordinal position in a family carries with it understood privileges and responsibilities. "Slotting" a child can detrimentally alter the dynamics of the family for all children. DOCS practice has been to permit "slotting" only in exceptional circumstances and only if certain conditions are met. These include that the age of the child to be adopted is no less than two years younger than an existing older child and no less than three years older than an existing younger child. Also, all existing children in the family must be older than five years of age at the time of the application and able to understand and accept the consequences of the proposed adoption.

Conclusion

6.103 In considering an applicant's suitability to adopt a particular child, the assessment should involve an examination of the applicant's family and other relationships, including careful and thoughtful attention to the potential effect of the adoption on any sibling relationships, including how long each child has been with the family. This assessment should be on a case-by-case approach. However, as a guide, children should not be placed with an applicant who has a child under two years of age, unless there are exceptional circumstances indicating that notwithstanding this constraint, the applicant is suitable to adopt the child. This applies to "special needs" children as well as other children.¹³³ The Commission supports the present DOCS approach to "slotting" and the assessment of each family's particular circumstances. The Commission also supports the present approach in the Adoption Regulation excluding applicants from being placed with a child where one of the approved applicants is pregnant.

Marital status and family structure

Present eligibility requirements

6.104 At present under the Adoption Act, adoptions must be made in favour of a husband and wife jointly except in certain circumstances.¹³⁴ One married partner can be the natural parent of the child.¹³⁵

6.105 De facto couples can adopt if they have lived together for at least three years before applying for an adoption order and the child they wish to adopt has been brought up by them jointly for at least two years or is a “special needs” child.¹³⁶ One partner can be the natural parent of the child.¹³⁷ The Court can disregard the minimum time period of co-habitation and minimum time period of maintenance of the child in ordering an adoption if this serves the welfare and interests of the child.¹³⁸

6.106 Aboriginal couples who are recognised as being married according to the traditions of the Aboriginal community or group to who they belong can adopt an Aboriginal child.¹³⁹ One partner can be the natural parent of the child.¹⁴⁰

6.107 A single person can adopt if the Court believes that it is desirable in the particular circumstances of the case.¹⁴¹ However, if the applicant is married and living with his or her spouse, that spouse must give written consent to the other spouse adopting.¹⁴²

6.108 The length of a couple’s relationship is also a gazetted assessment criterion.¹⁴³ It requires a minimum of three years marriage or co-habitation for couples prior to placement. The Adoption Act thus treats marital status as an important factor in promoting the interests and welfare of the child.¹⁴⁴ The increasingly diverse nature of families in New South Wales challenges this assumption.¹⁴⁵ The question now 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.¹⁴⁶

Discussion Paper 34

6.109 The Commission proposed that any assessment of applicants should ensure that unfair or unjustified assumptions are not made about the relevance of applicants’ sexual orientation and their suitability as adoptive parents. The assessment should focus on the ability of the applicants to meet the parenting needs of the particular child. This reflects the view that the law should be flexible so as to maximise the range of choice for children who become available for adoption. 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.

6.110 It seemed 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 families, in order to predict their relationship with a particular child. It also seemed wrong to say that homosexual couples or single people or de facto couples can never be the right choice for any child.

6.111 The Commission acknowledged that 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: see above discussion at paragraph 6.68. However, the importance for children of placement in conventional family structures should not be overstated. The Australian community today has many different family forms, and the Commission believed 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.¹⁴⁷

Submissions and response

6.112 The Commission is aware of strong community interest in this topic, especially about same-sex couple adoptions, and to a lesser extent, adoptions by non-married couples and single people. This is evident in the large number of submissions received on this topic compared with any other.¹⁴⁸ Clearly, many opinions are held on who should be allowed to adopt children based on the would-be adoptive parent’s sexual orientation or marital status. Since most submissions expressed opinions on same-sex couples adopting, this aspect will be examined in more detail.

Submissions against adoption by same-sex couples

6.113 Discussions about marital status and family structure often reflect differences about personal morality and religious beliefs, and what individuals or groups believe social morality ought to be. This is reflected in the nature of many of the submissions against adoption by homosexuals. Expressions such as “immoral”, “not normal”, “unnatural”, “against God”, “against the Bible” were commonly used. Some expressions were more pejorative. Over half of the submissions against adoption by homosexuals give reasons which fall into the category of personal moral views and religious beliefs.

6.114 Of the other submissions, nearly all relate to fears and concerns about homosexuals bringing up children. These fears fall into two main categories: one relates to concerns about appropriate role modelling by parents, and the other is generally against homosexual adoption as a “social experiment” with the child. An associated fear is of a social stigma placed on a child brought up by homosexual parents.

6.115 As DP 34 notes¹⁴⁹ there is a considerable body of literature and judicial law on the issues relating to homosexual parents.¹⁵⁰

6.116 The Family Court of Australia has taken the view that a parent’s homosexuality is simply one factor to be taken into account in custody disputes. There is no presumption that a parent’s homosexuality *per se* renders a parent unfit as the custodian of the child.¹⁵¹

6.117 A final concern in this area, as with age, is to do with the marginalisation of adopted children. As one submission described it:

If one accepts the principle that in adoption differences between adoptive families and other families in the community should be minimised to assist the child in his adjustments one would consider sexual orientation of parents, like age, as factors which can separate a child from his peers ... For adopted children, living in a same-sex family would be just one more difference with which they must cope.¹⁵²

Submissions supporting the Commission’s proposal in Discussion Paper 34

6.118 Several submissions by organisations working in the adoption area, and legal associations, supported the Commission’s view that any assessment should ensure that unfair or unjustified assumptions are not made about the relevance of applicants’ sexual orientation and their suitability as adoptive parents. The assessment should focus on the ability of the applicants to meet the parenting needs of children and the needs of the particular child.¹⁵³ Submissions also raised the birth parents’ wishes as to the type of adoptive parent for their child as a significant factor in placing a child.¹⁵⁴

Conclusion

6.119 Adoption law should allow a married or non-married couple jointly, and single persons, to be considered for adoption. It should allow a step-parent, whether married to or in a de facto relationship with the child’s birth parent, to adopt.¹⁵⁵ This includes allowing suitable same-sex couples, as with heterosexual de facto couples, to adopt a child jointly or for the step-parent to adopt the child of his or her partner. A joint or step-parent adoption reflects the reality of the dual parenting commitment and responsibility to the child.¹⁵⁶ As such, it benefits the child’s emotional and financial security. In the event of a separation, to resolve issues of custody, access and maintenance, same-sex couples would have access to the Family Court.¹⁵⁷

6.120 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 the applicants’ 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.

6.121 Any assessment should focus on the suitability of the applicants to promote the best interests of the child. It should ensure that unfair or unjustified assumptions are not made about the relevance of the applicants' sexual orientation or marital status to the applicants' suitability as adoptive parents. Rather, the assessment should focus on the ability of the applicants to meet the parenting needs of the particular child, or if unknown, the parenting needs of the types of children for which adoption is being considered.

6.122 To be eligible for adoption, the adoptive parents must aim to provide the child with a supportive, permanent and nurturing environment. The Court and agencies should focus on the quality and duration of the parental relationship. An examination of the relationship should apply to all couples, married and non-married, heterosexual and homosexual. At a minimum, joint applicants, whether in a marital or de facto relationship, should establish they have been co-habiting with each other, for a continuous period of not less than three years before applying for an adoption order. Similarly, step-parent applicants should establish co-habitation with the child's parent, whether in a married or de facto relationship, for a continuous period of not less than three years before applying for an adoption order.

6.123 Section 19(1B)(3) of the Adoption Act, requiring a single applicant to adopt who is married to obtain the consent of his or her spouse to the adoption if the two are living together, should be extended to the single applicant in a de facto relationship.

SELECTION PRACTICE

6.124 As DP 34 commented,¹⁵⁸ the reference does not require a review of the details of the processes of assessment. This is a matter of administration and professional practice rather than legislative policy.¹⁵⁹ The Commission is favourably impressed with the current approach. The present selection procedure was outlined above in paragraphs 6.17 to 6.20.

6.125 A few issues were raised in DP 34 and in submissions to it about the way in which applicants are assessed by the agencies. The issues are as follows:

- the breadth of legislative restrictions on eligibility to adopt;
- whether the assessment of parents should relate to a particular child;
- "pools" and placement; and
- education and training in the assessment process.

Legislative requirements

Discussion Paper 34

6.126 An issue considered in DP 34 was to what extent legislation, as distinct from selective professional practice, should determine who is eligible to adopt.¹⁶⁰ The Commission's view in DP 34 was that there should be very few legislative requirements relating to *eligibility*. The Adoption Act should exclude from consideration only those people who should not be allowed to adopt under any circumstances.¹⁶¹ It follows that the selection process, which the agencies administer, is the better method for determining who is eligible to adopt.

Submissions and response

6.127 Submissions generally supported the Commission's approach that agencies are best positioned to determine the more detailed requirements for eligibility. However, many tended to support a greater role for legislation than that put forward by the Commission. Many submissions indicated that certain categories of people should be excluded from adopting under the legislation. However, these submissions often differed in the types of people they argued should or should not be excluded under

the legislation. For example, some supported the initial exclusion of applicants based on age; others supported initial exclusion based on marital status and family structure.

Conclusion

6.128 There should be very few legislative requirements relating to eligibility. There are two reasons for this:

First, the best interests of any particular child are unlikely to be promoted if the law initially excludes from any consideration individuals or families who *might* be suitable to adopt that child.

Secondly, selection choices can respond to contemporary social conditions and changing community attitudes if suitability to adopt is determined by adaptive assessment considerations and not by legislatively entrenched requirements.

6.129 The role of the legislation should be to provide minimum requirements for eligibility, guiding the Court as to what it must examine in considering whether to grant an order for adoption. Beyond this, the difficult task of selecting the best parent possible for each child should be that of professionals appropriately trained in current child welfare knowledge and practice. The agencies, with much adoption expertise and experience, are best positioned to determine the more detailed requirements for eligibility.

6.130 Legislation should therefore support flexibility and adaptability in agency decision-making, rather than restrict the types of adoptive parents able to be considered by adoption professionals. Consequently, restrictions on eligibility under the adoption legislation should be few, although guidelines should identify the factors that may be taken into account in assessing suitability to adopt.

6.131 Apart from the above mentioned changes, the current division between legislative restrictions on allowing certain people to adopt and agency practice in selecting suitable adoptive parents should continue. That is, the agencies should determine selection practice and assessment processes in accordance with any legislative restrictions and their current professional judgment.

RECOMMENDATION 57

The legislation should provide that the Court must not make an order for the adoption of a child unless it is satisfied that the applicant or each of the applicants is or are:

resident or domiciled in New South Wales at the time of making the application;¹⁶²

over the age of 21 years and a minimum of 18 years older than the child (unless the applicant is a birth parent or relative of the child);¹⁶³ and

of good repute and a fit and proper person/s to fulfil the responsibilities of a parent.¹⁶⁴

RECOMMENDATION 58

The legislation should permit an adoption order to be made in favour of either a couple (whether married or living in a de facto heterosexual or homosexual relationship) or a single person.

RECOMMENDATION 59

The legislation should require joint applicants to have been cohabitating for a continuous period of not less than three years before applying for an adoption order.

RECOMMENDATION 60

The legislation should require that a step-parent applicant has been cohabitating with the child's parent for a continuous period of not less than three years before applying for an adoption order.

Assessment of parents for a particular child

Discussion Paper 34

6.132 The Commission took the provisional view in DP 34 that the assessment of applicants should be based on the suitability of the applicant in relation to the particular child.¹⁶⁵

Submissions and response

6.133 Submissions supported the Commission's proposal that the assessment of applicants should be based on their suitability in relation to the particular child. However, the Commission notes that in practice most assessments are made as to the general suitability of the applicants. With local adoptions, the successful applicants are then placed in a "pool" of eligible parents awaiting a child.

Conclusion

6.134 The assessment of an applicant should be based on the suitability of the applicant to adopt the particular child. If, however, the assessment has been made on general grounds as to suitability to be a parent, before placement of any child with the applicant, an assessment of the suitability of the applicant should also be made *in relation to that particular child*.¹⁶⁶

"Pools" and placements

Discussion Paper 34

6.135 As DP 34 explained, the agencies involved in the placement of locally born healthy infants put approved applicants into a "pool" from which they can be selected as the most suitable adoptive parents for particular children.¹⁶⁷ The DOCS "pool" generally numbers about 70 couples. It is large enough to provide a variety of applicants to meet the needs of children likely to be available in the next year or so, but small enough to be manageable in the selection of the most appropriate parent.¹⁶⁸ This system has been operating since the late 1980's.¹⁶⁹ From time to time new applicants are added to the "pool" as numbers become depleted as a result of adoption placements or withdrawals from the "pool".

6.136 In composing the "pool", the agencies try to anticipate the needs of children likely to become available for adoption.¹⁷⁰ Currently, applicants are chosen to be assessed for approval on the basis of qualities which make it likely that they will be placed with a child within two years of approval.¹⁷¹

6.137 The Commission considered that the present method of maintaining a "pool" of approved applicants is an appropriate way of dealing with the great imbalance between those wishing to adopt and children available for adoption, while still minimising the waiting time of children for placement. The Commission suggested certain guidelines on managing the "pool" system in DP 34.¹⁷² These were drafted as principles. For example, an applicant should be assessed as suitable for a particular child if he or she is able to meet the needs of that child and no one else could reasonably be expected to meet the needs of that child better. Another principle proposed was that membership of a "pool" does not create a right to have a child placed with an applicant.

Submissions and response

6.138 Submissions broadly agreed with the Commission's proposal.¹⁷³

Further issues

6.139 Should unsuccessful applicants be removed from the “pool” after a certain period of time? The benefits of imposing a time limit on remaining in the “pool” include: reducing the potential for applicants, unsuccessful after many years, to retain unrealistic expectations of a future placement; promoting the turnover of eligible applicants in a “pool”; and facilitating shorter waiting times for placement of children with suitable applicants from the “pool”.

6.140 Whether or not to impose a time limit on remaining in the “pool” should be a decision for the agencies: a legally imposed time limit is inappropriate and unnecessary. Under the Adoption Regulation, an applicant can be removed from the adoption register of persons approved as suitable to adopt if, because of a change in circumstances existing at the time of the agency approval, the applicant is no longer considered by the Director-General as suitable to adopt the child.¹⁷⁴ As well, the Director-General or the principal officer of a private agency may at any time revoke approval of a person as suitable to adopt.¹⁷⁵ Written reasons for the decision to revoke approval must be given and the applicant is to be advised of his or right to apply for a review.¹⁷⁶

6.141 As an agency decision, limiting the period during which an applicant can remain in the “pool” can be seen as a practical and fair way of managing the numbers of applicants wanting to adopt. In canvassing this issue, the Commission assumed that the practice would continue of only placing in the pool applicants who are reasonably likely to have a child placed with them within two years; and a periodic review of an applicant’s suitability takes place.

6.142 Another method of managing the numbers of applicants in practice might be through a regular review process and consultation with the applicants as to their status, rather than imposing an arbitrary time limit. This review would include an update, and reassessment, of the applicant’s ability to meet the requirements for eligibility.¹⁷⁷ However, a time might come, such as after several years of waiting, when the agency could conclusively determine that the applicant’s place in a “pool” must end because, on any reasonable assessment, there is no likelihood of a placement.

Conclusion

6.143 The present method of maintaining a “pool” of approved applicants is an appropriate way of dealing with the great imbalance between those wishing to adopt and children available for adoption, while still minimising the time a child must wait for a suitable placement. Also, any guidelines for “pool” management should be considered in practice by the agencies rather than prescribed in legislation. Any guidelines should support a “pool” membership consisting of applicants who are determined most likely to meet the needs of the children expected to become available in the near future. This approach means that the placement decision focuses on the needs of particular children rather than on the general eligibility of applicants as adoptive parents.

6.144 In the light of the submissions, the Commission supports selection of applicants (both joint and individual) for a “pool” based on the following approach:

To be in a “pool”, applicants must have been approved as, and must continue to be, eligible to adopt children. The applications to adopt must remain current.

An applicant is suitable, in relation to a particular child, if the applicant has been assessed as being well able to meet the needs of that child; no other applicants known to the agency appear better able to meet the needs of that child; and 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.

At any given time, the membership of the “pool” should be determined having regard to 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; the desirability of avoiding undue delay between entry into the “pool” of the applicant and placement of a child with the applicant; and the need to give appropriate consideration to all persons currently in the “pool” in relation to each child becoming available for adoption.

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

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

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.

If no applicant in the “pool” is suitable to adopt the child, the agency can 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.

Education and training

Discussion Paper 34, submissions and response

6.145 Although DP 34 did not specifically canvass the issue of education and training of applicants during the selection process, submissions suggested that the agencies face a dilemma in selecting applicants into their programs for education and assessment. One submission observed that to assess all applicants is an expensive, frustrating and misleading approach for some applicants.¹⁷⁸ While agreeing that selection considerations should comply with the intent of present laws against discrimination, another submission expressed concern that:

when applied, the number of applicants would far exceed the number of children to be adopted. To avoid this difficulty ... all applicants need to be well informed at the beginning of the assessment process of the number and needs of children available for adoption.¹⁷⁹

6.146 The agencies doing the selecting have limited resources, both financial and in relation to staff numbers. As one submission noted, professional resources within the agencies limit the ability to assess adequately every applicant, with the number of prospective applicants far outweighing the number of local healthy infants available.¹⁸⁰ Requirements which place limits on who will be considered provide a way of managing the imbalances between supply and demand, while at the same time enabling a child-focused process to predominate. It is not practicable to assess all enquirers and a substantial reduction of enquirers occurs by way of self-selection out of the adoption process and also by decisions made by the agency on the basis of maintaining a diverse “pool”.¹⁸¹ For example, in 1993 the Anglican Adoption Agency received 400 enquiries for 15 children.¹⁸² It is a question of resources and of needing to limit the “pool” so as to provide a range of approved applicants with a reasonable possibility of a placement within two years.¹⁸³

6.147 While appreciating the limited resources of the agencies, arbitrary eligibility limits, such as age or fertility or marital status, should not be used as the mechanism for controlling the numbers of people interested in adopting. The purpose and focus of eligibility requirements is to serve the child's best interests by finding the best possible parents for each child.

6.148 The “pool” system operates as a practical measure to reduce numbers of applicants. The agencies can assess applicants whom they determine satisfy the assessment provisions and criteria.¹⁸⁴ Any approvals may be subject to conditions, including limitations on the duration of the approval or the type of child.¹⁸⁵ Reasons for such decisions are to be given and rights of review exist.¹⁸⁶

6.149 At present, persons seeking to adopt are given information about the nature of adoption, the numbers and characteristics of children needing placements, the requirements for approval and selection, and the processes of investigation, approval and selection.¹⁸⁷

6.150 Applicants are encouraged to assess themselves against the eligibility requirements through initial advisory services, information seminars, and other compulsory education and training courses on adoption prior to any assessment.¹⁸⁸ This involves preliminary education on the characteristics of adopting different types of children (local, “special needs” and intercountry) and the current practices and realities of adoption. Applicants can then make informed choices as to whether they wish to continue further with the selection process.

6.151 One submission by prospective adopters brought attention to an inherent conflict in the selection process where the agency acts as both educator and assessor of applicants. The submission commented:

[T]he extent of education for us has been completely inadequate ... The process of education and assessment should be separated to enable prospective adoptive parents to speak openly about their concerns and not feel intimidated during the education process.¹⁸⁹

Conclusion

6.152 Unrealistic expectations of potential applicants should be managed through education and training seminars by the agencies.

6.153 A clear structural separation existing between the agency’s dual functions of education and assessment would reduce anxiety and encourage more active and freer participation in the education process by prospective adopters.

FOOTNOTES

1. New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965 (NSW)* (Discussion Paper 34, 1994).
2. For the purposes of this Chapter, “agencies” refers to both the Department of Community Services and the private adoption agencies, unless the context otherwise requires.
3. *Adoption of Children Act 1965 (NSW)* s 21(1).
4. *Adoption of Children Regulation 1995 (NSW)* cl 9 and Schedule 2, item 9.
5. Pursuant to the *Adoption of Children Regulation 1995 (NSW)*, the New South Wales Department of Community Services “Criteria for Assessment of Adoption Applicants” is published in the New South Wales *Government Gazette* No 58 (8 May 1992) at 3264.
6. NSWLRC DP 34 at para 6.6. For example, exceptions can be made under the Act to marital status if the Court is satisfied the adoption will serve the interests of the child: *Adoption of Children Act 1965 (NSW)* s 19.
7. *Adoption of Children Act 1965 (NSW)* s 20. The requirement does not apply where one of the applicants is a parent or relative of the child or where the Court considers that, in the particular circumstances, it is desirable to make the adoption order. In addition, the Court is required to have regard to the applicant’s age, and that of the child, in considering the applicant’s suitability to adopt the particular child: s 21(1)(c)(i)(b).
8. s 19AA.

9. s 21(1)(c)(i)(a).
10. s 21A.
11. s 21(1)(c)(i)(b).
12. s 21(1)(c)(i)(b).
13. s 21(1)(c)(i)(b).
14. s 21(1)(c)(i)(b).
15. See "Criteria for Assessment of Adoption Applicants".
16. "Criteria for Assessment of Adoption Applicants" criterion 2.
17. Criterion 5.
18. Criterion 6, other than for "special needs" adoptions.
19. Criterion 10.
20. Criterion 9, other than for intercountry and "special needs" adoptions. In relation to some intercountry programs, the overseas country has its own requirement as to infertility.
21. Criterion 7, other than for "special needs" adoptions.
22. Anglican Adoption Agency *Submission* (26 August 1994) at para 6.2 notes that the agency has removed the criteria of infertility for healthy infant adoption. Centacare requires applicants to demonstrate a willingness to be involved in information exchange and meetings with the child's birth family throughout the child's life.
23. *Adoption of Children Regulation 1995* (NSW) cl 6(5), 10, 11, 13, 14, 20 and Schedule 2, item 9 (4).
24. cl 6(1), (2), (3) and (4).
25. cl 7, 8, 10 and 11.
26. This is particularly so in the case of local healthy newborn infants.
27. *Adoption of Children Regulation 1995* (NSW) Schedule 1, Form 6; see further, Chapter 5.
28. Private agencies may only be involved in some categories of adoption; see further, Chapter 4.
29. *Adoption of Children Act 1965* (NSW) s 21(1)(c)(i)(b).
30. s 21(1).
31. s 21(1)(a), (b) and (1A).
32. Justice BJK Cohen *Submission* (29 July 1994) at 2-3.
33. *The Macquarie Dictionary* (2nd ed, Macquarie Library, NSW, 1991) at 504.
34. Examples of State and Federal anti-discrimination laws include: *Anti-Discrimination Act 1977* (NSW); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth).

35. For example: *Anti-Discrimination Act 1977* (NSW) s 24(1)(b), 39(1)(b), 49B(1)(b), 49ZG(1)(b), and 49ZYA(1)(b); *Racial Discrimination Act 1975* (Cth) s 9(1A) and 7(2); and *Disability Discrimination Act 1992* (Cth) s 6. Under the *Sex Discrimination Act 1984* (Cth) s 5(2) the requirement must not have the effect of disadvantaging persons of the same sex as the aggrieved person.
36. Anti-Discrimination Board of New South Wales *Submission* to Issues Paper 9 (14 August 1993) at 1. However, the Board supports the proposition that the child's interests are paramount.
37. NSWLRC DP 34 at para 6.33.
38. For a more detailed discussion, see NSWLRC DP 34 at para 6.37.
39. NSWLRC DP 34 Chapter 6, Proposal 2 and para para 6.2.
40. For example: New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 18; Anglican Adoption Agency *Submission* (26 August 1994) at para 6.1.
41. The Anglican Adoption Agency accepted "that the assessment of applicants should be conducted in a way that is consistent with the Anti-Discrimination Act, while still upholding that adoption is a service to children not to prospective parents": *Submission* (26 August 1994) at para 6.3; The Presbyterian Women's Association of Australia stated: "Adoption is not a provision of services to the parents as the paramount concern is the welfare of the child. Any service to parents should be consequential": *Submission* (22 July 1994) at 5; Centacare Catholic Community Services (Adoption Services) agreed that: "... applicants, on meeting Departmental or Agency criteria should be entitled to a fair assessment. However, in supporting a child-focussed adoption where the principle that the child's welfare is paramount, will mean that no applicant will have a right to a child": *Submission* (11 August 1994) at 18.
42. See NSWLRC DP 34 at para 6.32-6.47.
43. For example, the proportion of couple families with dependant children (aged under 15 years) where both parents were employed increased from 35% in 1979 to 58% in 1995: Australia - Australian Bureau of Statistics *Australian Social Trends 1996* (ABS, Canberra, 1995) at 31.
44. For example: Barnardos Australia *Submission* (26 July 1994); Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 21; NSW Branch of the Australian Society of Social Workers Ltd *Submission* (11 August 1994); Latter Day Saints Social Services *Submission* (5 October 1994) at 12; NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 21; NSW Department of Community Services *Submission* (5 September 1994) at 26; and Anglican Adoption Agency *Submission* (26 August 1994) at 6.5.
45. Barnardos Australia *Submission* (26 July 1994).
46. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 21; Latter Day Saints Social Services *Submission* (5 October 1994) at 12; NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 21; Centacare (Newcastle) *Submission* (29 July 1994) at 2.
47. NSW Department of Community Services *Submission* (5 September 1994) at 26.
48. Concern NSW Inc *Submission* (2 August 1994) at 5.
49. Barnardos Australia *Submission* (26 July 1994).
50. NSW Department of Community Services *Submission* (5 September 1994) at 26.

51. Latter Day Saints Social Services *Submission* (5 October 1994) at 12; NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 21; Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 21.
52. NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 21.
53. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 21.
54. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 21.
55. NSW Department of Community Services *Submission* (5 September 1994) at 28.
56. NSW Branch of the Australian Society of Social Workers Ltd *Submission* (11 August 1994).
57. Barnardos Australia (an agency specialising in the adoption of older children) observed that, in its experience, "every child so far referred to our program has required a full-time parent for at least six - twelve months after placement. These children, whether pre-school aged or school aged, have experienced abuse, neglect, rejection, multiple carers/placements and thus have emotional damage, behavioural difficulties and a lack of trust in adults and may have developmental/learning delays ... It is Barnardos experience that placements have disrupted when both parents have been working full-time with a critical factor being the effect of emotional and physical exhaustion which results from working and parenting an older child placed by Barnardos": *Submission* (26 July 1994).
58. Concern NSW Inc *Submission* (2 August 1994) at 5.
59. Barnardos Australia *Submission* (26 July 1994). The *Industrial Relations Act 1991* (NSW) only provides for unpaid adoption leave of up to one year for a child under the age of 5 years who has not previously lived with the employee for a continuous period of six months, or who is not a child or step-child of the employee or his or her spouse: definition of "child" s 56 and 55. The 1991 Act is repealed by the *Industrial Relations Act 1996* (NSW) s 408. The *Industrial Relations Act 1996* (NSW) similarly allows unpaid adoption leave of up to one year for a child under five years of age, unless the child has previously lived with the employee for a minimum period of six months or is a child or step-child of the employee or his or her spouse: s 54 and 55(4). Although not prescribed in the Act, some workplaces do, in any event, extend adoption leave to school age children.
60. NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 21.
61. NSW Department of Community Services *Submission* (5 September 1994); Barnardos Australia *Submission* (26 July 1994).
62. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 21.
63. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 21.
64. NSW Department of Community Services *Submission* (5 September 1994) at 26.
65. For example, Barnardos Australia *Submission* (26 July 1994). The Anglican Adoption Agency does not have a requirement for an adopting parent to remain at home, but noted that in practice one parent does stay at home for the first year: *Submission* (26 August 1994) at 6.5.

66. Each case is varied and as such a policy on full-time care should not be set in legislation: Barnardos Australia *Submission* (26 July 1994), Anglican Adoption Agency *Submission* (26 August 1994) at 6.5.
67. NSW Branch of the Australian Society of Social Workers Ltd *Submission* (11 August 1994).
68. Barnardos Australia *Submission* (26 July 1994); NSW Department of Community Services *Submission* (5 September 1994) at 26; Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 21.
69. "Criteria for Assessment of Adoption Applicants" criterion 9.
70. The Anglican Adoption Agency noted that "[u]nless the adoptive parents are in tune with their own needs and feelings, they will experience the child's need to know of his or her adoption, as a threat. Acknowledgement and disclosure of adoption remind them of their infertility": *Submission* (26 August 1994) at para 6.2.
71. Anglican Adoption Agency *Submission* (26 August 1994) at para 6.2.
72. NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 22.
73. Anglican Adoption Agency *Submission* (26 August 1994) at para 6.2.
74. NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 22.
75. NSW Department of Community Services *Submission* (5 September 1994) at 24.
76. Concern NSW Inc *Submission* (2 August 1994) at 5.
77. B and F Peterie *Submission* (14 July 1994) at 5.
78. Anglican Adoption Agency *Submission* (26 August 1994) at para 6.2.
79. New South Wales Law Reform Commission *Intercountry Adoption and Parent Support Groups* (Research Report 6, 1997).
80. *Adoption of Children Regulation 1995* (NSW) cl 32 requires agencies to make all reasonable efforts to place a child with an approved person whose expressed intention for the religious upbringing of that child accords with any birth parent wishes.
81. *Adoption of Children Act 1965* (NSW) s 21A.
82. *Adoption of Children Act 1965* (NSW) s 21(1)(c)(i)(b).
83. Italics added.
84. B and F Peterie *Submission* (14 July 1994) at 5; Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 18.
85. Latter Day Saints Social Services *Submission* (5 October 1994) at 11; Anglican Adoption Agency *Submission* (26 August 1994) at para 6.3. The NSW Department of Community Services comments that it is aware that some overseas adoption agencies will not accept applicants in Australia from particular faiths: *Submission* (5 September 1994) at 27.
86. NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 22; NSW Department of Community Services *Submission* (5 September 1994) at 27; National Children's and Youth Law Centre *Submission* (29 July 1994) at 9; Barnardos Australia *Submission* (26 July 1994). The Anglican Adoption Agency commented that "[t]he current

practice that placements reflect community norms is based on substantive evidence from research and experience, that adopted persons see themselves as 'different' by virtue of their adoptions. To place children in circumstances which heighten that sense of difference places a great deal of psychological stress on adopted children leaving them more vulnerable ... It, therefore, is imperative for agencies to minimise this impact by seeking placements for children which do not exacerbate these differences by placing children with families who are outside the norms of the community. Children are acutely conscious of differences between themselves and their peers": *Submission* (26 August 1994) at para 6.1. Centacare Catholic Community Services (Adoption Services) considered selection criteria should be influenced by the following principles: 1. "that adopted children should not be marginalised by placement in families which are atypical in the broader community." 2. "that the final selection of adoptive parents where possible, should rest with the birth parents and therefore the pool should reflect the values and aspirations which birth parents hold with respect to the care and nurture of their children": *Submission* (11 August 1994) at 18.

87. An important qualification to this is in relation to Aboriginal and Torres Strait Islander children and the value of cultural heritage in children's lives, discussed in Chapters 9 and 8 respectively.
88. *Adoption of Children Act 1965* (NSW) s 20.
89. Under powers to establish selection criteria in *Adoption of Children Regulation 1995* (NSW) cl 9; Schedule 2, item 9(1).
90. "Criteria for Assessment of Adoption Applicants" criterion 6. Some private agencies have slightly lower age limits for infants.
91. "Criteria for Assessment of Adoption Applicants" criterion 6.
92. As informed by the Adoption Branch, NSW Department of Community Services.
93. New South Wales - Department of Youth and Community Services *Adoption - Options for Reform* (1985) at 9.
94. Council of Social Welfare Ministers *Draft National Minimum Principles in Adoption*, July 1995 at para 6(1) and *National Minimum Principles in Adoption*, June 1993 at para 6(1). Other States and Territories of Australia also impose upper age limits varying from mid-30's to late-40's.
95. NSWLRC DP 34 Chapter 6, Proposal 8.
96. NSWLRC DP 34 at para 6.91 and 6.92.
97. Western Australia - Adoption Legislative Review Committee *Final Report: A New Approach to Adoption* (February 1991) at 106.
98. ACCESS Australia's National Infertility Network *Submission* (5 August 1994) at 3.
99. United Kingdom - The Department of Health, Welsh Office, Home Office, Lord Chancellor's Department, *Adoption: the Future* (HMSO, London, November 1993) at 1, 9-10: This White Paper on the future of adoption in England and Wales draws upon the work of an interdepartmental working party, *Review of Adoption Law*, published in October 1992 as a consultation document. The White Paper notes that age is a relevant factor in any assessment of adopters based on a reasonable expectation that they will retain their health and vigour to care for a child until he or she is grown up. However, it also warns that "[g]overnment guidance will emphasise that rigidity of approach is out of place. Parents in their forties may well have much to bring to the care and upbringing of adopted children."
100. Concern NSW Inc *Submission* (2 August 1994) at 5.

101. ACCESS Australia's National Infertility Network *Submission* (5 August 1995) at 3.
102. Leslie *Submission* (28 July 1995) at 8; Concern NSW Inc *Submission* (2 August 1994) at 5.
103. Concern NSW Inc *Submission* (2 August 1994) at 5.
104. For example, the New South Wales Bar Association commented that "[t]he inconsistency in the report in recommending that there should be an age limit in respect of adoptive parents, but not perceiving any such difficulty in respect of single sex parents is worthy of criticism. The Association recommends that people should not be excluded from the pool of adoptive parents because of the marital status or sexual orientation, however a different view is taken in respect of persons who are not considered the right age, for example: 'Social workers have informed the Commission of adoptees who have questioned why they are 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.' The legislation should not simply distinguish eligibility by reason of age": *Submission* (16 September 1994) at 1-2.
105. Factors such as the increased rate of participation of women in the work force, long term career expectations, the changing roles of women generally, and the increasing financial imperatives of a two income household, have all contributed to this increasing age of child bearing and rearing. These factors were not foreseen at the time the original legislation was enacted.
106. Australian Bureau of Statistics *Australian Social Trends 1996* (ABS, Canberra) at 40. "Norms" differ from vicinity to vicinity. In the Northern Sydney area in 1991, 11% of all women giving birth for the first time were aged 35 years and over, compared with 6% in the rest of the State: Concern NSW Inc *Submission* (2 August 1994) at 5 citing from H Longbottom, D Pakchung, I March and D Holt *Midwives Data Collection: A Profile of Pregnancy Outcomes of Mothers and Infants in the Northern Sydney Health Area* (Northern Sydney Public Health Unit, 1993).
107. Australian Bureau of Statistics *Australian Social Trends 1995* (ABS, Canberra, 1995) at 34 and 36 comments: "Because of the increase in divorces, there are now a larger number of divorcees than before 1976, when the Family Law Act came into effect. This has led to a larger proportion of marriages being remarriages for one or both partners. Since people who remarry are older than those who marry for the first time, this is also a contributing factor to higher median age for all marriages ... In the 1980s remarriages accounted for around one-third of all marriages."
108. Concern NSW Inc *Submission* (2 August 1994) at 5.
109. Criterion for Assessment of Adoption Applicants, criterion 6.
110. NSW Department of Community Services *Submission* (5 September 1994) at 23. *Adoption Regulations 1989* (SA) reg 9(3)(o) requires applicants interested in adopting a child with special needs to show the capacity to provide the standard of care required to fulfil the needs of such a child.
111. New South Wales. Department of Youth and Community Services *Adoption - Options for Reform 1985* at 13.
112. Western Australia - Adoption Legislative Review Committee *Final Report: A New Approach to Adoption* (February 1991) at 109.
113. For example, the New South Wales Department of Youth and Community Services gave the following reason for recommending the imposition of new upper age limits in the department report: "The Department recognises that any age criterion must be arbitrary. However, it believes that the age criteria proposed allows the placement of an adopted child into a family whose age approximates the norm for other Australian families. A maximum age difference between a baby and its adoptive parents of 40 years is commonly accepted by other States ... In taking this action in applying the new age criteria to the existing waiting list the Department considers that it has

developed an age criterion which considers the needs of children and is the fairest treatment for applicants ... and is essential in view of the decline in the number of available children”: *Adoption - Options for Reform* (1985) at 9.

114. The Anti-Discrimination Board of New South Wales indicated that the minimum age difference between adopting adult and child should be the same for both men and women, otherwise it could be considered discriminatory: *Submission* to Issues Paper 9 (14 August 1993) at 3.
115. Department of Health and Social Services (Northern Ireland) *Guidance Note on Procedures in Intercountry Adoption* issued under covering letter (18 December 1992).
116. *Adoption of Children Regulation 1995* (NSW) cl 32, 33, Schedule 1, Forms 1 and 6; see further, Chapter 5.
117. cl 33, Schedule 1, Form 6.
118. *Adoption of Children Act 1965* (NSW) s 26(4A), s 33(1); *Adoption of Children Regulation 1995* (NSW) cl 28 and Schedule 1, Form 5. However, a child who has attained the age of 12 years consents to his or her adoption by named applicants.
119. NSWLRC DP 34 Chapter 6, Proposal 4.
120. NSWLRC DP 34 Chapter 6, Proposal 3.
121. For example: Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 14, 15 and 20; NSW Department of Community Services *Submission* (5 September 1994) at 27; Anglican Adoption Agency *Submission* (26 August 1994) at para 6.4; NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 19.
122. “Criteria for Assessment of Adoption Applicants” criterion 8.
123. *Adoption of Children Act 1965* (NSW) section 21(c)(i)(b); *Adoption of Children Regulation 1995* (NSW) cl 8.
124. Council of Social Welfare Ministers *Draft National Minimum Principles in Adoption*, July 1995 at para 6(3) and *National Minimum Principles in Adoption*, June 1993 at para 6(3) state that the health of applicants must not impede their ability to care for the child; while the life expectancy of applicants, as well as their health, should be such that they can parent the child and provide quality care until the child attains independence.
125. NSWLRC DP 34 Chapter 6, Proposals 7 and 13.
126. For example: NSW Department of Community Services *Submission* (5 September 1994) at 25; Anglican Adoption Agency *Submission* (26 August 1994); NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 21.
127. NSWLRC DP 34 Chapter 6, Proposals 13 and 7.
128. “Criteria for Assessment of Adoption Applicants” criterion 7 requires a child (other than a child with special needs) placed with an applicant who already has a child to be at least two years younger than the existing child.
129. *Adoption of Children Regulation 1995* (NSW) cl 31(2), (3) and (4).
130. NSWLRC DP 34 Chapter 6, Proposal 9.
131. NSWLRC DP 34 Chapter 6, Proposal 14.

132. Barnardos Australia *Submission* (26 July 1994); NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 20-21.
133. "Criteria for Assessment of Adoption Applicants" criterion 7 excludes children with special needs from the requirement that the child placed for adoption must be at least two years less than the age of the applicant's child.
134. *Adoption of Children Act 1965* (NSW) s 19(1).
135. s 19(1B)(4).
136. s 19(1A)(a) and (b).
137. s 19(1B)(4).
138. s 19(1B).
139. s 19(1A)(c).
140. s 19(1B)(4).
141. s 19(1B)(2).
142. *Adoption of Children Act 1965* (NSW) s 19(1B)(3).
143. "Criteria for Assessment of Adoption Applicants" criterion 10. At the time of placement, married applicants must have been married for at least three years, or married for at least two years and immediately before that, married or co-habiting for at least one year. De facto applicants must have been co-habiting for at least three years before placement.
144. Although in practice the NSW Department of Community Services no longer discriminates against couples on the basis of marital status in its assessment of applicants: see Anti-Discrimination Board of New South Wales *Submission* to Issues Paper 9 (14 August 1993) at 3.
145. In 1995 in New South Wales, parents were married or in a de facto relationship in 42% of families; 9.5% of all families were one-parent families; 24.5% of all births were outside marriage. The crude divorce rate in 1994 (the number of divorces granted per 1000 of the estimated resident population) was 2.6; 50% of all divorces involved children: Australian Bureau of Statistics *Australian Social Trends 1996* (ABS, Canberra) at 31-32.
146. Under the *Adoption Act 1988* (SA) s 12(4) definition of "marriage relationship": both de facto couples and married couples with a relationship of five years standing are similarly eligible to adopt. (Five years cohabitation is not always required; s 12(2) allows the court to order in favour of applicants where cohabitation has been less than five years if special circumstances exist.)
147. NSWLRC DP 34 at paras 6.71-6.72.
148. The Commission notes that of the 279 submissions received to NSWLRC DP 34, 153 submissions were against homosexuals adopting. Of the 153 submissions, 36 were also against de facto heterosexual couples adopting and 39 against single people adopting. Most submissions were by individuals, many being petitions or campaign letters, and some were by religious and local political or social groups.
149. NSWLRC DP 34 at paras 6.77 and 6.78.
150. For example: F L Tasker and S Golombok "Children raised by Lesbian Mothers: the Empirical Evidence" (May 1991) 21 *Fam Law* 184; C J Patterson "Children of Lesbian and Gay Parents" (1992) 63 *Child Development* 1025; A Shaista-Parveen "Homosexual Parenting: Child Custody

and Adoption" (1989) 22 *University of California Davis Law Review* 1009; H Cosis Brown "Competent Child-Focused Practice: Working with Lesbian and Gay Carers" (1991) 15 *Adoption and Fostering* 11; *In the Marriage of Schmidt* (1979) 5 Fam LR 421; *L v L* [1983] FLC 91-353; M Otlowski "Doyle and Doyle: Family Court Awards Custody to Homosexual Father" (1992) 11 *University of Tasmania Law Review* 261.

The research evidence suggests that children brought up in homosexual households are not disadvantaged by the experience. Tasker and Golombok concluded in their study of lesbian mothers and their children that "[e]mpirical evidence demonstrates that the mother's sexual orientation does not appear to influence the child's well-being. Legal decisions concerning where the child should reside post-divorce should focus instead on the quality of parenting": "Children Raised by Lesbian Mothers: the Empirical Evidence" at 187. Patterson, in a paper reviewing research evidence on the personal and social development of children with gay and lesbian parents, concluded that "[t]here is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents ... despite the accumulation of a substantial body of research investigating these issues, not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth": "Children of Lesbian and Gay Parents" at 1036.

151. Otlowski "Doyle and Doyle: Family Court Awards Custody to Homosexual Father" at 266. Hannon J of the Family Court of Australia in *Doyle v Doyle* (1992) FLC 92-286 at 79, 122 stated that: "In determining the issue of custody it is the function of the Court to address the specific circumstances of the case to the particular welfare of the child who is the subject of the application. The morality and the sexual orientation of the parents are but two of the important factors to be considered but they are limited in their effect to what relevancy they have, directly or indirectly on the welfare of the child. The parent's lifestyle is of no relevance without a consideration of its consequences on the child's well-being. Homosexuality is relevant only if it affects the parenting abilities or the welfare of the child, and for that reason the fact of that homosexuality does require that the Court, even taking the most liberal view, scrutinise the parent's way of life."

Several State courts in the United States have taken a similar approach to the Family Court of Australia in custody disputes involving homosexual parents. See Shaista-Parveen "Homosexual Parenting: Child Custody and Adoption" at 1024: "These courts have held that homosexuality alone does not render a parent unfit as a matter of law. The courts ... instead require a specific showing that the parent's homosexuality adversely affects the child. In these cases, the courts examine the facts of each case instead of presumptively denying custody to the homosexual parent. Thus, by treating homosexual parents fairly and by dismissing irrational preconceptions regarding them, these courts properly focus on the child's best interests."

152. Anglican Adoption Agency *Submission* (26 August 1994) at para 6.4.
153. For example: National Children's and Youth Law Centre *Submission* (29 July 1994) at 9; NSW Branch of the Australian Society of Social Workers Ltd *Submission* (11 August 1994); Lawyers Reform Association *Submission* (9 May 1994); Centacare (Newcastle) *Submission* (29 July 1994) at 2; The New South Wales Bar Association *Submission* (16 September 1994) at 1-2. The NSW Committee on Adoption and Permanent Family Care commented: "[t]he Committee supports this proposal in principle and agrees that a general assessment of the applicants would need to consider their capacity to parent an adopted child, including their ability to meet the normative needs of that child and their acceptance by the birth family and the child. A placement decision should be made on the basis of this applicants being the most suitable for a particular child.": *Submission* (30 August 1994) at 20. Barnardos Australia likewise supported the proposal in principle: "[w]hile Barnardos would agree that 'unfair or unjustified assumptions are not made' and that a person must not be discriminated against because of his/her sexual orientation, the assessment needs to focus on the needs of a particular child and must look at many other

factors, including the wishes of the birth family and the child, if appropriate. As in all situations, the focus must be on the needs of the child and the selection of the family, regardless of its composition, which is best able to meet those needs”: *Submission* (26 July 1994) at 6. The NSW Department of Community Services made the following comment: “[a] person’s sexual orientation should not preclude them from expressing an interest in the adoption of a child. The assessment should focus on their capacity to parent a particular child taking into account the birth parent’s views and the child’s needs being paramount in the placement decision”: *Submission* (5 September 1994) at 28.

154. The NSW Department of Community Services recognised that there is a growing diversity of family types in the community and that interested families should be able to be assessed to determine if they have the suitable characteristics and strengths to meet the child’s needs: *Submission* (5 September 1994) at 24. However, it also cautioned that any changes would have limited impact in practice: “[i]n reality the opportunity for homosexual persons to adopt is limited. Relinquishing parents should have the right to express their views of the structure of the adoptive family; most relinquish in the hope their child will be placed with a heterosexual married couple. No overseas program would approve placement of a child with a homosexual person/couple”: at 25. The Anglican Adoption Agency also observed that birth parents using their services would be unlikely to agree to the placement of their children in homosexual families: “[a] frequently stated reason for relinquishment is for the child to have two parents, both a mother and a father”: *Submission* (26 August 1994) at para 6.3.

Adoption of Children Regulation 1995 (NSW) Schedule 1, Form 6 allows birth parents to express wishes as to whether they desire married adoptive parents, non-married adoptive parents or single adoptive parents.

155. See further Chapter 4 on step-parent and relative adoptions.
156. The Gay and Lesbian Rights Lobby commented: “[c]urrently, when a ‘single person’ applies to adopt a child, if the person is in a relationship, their partner is generally assessed by social workers as to her or his parenting abilities. The child will only be placed if both people would provide an environment from which the child would benefit. There can therefore be no reason not to make an adoption order in favor of a lesbians or gay male couple jointly. Concerns about the relationship ending are no more applicable to lesbian and gay male relationships than they are to heterosexual relationships”: *Submission* (29 August 1994) at 15.
157. Specifically through the referral of most State family law matters in respect of children to the Commonwealth under the *Commonwealth Powers (Family Law - Children) Act 1986* (NSW) and picked up by the *Family Law Amendment Act 1987* (Cth). More generally through the cross-vesting legislation: *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW). As for heterosexual couples, the Family Court, with its counselling services, child’s representative system, and specialist expertise in custody, access and maintenance matters, is the most appropriate jurisdiction to determine issues on children arising from parental separation of same-sex couples. See also *W v G* (New South Wales Supreme Court, 2 February 1996, Hodgson J, No. 4607/94, unreported): in that case it was held that, on the basis of equitable estoppel, the defendant had an obligation to contribute to the costs of raising the two children born to the plaintiff in the course of the defendant’s lesbian relationship with the plaintiff. A related issue is making provision for children of same sex couples in the event of the deaths of the parents. It is likely that a successful application for provision could be made under the *Family Provision Act 1982* (NSW). The *Domestic Relationships Bill 1996* (NSW) has not yet been tabled in Parliament but is expected to be tabled in the near future. The effect of the Bill is to extend the operation of the *De Facto Relationships Act 1994* (NSW) to, inter alia, same-sex couples. The Bill provides for rights to redistribution of property on the breakdown of a same-sex couple relationship and maintenance for children for whom both parties have accepted long term responsibility.
158. NSWLRC DP 34 at paras 6.101- 6.103.

159. However, the assessment process is guided to some extent by legislation. See for example *Adoption of Children Regulation 1995* (NSW) Parts 3 and 5, Schedule 2, cl 3, 4, 9(4) and 10.
160. NSWLRC DP 34 at paras 6.98 and 6.100.
161. NSWLRC DP 34 at para 6.100.
162. *Adoption of Children Act 1965* (NSW) s 8.
163. Similar to *Adoption of Children Act 1965* (NSW) s 20, which requires a male applicant to be a minimum of 18 years older than the child and a female applicant to be a minimum of 16 years older than the child.
164. *Adoption of Children Act 1965* (NSW) s 21(1)(c)(i)(a) and NSW Department of Community Services *Submission* (5 September 1994) at 24.
165. NSWLRC DP 34 Chapter 6, Proposal 1.
166. Barnardos Australia *Submission* (26 July 1994).
167. NSWLRC DP 34 at paras 6.101 and 6.104.
168. DOCS has expressed a concern that private agencies operating with smaller pools may not have a sufficient variety of applicants to make the best possible selection for the child in need of care.
169. A Roughley *Identifying Adoption Practice and Problems in Relation to the Local Adoption of Infants* Project prepared at the request of the New South Wales Law Reform Commission (September 1993) at 12-13.
170. Anglican Adoption Agency *Submission* (26 August 1994) at para 6.4; Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 18.
171. Roughley *Identifying Adoption Practice and Problems in Relation to the Local Adoption of Infants* at 13.
172. NSWLRC DP 34 at para 6.105.
173. NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 24; Barnardos Australia *Submission* (26 July 1994); NSW Department of Community Services *Submission* (5 September 1994) at 29.
174. *Adoption of Children Regulation 1995* (NSW) cl 18(1)(d).
175. cl 19(1).
176. cl 19(2) and (3).
177. This is supported by *Adoption of Children Regulation 1995* (NSW) cl 18(1)(d) where an applicant can be removed from the adoption register of approved persons because a change in circumstances makes the applicant no longer suitable to adopt the child in the opinion of the Director-General.
178. NSW Department of Community Services *Submission* (5 September 1994) at 23.
179. NSW Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 18.
180. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 19.

181. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 19.
182. Anglican Adoption Agency *Submission* (26 August 1994) at para 6.3.
183. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994) at 19.
184. *Adoption of Children Regulation 1995* (NSW) cl 10(1), 11(1) and 12(1).
185. cl 10(1), 11(1), 12(3) and 13.
186. cl 14 and 20 (1); Schedule 2, item 9(4).
187. cl 6(5); Schedule 2, item 9(3).
188. Under cl 8(6) the agencies may require the applicant to attend an adoptive parent education and training course before assessment.
189. Leslie *Submission* (28 July 1994) at 4.

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

7. Openness in Adoption

INTRODUCTION

7.1 One of the most distinctive features of recent thinking and practice in adoption is the view that adoption law should not facilitate deception or secrecy, but should promote honesty and openness. This mode of thinking developed from research into the long term effects of adoption and the needs of consumers of adoption services. Research and experience, both in Australia and overseas, shows that this is in the best interests of the child and should, therefore, be encouraged.

7.2 The Commission endorses the position that adoption placements should provide for openness. The issue for consideration in this chapter is not, therefore, whether there should be openness at all in adoption, but the extent to which "open adoption" practices should be implemented in the legislation and the manner in which this should be done.

7.3 It is important to distinguish between adoptions in which openness is a part of the arrangement from the start, and the quite different situation where openness is created in relation to people who have gone through an adoption at an earlier time when adoption was characterised by secrecy. This second situation is dealt with by the *Adoption of Information Act 1990* (NSW) ("the Adoption Information Act") and it is not necessary to deal further with it here. The present discussion is concerned with the question as to what extent and in what manner openness should be a feature of new adoptions.

DEFINING OPENNESS IN ADOPTION

7.4 Although submissions received by the Commission were all opposed to secrecy and deception in adoption, there was wide variation in defining what constitutes openness in adoption. It has long been accepted that it is highly desirable for adopted children to be told at an early age about their adoptive status and to be told in general terms some characteristics of their birth families and the circumstances of their adoption. However, in more recent times "openness" has gone considerably further than this.

7.5 In submissions to the Commission, the term "open adoption" was used variously to refer to situations such as the following:¹

adoptive parents who recognise and are comfortable with the fact that the adoptee is also a member of his or her birth family and are able to discuss the adoptee's loss and other issues surrounding the adoption with the adoptee;

a simple exchange of information and photographs between the birth parents and the adoptive parents, that may or may not involve the adoptee;

the situation where the birth parents select the adoptive parents from agency profiles and have an initial meeting with them, which may or may not be followed by subsequent exchanges of information and photographs or actual contact;

informing the birth parents if the child's placement has broken down and involving them in developing a new case plan for the child;

informing the birth parents if the child dies;

intermittent contact between birth parents and the adoptee, either ad hoc, depending on requests of the adoptee or the birth parents, or defined, such as on birthdays or at Christmas; and/or

situations where a close relationship develops between birth family and adoptive family that is somewhat more informal.

7.6 Each of the situations above provides a snapshot of the way in which an open adoption arrangement may work at a particular time, rather than describing fixed categories of open adoption. The openness of an adoption may change and develop in accordance with the changing needs of the parties involved. Birth families and adoptive families may change residence. Adoptees may feel the need for different levels of contact throughout their lives. Adoptees who have experienced trauma before or during separation from their birth family may need a period of attaching to their adoptive parents before they are able to benefit from contact with birth parents. Children who are adopted when they are older may have quite different short and long-term needs with regard to contact, particularly if they have developed relationships with members of their extended birth family.

7.7 The conclusion reached in many of the discussions held with the Commission was that there needed to be some degree of flexibility in open adoption arrangements, so that people could design an arrangement that they felt comfortable living with on a day-to-day basis.² Allowing for flexibility also acknowledges that individual children will have differing needs at various times in their lives. It would be difficult, and would not serve the changing needs of individual adoptees, to prescribe a rigid form of openness in adoption.

CURRENT PRACTICE

7.8 The following excerpt from the submission of Barnardos Australia demonstrates the level of openness that already exists in practice:

Since its inception in 1985, Barnardos' Adoption program, has endorsed the philosophy of "open adoption" with all the children in the program having a detailed Life Story Book, being fully aware and informed of their birth family members, having photographs and, in most situations, having physical contact with significant birth family members on an ongoing basis. In the past 9 years, Barnardos has finalised 52 adoption orders through the Supreme Court with the mean age of the child at the time of the adoption order being 9 years. For those referred to the Adoption Program, the greater majority have contact arrangements, agreed to by all parties, as part of the adoption application. The Court appears to view these arrangements positively. The only instances where ongoing contact has not occurred have been where birth family members decline contact or cannot be found. It is Barnardos' experience that contact arrangements continue satisfactorily for many years after the finalisation of the adoption order and are seen by all parties as beneficial to and in the best interests of the child.³

7.9 Although Barnardos found that some adoptive parents had initial reservations about openness, the preparation and assessment program helped to bring about changes in attitudes. A research project, conducted in 1991, demonstrated that open adoption was supported by adoptive parents and adoptees and was felt to be in the best interests of all those involved.⁴

We found that open adoption worked well provided that Barnardos offered a great deal of support to all parties and the adoptive families were willing to put both time and effort into maintaining contact. Overall, open adoption was seen as beneficial and an integral part of many placements ... It appears that successful open adoptions demand more of the agency and adoptive families. For positive contact the onus falls on the adoptive family to initiate and maintain contact if the open adoption is to be successful.⁵

7.10 Centacare Catholic Community Services (Adoption Services) also involves birth parents in the selection of adoptive parents, organises a regular exchange of letters, photos and gifts between some families and has helped to establish face-to-face contact in some cases. These practices appear to have worked well.⁶

7.11 In the period from January 1993 to June 1994, every birth parent who placed his or her child for adoption with Centacare elected to participate in the selection of adoptive parents. Of the 24 placements made during this period, 20 have involved at least one meeting between birth parents and adoptive parents, with all parties indicating a desire for ongoing contact.⁷

7.12 A commitment to openness in adoption has become one of Centacare's criteria for selecting suitable adoptive parents, as well as comprising a significant component of the preparation of prospective adopters. Ongoing workshops, support groups and seminars are offered to all parties to the adoption, including interested members of the extended families of prospective adopters. Centacare has also produced Life Story Books for pre-school and school age children, "which in many cases include a substantial contribution by birth parents".⁸

7.13 It has also been the experience of the Anglican Adoption Agency, over the last ten years, that changes promoting openness and honesty have long term benefits for all involved, but most importantly for the adoptee. For over ten years, adoptive parents have been expected to provide the agency with photographs and information to be forwarded to birth parents.

DISCUSSION PAPER 34

7.14 DP 34 set out the arguments for and against introducing the concept of openness into adoption legislation.⁹ It was the Commission's provisional view that the case for openness in adoption was strong and that the arguments against it were not persuasive. The trend in open adoption has resulted from an accumulation of adoption knowledge and wisdom and the experience of adoption workers and participants over the past thirty years or more. The consensus is that adoption needs to be more open and honest about adopted children's dual parentage.

7.15 The Commission proposed that:

the legislation should support the policy of open adoption as there were clear benefits not only for adoptees, but for adoptive parents and birth parents; and

the legislation should create a system of adoption in which a package of orders and arrangements could be tailored to meet the needs of each child.¹⁰

Examples were given of existing and proposed systems from the Northern Territory, Western Australia, Victoria, England and Wales.

7.16 The Commission invited comment on:

whether it was correct to approach adoption legislation on the basis that, as far as possible, deception and secrecy should be avoided; and,

the extent to which the law should actively implement or encourage openness, as distinct from creating a framework that relies heavily on the judgment of adoption workers and the other adults involved.

SUBMISSIONS AND RESPONSE

General attitudes

7.17 Submissions received in response to DP 34 unanimously supported the concept and promotion of some form of openness in adoption. However, many were concerned about the practical implementation of openness and its effect on individual privacy. One submission expressed a typical reservation in this way:

I believe openness in adoption is good, long overdue, and fundamentally necessary for the well being of the children and of both the families, however I also am a firm believer in the right to privacy for all parties to an adoption.¹¹

7.18 Submissions drew attention to a point often made that open adoption be seen not as a cure for any grief or loss felt in adoption but as a means for each of the parties involved, including the child, to

deal with his or her grief or feelings of loss in a way which benefits the adoptee.¹² Some submissions also commented on the difficulties experienced within the current system of open adoption.

Difficulties experienced with open adoption

7.19 The Commission received several submissions from birth mothers who had met the adoptive parents prior to placement but now had no contact with or information about their children and who felt distressed by this. They wished at least to know that their child was well and that the placement was working. Adoption agencies have all noted cases where adoptive parents have initially agreed to some form of open adoption but have then refused any form of contact once the adoption order has been made. It is difficult for adoption agencies to predict whether adoptive parents will maintain open adoption arrangements, even when they have originally indicated their willingness to do so.

7.20 Reneging on agreements for openness occasionally still occurs, even though the ability of adoptive parents to accept birth parents and to be prepared for open adoption is now an important factor in the selection and preparation of adoptive parents.¹³ Arrangements for contact and exchange of information are most frequently made after the child has been placed with the adoptive parents, rather than before.¹⁴ This means that birth parents have a far more limited ability to contribute to and influence the decision-making process, despite the fact that they will be a party to it.¹⁵ They may also find that they are limited by the particular practices of their adoption agency when it comes to resolving conflicts over openness.¹⁶

7.21 Some submissions from birth parents indicated that they had not felt in control of the decision-making process that led to the adoption of their child. Even where birth parents had selected the adoptive parents from agency profiles, some felt that they had been allowed to proceed through the adoption without really understanding how their parental relationship with the child would cease. In such cases, they found participating in open adoption and being referred to as “special person” instead of “mother” or “father” to be distressing, particularly if they disagreed with the parenting style of the adoptive parents.

7.22 The Anglican Adoption Agency noted that some birth parents cannot cope with seeing the child thriving under the care and attention of the adoptive parents:

This is often the case with parents of children with disabilities who have tried to care for the child and have eventually relinquished him/her two or more years later. They may experience access as humiliating but can often see value in contact and are more comfortable with corresponding by letter.¹⁷

7.23 Submissions from adoptive families described another problem that arises where one child has an open adoption with his or her birth parent while the other child has no contact with or knowledge of their birth parents. One family described their situation in which there is a growing relationship with their daughter's birth father and birth mother but no such contact with their son's birth parents. The parents in this family feel that although their son does not have the information and the contact he would like, and feels sad and angry at times over this, he has benefited greatly from participating in a relationship with his sister's birth parents. It has allowed him to understand the nature of adoption and appreciate the way in which his birth parents may be feeling about or reacting to his adoption.¹⁸

7.24 Open adoption can also be very difficult for birth parents and adoptive parents in acting as a constant reminder of loss or of infertility. It may strike deep into feelings of inadequacy as a parent or person.

Summary of conclusions reached in submissions

7.25 The vast majority of submissions concluded that the present practice of open adoption, despite its difficulties, is a major improvement on the former approach of surrounding adoption with secrecy. Some significant areas highlighted in the submissions were as follows:

To what extent should adoption legislation support the practice of open adoption? The effect of the making of an adoption order requires the amendment of birth certificates with the concealment of information about birth parents that this entails; thus it is perceived that current legislation is failing to endorse current practice.¹⁹ Some social workers feel that legislative backing would help them convince the parties involved of the value of openness in adoption and that it would reflect the important status of this principle in the current practice of adoption.

It is important to accept that openness may not work in all cases. The success of an open arrangement is dependent to some extent on good counselling and support and requires each of the parties to be emotionally capable of participating. Open adoptions will encounter the same difficulties as any other complex family relationship; each of the parties may desire more or less involvement than they receive. Any legislative statement would therefore need to be flexible.

A structure for resolving any conflict that may arise between the parties to an open adoption should be provided. Present agreements for openness can become obsolete or unsatisfactory to any of the parties to the agreement, leaving them without a formal process for re-negotiation.²⁰

7.26 The discussion which follows considers some specific measures to address areas of concern in the practice of open adoption.

LEGISLATIVE SUPPORT FOR OPEN ADOPTION

7.27 This section reviews a number of legislative schemes for openness. The most notable of these is the scheme for negotiated adoption plans provided for in the *Adoption Act 1994 (WA)*.

The *Adoption Act 1994 (WA)*

7.28 The *Adoption Act 1994 (WA)* provides that an adoption plan is to be negotiated, if possible, between the birth parents who have consented to the adoption, the prospective adoptive parents and, if the Director-General believes it to be appropriate, a child's representative.²¹ The Act sets out some matters that *may* be provided for in the adoption plan but does not set out any *requirements* as to content. The plan may be to the effect that there will not be any exchange of information or contact.²²

7.29 Schedule 2, entitled "rights and responsibilities to be balanced in adoption plans", sets out rights and responsibilities of adoptive parents, birth parents and the child, divided into the four stages of the adoptee's life, namely: infancy; childhood; adolescence; and adulthood. Persons who negotiate an adoption plan are to have regard to these rights and responsibilities.²³

7.30 The Director-General is required to provide assistance and mediation services to persons in the process of negotiating an adoption plan.²⁴ If the Director-General is of the opinion that no adoption plan can be agreed upon, he or she may allow further time for the selection of an adoptive parent or for the negotiation process,²⁵ apply to the Court for an order regarding any disputed matter that is preventing agreement to the adoption plan,²⁶ place the child with other suitable prospective adoptive parents,²⁷ or cause notice to be given that it is not possible or desirable to place the child for adoption.²⁸

7.31 Adoption plans must also be entered into where the child is to be adopted by a step-parent or a person who has had, for at least three years, the daily care and control of the child and the responsibility for making decisions concerning the daily care and control of the child.²⁹

7.32 Except in certain situations, in which the Court can dispense with the requirement for an adoption plan,³⁰ an order for adoption cannot be made unless the Court approves the provisions of the adoption plan.³¹ Where the plan has been approved by the Court, any breach of the provisions of the plan means that the Court may order the parties to participate in a mediation process,³² enforce a provision of the plan as if it were an order of the Court,³³ or punish the person breaching the provision for contempt.³⁴

7.33 Certain persons can apply to the Court to vary the adoption plan.³⁵ If the Court is satisfied that there has been a change in circumstances since the plan was approved, and that the proposed variation adequately balances the rights and responsibilities of the parties as mentioned in Schedule 2, then the Court can allow the variation to the plan.³⁶

7.34 The *Adoption Act 1994* (WA) implemented recommendations of the Report of the Western Australian Adoption Legislative Review Committee. In considering the appropriate path for New South Wales to take, it is useful to keep in mind several of the recommendations made by the Western Australian Committee. These were as follows:

that agreements must ensure that the child's interests are paramount, placement of the child with the most appropriate adoptive family is not compromised and the child belongs to a secure family system without interference;³⁷

that adoptive parents have the right to bond with and rear the child without interference and have the right to family privacy;³⁸ and

that the Negotiated Adoption Agreement be sufficiently flexible to remain developmentally appropriate to the growing child and able to meet the changing needs of the other parties.³⁹

7.35 Two important points have emerged from the experience in Western Australia. First, and obviously, the agreement will be more likely to succeed if it is one with which all parties are completely satisfied.⁴⁰ Secondly, the parties must recognise the need for change over time:

To recognise in law the continuum of options is to allow for responsive decisions in relation to what arrangement is in the best interests of the child. Flexibility in open arrangements recognises that with any relationship there may arise the need to re-negotiate the terms of the agreement. It further recognises that flexibility in arrangements supports the principle that each child be treated individually and as having his or her own special needs.⁴¹

Models for open adoption agreements from other jurisdictions

7.36 Several child welfare agencies in Illinois in the United States have systems for negotiation of open adoption agreements.⁴² Foster parents and birth parents, or any other relatives, meet with a representative of the agency that has responsibility for the child. If open adoption is agreed upon, the details are drafted into a written agreement, such as locations for future contact, the means and nature of correspondence and the involvement of the child welfare agency. All parties are informed that the agreement is subject to the needs of the child and should be altered in accordance with those changing needs. Adoptive parents, as the legal guardians and day-to-day carers of the child, are considered the appropriate parties to indicate that circumstances require a change to the original agreement.⁴³

7.37 The agreement is negotiated prior to completion of the adoption. This program has also recognised the need for children to be included in discussions as far as possible and that a guardian *ad litem* or separate representative of the child needs to be included in negotiations to represent the child's interests.⁴⁴

7.38 A Canadian review by a Special Committee recommended that the adoption legislation in Ontario be amended to allow rights of access to coexist with an adoption order, although not in relation to step-parent adoptions. The proposed amendment took the following form:

The Court shall not make an order for contact under subsection 2 unless the Court is satisfied that:

- (a) It is in the best interests of the child to be adopted and to maintain ties with members of his or her birth family.

- (b) There is a meaningful relationship between the child and the proposed contact person, and a disruption of that relationship is likely to be detrimental to the child. Regard should be given to the child's physical, mental and emotional development, and the child's views and preferences, where such can be ascertained.
- (c) Where there is a prospective adoptive family, the prospective adoptive parents consent to the contact order.
- (d) The proposed contact person accepts that the child will be adopted.
- (e) The contact person and the prospective adoptive parents, if any, are committed to placing the needs and the stability of the child as a first priority, and to making genuine efforts not to undermine the implementation of the contact order.⁴⁵

Submissions and response in relation to a legislative scheme of agreements for openness

7.39 Many submissions gave support generally to a legislative scheme of agreements for openness and to the Western Australian scheme in particular.⁴⁶ The benefits noted were as follows:

The agreement could easily be attached to the Order for Adoption and would be made by the parties rather than imposed by the Court.

Any difficulties in negotiation could be mediated by the agency that made the placement.

The possibility of intervention by the Court could motivate efforts to conciliate any dispute.⁴⁷

7.40 One submission suggested that the birth parents and the adopted parents could draw up a parenting plan, along the lines of s 63C of the *Family Law Act 1975* (Cth):

dealing with the child's residence, contact with the birth parents, education, religion, name, health, communication between parents and carers and what is to happen on the death of a parent ... This would allow an arrangement tailored to the particular circumstances of the people involved and tailored to meet the individual needs of the child.⁴⁸

7.41 The New South Wales Committee on Adoption and Permanent Family Care advocated that:

a prescribed form agreeing to participating in the interchange of information be part of the consent/adoption agreement documentation for both the birth parents and the adoptive parents.⁴⁹

The advantages and disadvantages of a legislative scheme

7.42 The question that needs to be answered in this chapter is whether legislation should be used to impose a system of compulsory agreements for openness that create enforceable rights in the parties to the agreement.

7.43 A resolution of this issue must proceed on the understanding that the unique needs of the parties involved make it obvious that the legislation should not specify what particular arrangements should be made; this should be worked out among the parties according to the circumstances of each particular case.

7.44 The main disadvantage of a legislative scheme is that it creates rights to openness that can be enforceable in a court. A court order enforcing a provision of an adoption agreement could foreseeably place strain on the adoptive family, on the birth parents and/or on the relationship between the two, impacting negatively on the child. It is true, however, that if parties are required first to pursue mediation

channels in the event of a dispute, in the majority of cases potentially damaging litigation may be avoided.

7.45 A further argument against providing for open adoption agreements in the legislation is that it is not the role of legislation to regulate family life in this manner. It is more appropriately an area of social work and of voluntary consensus between the parties to the adoption.

7.46 The advantages of a legislative scheme can be summarised as follows:

Legal regulation ensures that all parties' interests, in particular the child's, are protected. The Court can be given the power to make a variety of orders relating to contact, depending on the needs of the particular child, and all parties can be given the opportunity to be heard.

The agreement for openness would be before the Court when it makes its decision as to whether the adoption will be in the best interests of the child.

Parties may be more likely to regard the agreement for openness as a serious aspect of the adoption and not just as an agency requirement which they must meet in order to have a child placed with them.

Although parties can enter into voluntary agreements they then do not have access to a legislative structure for resolving any conflicts which may arise.

A legislative right to openness is an acknowledgment that adoption has changed and that it is now considered appropriate to include provision for openness in any adoption placement.

Conclusion

7.47 While the Commission recognises that there are a number of forceful arguments in favour of a legislative scheme for open adoption agreements, the Commission has concluded that these are overwhelmed by the undesirability of creating legally enforceable rights in the context of such family relationships. Therefore, the Commission does not recommend that there be a legislative scheme for open adoption agreements.

7.48 However, the Commission supports a system of voluntary agreement as to openness in an adoption.

RECOMMENDATION 61

The parties to the adoption should reach agreement as to openness prior to the placement of the child with the adoptive family.

RECOMMENDATION 62

In applying for an adoption order, the parties must present to the Court their agreement for openness in the adoption. Prior to making an adoption order, the Court must be satisfied that the proposed arrangements are in the child's best interests and are proper arrangements in the circumstances.

TELLING ADOPTEES OF THEIR ADOPTIVE STATUS

7.49 Even if legislation does not dictate what ought to be in an agreement for openness, the question arises separately as to whether adoptive parents should be required to tell their child of his or her adoptive status.

7.50 Current research and the overwhelming majority of submissions suggest that it is the "right" of the adopted child to know of his or her adoptive status and that the adoptee should be provided with this knowledge and information at an appropriate time. Some submitted that that this should be enshrined in

legislation and should be part of a written and signed agreement prior to the making of the adoption order.⁵⁰ Submissions also supported the notion that children need ongoing information and that provision of this should be required by legislation.⁵¹

7.51 Informing the adoptee that he or she is adopted is an important aspect of openness in adoption. Withholding this information from the adoptee can cause pain and confusion, or worse, if the child later learns this information from other sources. It is the current practice of DOCS and the private agencies to educate adoptive parents about the value of telling their children they are adopted. The ability to deal with this issue is also a relevant part of the procedures for assessing and approving adoptive parents. However, there continue to be some cases where adoptive parents have later been reluctant to tell the child of his or her adoptive status. There is very little that social workers can do at this stage to change the decision of the adoptive parents.

7.52 Perhaps some otherwise reluctant adoptive parents would tell their children about their adoption if this was a legislative requirement and not just the request of the adoption agency. However, creating a legal obligation to inform, and a concomitant right in the adoptee to be informed, would also create a right to seek legal redress if the adoptive parents failed to tell their child of his or her adoptive status. Taking legal action against the adoptive parents for their failure to inform would obviously create less than ideal conditions for the adoptive family.

7.53 Such information needs to be imparted to the child sensitively, by adoptive parents who feel comfortable in their role and can support the adoptee in coming to terms with any feelings of grief or loss. In these circumstances, a system of enforceable legislative rights is unlikely to be of benefit to the adoptee. Therefore, the Commission does not recommend that a procedure for ensuring a child is told of his or her adoptive status be implemented in law.

7.54 The proper domain for ensuring that the adoptee is informed of his or her adoptive status in a manner appropriate to his or her age is through education, both in preparation of applicants for adoption and in post-adoption support programs. The issue would also be a factor in assessing applicants' suitability to adopt. Ultimately, responsibility for informing adoptees should rest with DOCS or the private agency and the adoptive parents, not with legislative provisions.

7.55 At any rate, adoptive parents would be aware that after their adopted child turns 18, members of the child's birth family may make contact under the Adoption Information Act, even if the child has not been told of his or her adoptive status. This may have the effect of a deferred legislative enforcement.

INVOLVING BIRTH PARENTS IN PLACEMENT BREAKDOWN

7.56 If a breakdown in an adoption placement occurs the question arises as to whether legislation should require that birth parents be informed. A number of birth parents, who had discovered that a breakdown in their child's adoption placement had occurred, indicated to the Commission that they would have liked to have been told and involved in placing the child in a new family. Some of these birth parents indicated that had they known of the breakdown at the time it occurred, they would have been able and willing to resume care of the child. Some argued that birth parents should be informed of *any* change of status of the adoptive family.⁵²

7.57 Similar views were put to the Adoption Legislative Review Committee in Western Australia. The Committee's recommendations for reform included the establishment of an Adoption Information Exchange. In the event of an adoption breakdown, the Committee recommended that the child's birth parents be informed of the breakdown through the services of the Adoption Information Exchange, and that their ability to participate in decision-making be considered. This procedure would not be followed if the birth parents had explicitly excluded contact.⁵³

7.58 Form 6 in Schedule 1 of the Adoption Regulation is a form to be used in conjunction with the signing of consent to the adoption of a child and allows for birth parents to make certain requests in relation to the placement of their child, and other matters. The birth parent can request that DOCS or the private adoption agency inform him or her should they become aware that the child he or she

relinquished for adoption is no longer in the care of the adoptive parents. “No longer in the care” obviously covers a breakdown in the adoption placement.

7.59 As with other requests made by birth parents when consent to the adoption is given, it is made clear to the birth parents that the Director-General will make every effort to accommodate those requests but there can be no guarantee of compliance.

7.60 The Commission cannot recommend that legislation go further than this for similar reasons that a legislated scheme for open adoption cannot be recommended. If legislation created a right in the birth parents to be informed of an adoption breakdown then that right would be enforceable at law. It is appropriate that, if practicable and in the child’s interests, the birth parents be given this information. However, it is not appropriate that the birth parents be permitted to take action against DOCS or the agency for a failure to impart the information, given that parental responsibilities have been relinquished voluntarily and after proper consideration.

7.61 It is also a matter for DOCS or the agency to consider whether it is in the child’s best interests to involve the birth parents in future plans for the care of the child following an adoption breakdown. This may well be desirable, and the Commission encourages consideration of this. However, again, the Commission does not consider it appropriate for legislation to create an enforceable right for such subsequent involvement.

BIRTH CERTIFICATES

The present law

7.62 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.⁵⁴ This new certificate is known as an “amended” birth certificate. Whilst this has not always been the case, the amended certificate is now indistinguishable from the birth certificates of people who have not been adopted.⁵⁵ Occasionally, there may be a feature of an adopted person’s birth certificate which can alert the trained eye, such as a time delay between the date of birth and the date of registration.

7.63 The amended certificate gives the child’s name as determined in the order of adoption, and the true date and place of the birth. It sets out 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. The amended certificate is created from information contained in the memorandum of adoption received by the Registry.

7.64 The original birth certificate, which normally includes the name of the birth mother and sometimes that of the birth father, is not destroyed but is retained within the registry, although access to it is strictly limited. It is not generally released by the Registry except under the provisions of the Adoption Information Act. If the original birth certificate is released under this legislation, it is not available for official use as a birth certificate. It bears a certification in the following terms: “superseded by a later record and issued under the *Adoption Information Act 1990*. Not for Official Use”.

7.65 The key provisions under the *Births, Deaths and Marriages Registration Act 1995* (NSW) in relation to adoption are as follows:

Under s 23 of this Act, adoption orders must be registered and, pursuant to s 24, this is done by entering the particulars of the adoption order into the register.

Section 25 of the Act requires the Registrar to note a reference to an adoption order in the entry relating to the birth of the adoptee.

Section 48 provides that in supplying information extracted from the register, the Registrar must, as far as practicable, protect the persons to whom the entries in the register relate from unjustified intrusion on their privacy.

Section 49 provides that the Registrar may issue a certificate certifying particulars contained in an entry.

Section 52 makes it clear that the ability of a person to have access to, or receive certification of, information on the register is subject to the provisions of the Adoption Information Act.

7.66 The *Births, Deaths and Marriages Registration Act 1995* (NSW) repealed the *Registration of Births, Deaths and Marriages Act 1973* (NSW) and has introduced greater flexibility into the registration and retrieval of information, whilst expressly protecting privacy. It is apparent from Part 8, Division 4 in particular that the Act has introduced the concept of “registrable information”, with a right to certification of particular entries on the Register.

7.67 Under s 43 of the previous Act, where a birth certificate was required, a certified copy of, or a certified extract from, an entry in the Register was issued which amounted to a copy of the relevant page from a bound book. Section 49 of the new Act does not refer to “certified cop[ies] or extract[s]” but rather refers to the “issue of certificate[s]”. Section 49 gives the Registrar the power to issue a certificate certifying particulars contained in an entry. A certificate can certify one, some or all particulars contained in an entry. This greater flexibility in how information can be provided, combined with the computerisation of the Registry’s records, enables the Registry to produce a document which can be tailored to a person’s particular needs.

7.68 At present, however, when application for a birth certificate is made a standard form of certificate is issued. No system of being able to “pick and choose” the form of the certificate has been implemented.

Discussion Paper 34

7.69 The information to be provided on the birth certificate of the adoptee has become a central issue in promoting openness in adoption. In DP 34 the Commission presented five alternative solutions to the issues which arise in relation to birth certificates. The alternatives were:

retain the present system;

supplement the present system by registering a separate document, a certificate of adoption, which would include pre- and post-adoption information;

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;

combine the birth information and adoption information so that adoptees would only have one birth certificate, which would contain both birth and adoption details; or

provide that no new birth certificate should be issued upon the making of the adoption order.

7.70 The Commission made the provisional recommendation that birth certificates be retained in their current form with the accompanying registration of an adoption certificate that would record all the details of the child’s birth parents and adoptive parents and the date of the adoption (Option 2). This option was felt to achieve the best balance in the debate in which some people emphasised the importance of honesty and others emphasised the importance of privacy. Although it would not completely remove the misleading nature of the birth certificate, the birth 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.

Submissions and response

7.71 Submissions to DP 34 continued the debate about the apparently competing values of honesty and privacy. Submissions raised the point that the current birth certificate has created the illusion that the child has ties to only one set of parents and that this is contrary to the spirit of openness in adoption:

The major evidence of legal fiction is in the amended birth certificate which is issued after a child's adoption, and in the lack of access to information about the child's birth family.⁵⁶

The right of a child to knowledge of his/her status and background should be recognised in the Act. This right would be further recognised by the removal of the legal fiction created by the current amended "birth" certificate.⁵⁷

The reality of adoption is that increasingly the majority of children placed are older and it is important that their adoptive status is acknowledged. Furthermore, in terms of consistency and to challenge any notion that an adoptive status is stigmatising or inferior, then all birth certificates of all adoptive children should state their status.⁵⁸

7.72 Having the acknowledgment of adoptive parents on the birth certificate was also felt to be a necessary legislative amendment to meet the needs and rights of children who are adopted.⁵⁹

It would present a truthful and comprehensive record, and should be available to all parties. The extract could be defined as presenting date and place of birth, adoptive parents, and the name by which the adoptee is known. This would then be indistinguishable from other children's birth certificate[s] and would give the privacy required when presentation of [a] birth certificate is necessary in childhood.⁶⁰

7.73 There was some disappointment expressed that the option of the combined birth information and adoption information, with use of extracts to protect privacy, had been rejected because, in many circumstances, a full birth certificate is still required. Submissions called for the amendment of legislation requiring the use of full birth certificates to allow for the use of extracts.

7.74 Other submissions supported Option 2 because it would provide adoptees with information about their birth parents and their adoption but would not infringe the adoptee's right to privacy:

This would mean that because we have openness in adoption we could talk to the children and they could have the extra document but still use the ordinary birth certificate (just like all their peers). They would not be discriminated against because of their adoption.⁶¹

7.75 Some adoptive parents also felt that the information on the adoption certificate would be extremely beneficial for their children to have, particularly in situations where there was no ongoing contact between the two families. Adoptive families would be able to refer to the child's birth parents by their first names:

Our son L, for instance, would love to know his birth parents' surnames and dates of birth. We would not be wishing to use this to contact them but rather to give L a feeling of knowing where he has come from. And with the birth dates it would then be possible to especially remember his birth parents on those days. The information would help L come to terms with who he is and where he has come from.⁶²

7.76 A further option emerged from submissions to DP 34. This option would retain the current system of birth certificates except where both the adoptive parents and the birth parents consent to an amended birth certificate showing the additional birth information. The content of the birth certificate would then be another matter to discuss at the time of placement, when plans for contact and exchange of information are being made. Even if the adoptive parents and birth parents consented to the birth certificate showing full information, the adoptee would still be able to request a printed certificate, showing only the details of the adoptive parents, if this was desired.

7.77 The disadvantage of this option is that the adoptee, who has the greatest interest in what form the birth certificate should take, does not participate in the decision. As the adoptee becomes older he or she may disagree with the decision taken largely on his or her behalf. Some may feel unhappy revealing his or her adopted status to anyone requiring presentation of the certificate. Others may feel unhappy that the certificate does not accurately reflect the circumstances of their births.

Conclusion

7.78 Increasingly in our society, a birth certificate is required to be produced to prove one's legal identity. "Birth certificate" has perhaps even become a misnomer as its use as an identity document overtakes its role as a record of birth information. Accordingly, one of the principal roles of the Registry of Births, Deaths and Marriages is to issue a document, on which interested parties can rely, which certifies a person's legal identity. The Registry has expressed the concern that any system of birth certification of an adoptee must not give the adoptee the opportunity of presenting two different legal identities. The Commission shares this concern, which led it to reject Option 3.

7.79 Certainly, it is unsatisfactory for a document to portray that a child was born to two people when this is in fact not true. What is true is that the child became a child of those people by an order of adoption. The seemingly simple cure to this deception is to produce a "birth certificate" which shows the actual *birth* information or, alternatively, a document which gives a complete picture of birth and adoption details. It is clear, however, from the submissions and from the above discussion that the cure is not simple. Primarily, the document *must*, as pointed out above, show the person's true and current legal identity. An adoptee's legal identity is that given to him or her under the Adoption Order. Hence, it is not an option for the adoptee to choose to use his or her original birth certificate as this would not certify to the world at large his or her true and current legal identity. It would be necessary for the adoptee to change by deed poll his or her name from the adopted name to the birth name.

7.80 The Commission has concluded that the only practicable solution to the present unsatisfactory system is along the lines of Option 2.

7.81 As is discussed above, the effect of the *Births, Deaths and Marriages Registration Act 1995* (NSW), in conjunction with computerisation of the Registry's records, is that it is now possible to hold all the pre- and post- adoption information on the register and to produce a printed birth certificate showing whatever amount of information is desired. It is possible, therefore, for the Registry to produce a document from its computer records which combines on the one certificate information about the child's birth, birth family, adoption and adoptive family.

7.82 The Commission recommends that adoptees have the option of applying for a birth certificate in one of two forms. The first form would be exactly as amended birth certificates are currently issued for adoptees, showing details of the adoptive parents and adoptive siblings, if any. This certificate would be, as it is now, indistinguishable from the birth certificates of non-adoptees. The second form would be divided into two sections. The top section would show details of the birth parents and any birth siblings. The bottom section would show details of the adoptive family and the date of adoption. The Commission sees no reason why an adult adoptee could not be in possession of both forms of certificate as the adoptee's legal identity is apparent from either. Nor does the Commission see any reason why the form showing details of both families would need to be for information purposes only or endorsed "for information only" or "not for official use". Again, if an adoptee presents this form of the certificate, it is clear to the reader that the person's current legal name is the one given on the making of the Adoption Order.

RECOMMENDATION 63

Adoptive parents of children under 18 years of age and adult adoptees should have the option of applying for a birth certificate in one or both of two forms:

The first form should be exactly the same as the amended birth certificate which is currently issued for an adoptee, showing details of the adoptive parents and adoptive siblings, if any.

The second form should be divided into two sections. The top section should show details of the birth parents and any birth siblings. The bottom section should show details of the adoptive family and the date of adoption.

Further issue: adoptive parent who dies before the making of the adoption order

7.83 There have been several cases in New South Wales where one adoptive parent has died in between the time that the child is placed with the adoptive parents and the time the Adoption Order is made. As it is clearly not possible for the Court to make an order in favour of a person who is deceased, the unfortunate result is that the child is adopted by, and has, only one legal parent. Adoptive parents may feel that a blank space next to the category of mother or father on the child's birth certificate may cause embarrassment. Most of all, the child will not have evidence of the deceased prospective adoptive parent's decision to become the child's parent.

7.84 In the case of biological children, if a father dies before the birth of the child, it is possible to have the father's name recorded on the birth certificate posthumously. However, a birth certificate is a record of information whereas an order for adoption is a transfer of legal parental rights and responsibilities to named individuals, who must be in existence at the time the order is made.

7.85 In these situations, a solution could be found in noting the deceased adoptive parent's intention to adopt the child on the birth certificate in the space where that particular parent's name would have appeared had the order for adoption been made in his or her name.

RECOMMENDATION 64

Where one of two joint applicants to adopt dies before the making of the Adoption Order, the surviving adoptive parent should have the right to apply to the Registry of Births, Deaths and Marriages for a notation as to the deceased's intention to adopt the child to be entered on the child's amended birth certificate.

FACILITATING OPENNESS

7.86 There are a number of practices which agencies can follow which have the potential of increasing the chances of a successful open adoption. These are as follows:

allowing birth parents to participate in the selection of adoptive parents;

encouraging adoptive parents and birth parents to meet prior to placement; and

providing certain post-adoptive services.

7.87 Another factor, rather than a practice, which can affect the success of open adoption arrangements is the extent to which birth parents have made a fully informed decision to relinquish their child and have a realistic understanding of what adoption will mean for themselves and for the adoptee.

Allowing birth parents to participate in the selection of adoptive parents

7.88 As discussed above, DOCS and each of the private adoption agencies routinely involve birth parents in the selection of adoptive parents by discussing with them the sort of people they would like to adopt their child and by allowing them to peruse at least two or three non-identifying profiles selected by the social worker from the agency's pool of adoptive parents which most closely accord with the birth parents' expressed wishes. If they are not happy with the profiles shown to them, they may (and often do) request to see further profiles. If a birth parent still cannot choose an adoptive parent after being shown a number of profiles, DOCS discusses with that birth parent whether he or she truly wants to go ahead with the adoption. Being shown profiles of applicants can be an effective way of testing whether the birth parent can envisage, and accept, his or her child being cared for by someone else.

7.89 A survey of one agency, which involves birth parents in the selection of adoptive parents in this way, showed unanimous support for the program.⁶³ The participating birth parents felt that having a voice in the selection of the adoptive parents gave them a sense of control and helped them define their role in relation to their child. Some birth parents also submitted to the Commission that this service had helped them come to terms with their loss in the long term.⁶⁴ Adoptive parents often felt a greater control over their part in the adoption process by being able to create their own profiles. Being selected by the birth parent also gave them increased confidence to parent the child.

7.90 However, social workers had some criticisms of the process. The way in which social workers could become drawn into 'selling' adoptive parents, particularly those who did not present well on paper, was perceived as a disadvantage of the practice. Also, the lack of conformity in the way profiles were written was seen to present difficulties. Despite these criticisms, the Commission endorses the present practice of allowing birth parents to peruse a number of suitable profiles of applicants.

7.91 The Adoption Regulation has formalised birth parents' involvement in the selection of adoptive parents to a certain extent by providing that the Director-General is to make all reasonable efforts to place the child in conformity with the birth parents' wishes as to religious upbringing, ethnicity or the domestic arrangements of the adoptive parents.⁶⁵ The implications of this, and the need to discuss with birth parents that it may not always be possible to accommodate their wishes, is discussed in detail in Chapter 5.

Encouraging adoptive parents and birth parents to meet prior to placement

7.92 Adoptive parents have submitted to the Commission that an initial meeting with the birth parents helped lessen or eliminate their fears about open adoption, particularly fears concerning demands of the birth parents and fears that a birth parent may try to take the child from them. Most reported that the initial meeting increased their ability to regard the child as "theirs", especially where there was clear approval of them by the birth parents.⁶⁶ Research, not surprisingly, has established that it is crucial to the success of an open adoption that the adoptive parents have a positive attitude towards the arrangement for openness.⁶⁷

7.93 A study of the experiences of seventeen adoptive families who had entered into an open adoption arrangement looked at the meetings between adoptive and birth parents.⁶⁸ Most of the birth parents understandably approached the initial meeting with the adoptive parents with trepidation. However, all experienced it as a good chance to discuss expectations for the adoption and to resolve issues, including future contact. All birth parents reported feeling relieved and reassured about the adoptive parents:

A number reported that the meeting had helped them to re-evaluate the choice between adoption or keeping the child, and given them peace of mind with the adoption decision.

After the meeting had taken place, birthmothers reported that their anxiety about signing consent to adopt had been considerably reduced. One respondent reported:

"I felt so badly about having to go and sign a piece of paper giving away my own child. It felt just like changing ownership papers of a car. It seemed so rejecting. How would the child ever understand? After I met the adoptive parents I felt I was no longer going to sign my baby away, but was doing something which was really important for all of us. I knew I would really miss her but at least I knew she was going to be really loved and cared for. I would at least know where she was and how she is getting on in life. She will know that I loved her so much that I did not want to lose contact with her and did not want her to grow up feeling rejected and an outcast."⁶⁹

7.94 The Commission supports the practice of the agencies in encouraging birth parents to meet with the adoptive parents they have selected from the agency files. Obviously, the parties need to be adequately prepared and supported before undertaking such a meeting in order to gain optimum benefit from the opportunity.

The provision of adequate post-adoption services

7.95 The majority of parties to an adoption, at some point at least, need the mediation and support skills of an appropriately qualified person or agency. This is particularly so at the start of an open adoption when the parties are establishing appropriate forms of relating to each other. But agencies may also be needed to help the adults involved respond to the changing needs of the adoptee. New parties may need to be factored into the agreement as time passes, such as a birth parent's new partner.⁷⁰

7.96 Providing these services, which include facilitating the exchange of photographs and letters, is a growing component of post-adoption support. Centacare Catholic Community Services recommended that adoption agencies continue to provide a high level of education, counselling and support to all parties with regard to the need for and value of openness in adoption.⁷¹

7.97 Barnardos Australia indicated that during 1993/94, 30 out of 74 children (40.5 per cent) involved in its adoption program required ongoing support from professional staff. This support was seen as critical for two reasons. First, the children referred to Barnardos are described as "hard to place" children because of behavioural difficulties, often involving a history within the welfare system. Post-adoption support is necessary to aid families in their decision to parent these children. It is also seen as vital in facilitating contact between the child and his or her birth family.⁷²

7.98 A study of birth parents' feelings about open adoption reveals the complex relationships between the parties to an open adoption arrangement. Some birth parents in this study described feelings of panic when letters were not received on time, periods of anger at seeing their child raised by someone else, uncertainty as to what to write in letters and fears of writing the wrong thing, thereby jeopardising contact.⁷³ Feelings of insecurity can result in misinterpretation of the actions of the other party, giving rise to tension between the parties. Each of these examples highlights the need for close and ongoing support from the adoption agencies.⁷⁴

As in foster care, access often needs continuing mediation or facilitation. While the goal is an arrangement directly between the parents, many want worker involvement initially and for some years after placement.

If the preferred contact is by letters and photos this too is usually mediated initially by the Agency. Open adoption is a growing component of post-adoption services.⁷⁵

7.99 Mediation by an agency can be used to resolve conflict over arrangements for openness that cannot be resolved by the parties themselves.⁷⁶ The advantages of mediation by an independent agency or post-adoption resource centre is that some distance is put between the issue of contact and the issue of the ability to parent the child.

7.100 It has been suggested that birth parents should have separate representation by social work services or voluntary sector organisations in negotiating an agreement for openness.⁷⁷ However, the danger in involving organisations outside of the adoptive agency is that an adversarial approach may be created. Perhaps it may be appropriate for the adoption agency to involve more than one social worker in the negotiation process, such as the social worker who has had involvement with the birth parents and the social worker who has dealt with the adoptive parents.

RECOMMENDATION 65

Agencies should continue to devote resources to post-adoption support, including provision of mediation services by appropriately qualified workers.

Birth parents' understanding of the adoption

7.101 Submissions and consultations with adoption workers revealed that it is crucial that birth parents understand that the adoption of their child will extinguish their parental rights and responsibilities. They will no longer be the child's parental carer. Birth parents need to be prepared for

the parent-child relationship between the adoptive parents and the child and the fact that a child's need to, or interest in, seeing a birth parent may vary throughout his or her childhood. Agencies reported that the best results with open adoption were achieved where arrangements were flexible enough to meet the growing needs of the child and where birth parents recognised the adoptive parents as the child's psychological parents.⁷⁸

7.102 It is particularly valuable for an older child to know that his or her birth parents are accepting and approving of the adoptive arrangement. This allows the child to attach to the adoptive parents and stimulates the positive aspects of open adoption arrangements for all parties. Obviously, birth parents need to feel genuinely that they have made the right decision in placing their child for adoption before they will be able to give the child the reassurance he or she needs.

7.103 Further discussion and recommendations in relation to this issue can be found in Chapter 5.

OPENNESS AND INTERCOUNTRY ADOPTION

7.104 Openness in adoption is equally important for children who have been adopted from overseas. Australia also has international obligations to facilitate as much openness as is possible in an intercountry adoption. These obligations arise under the *United Nations Convention on the Rights of the Child* and the *Hague Convention on Protection of Children and International Co-operation in Respect of Intercountry Adoption*. The issue of openness in the context of intercountry adoption is dealt with in Chapter 10.

FOOTNOTES

1. "Ruth McRoy (*Adoption and Fostering* Vol 15 No 4 at 103) has identified 33 subcategories in levels of openness in her American research, confirming the complexities of defining 'open adoption': New South Wales Department of Community Services *Submission* (5 September 1994) at 7.
2. Barnardos Australia *Submission* (26 July 1994).
3. Barnardos Australia *Submission* (26 July 1994).
4. Barnardos Australia *Submission* to Issues Paper 9 (6 September 1993). The research project was undertaken by a student placement at Barnardos Australia Adoption Program, 1991: C Raffo and L Johnson *Open Adoption: Research on the Views of Children, Adoptive Parents and Birth Parents* (November 1991) at 14-16. This paper appeared as Appendix 1 to the submission. See also L Moggach "Openness: Changing Practice, Changing Perceptions" in Proceedings of the Fifth Australian Adoption Conference *Has Adoption a Future?* (Post Adoptive Resource Centre, Sydney, 1995) 403.
5. Raffo and Johnson at 14-16.
6. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1993).
7. M Barnes "Perspectives from the Experience of Centacare Adoption Services" in Proceedings of the Fifth Australian Adoption Conference *Has Adoption a Future?* 394 at 396.
8. Barnes at 396.
9. New South Wales Law Reform Commission *Review of the Adoption of Children Act 1965* (NSW) (Discussion Paper 34, April 1994) at para 4.45-4.55.
10. NSWLRC DP 34 Chapter 4, Proposals 5 and 6.
11. E Berzins *Submission* (27 July 1994).

12. See, for example, T Blanton and J Deschner “Biological Mothers’ Grief: The Post-adoptive Experience in Open Versus Confidential Adoption” (1990) 49 *Child Welfare* 525.
13. Anglican Adoption Agency *Submission* (26 August 1994).
14. M Van Keppel “Openness in Adoption: Birth Parents and Negotiated Adoption Agreements” (1991) 15 *Adoption and Fostering* 85.
15. Van Keppel.
16. Van Keppel.
17. Anglican Adoption Agency *Submission* (26 August 1994).
18. B and F Peterie, *Submission* (14 July 1994).
19. Van Keppel “Openness in Adoption: Birth Parents and Negotiated Adoption Agreements”.
20. Van Keppel.
21. *Adoption Act 1994* (WA) s 46.
22. s 46(2).
23. s 46(5) and 55(2).
24. s 47.
25. s 49(a) and (b).
26. s 49(c).
27. s 49(d).
28. s 49(e). Such notice would be given under s 30.
29. s 55.
30. s 73.
31. s 72(1).
32. s 72(2)(a)(i).
33. s 72(2)(a)(ii). Under this section the Court can exercise its powers under s 47, 48 or 53 of the *Family Court Act 1975* (Cth).
34. s 72 (2)(b). The Court can punish the contempt by exercising its powers under s 88 (2), (4) or (5) of the *Family Court Act 1975* (Cth).
35. s 76(4).
36. s 76(4). An adoption plan that is varied in this manner is then enforceable under s 72(2): s 76(5).
37. Western Australia - Adoption Legislative Review Committee *Final Report: A New Approach to Adoption* (February, 1991) Recommendation 49, para (2) at 85.

38. Western Australia - Adoption Legislative Review Committee *Final Report* Recommendation 49, para (3).
39. Western Australia - Adoption Legislative Review Committee *Final Report* Recommendation 49, para (4).
40. Van Keppel "Openness in Adoption: Birth Parents and Negotiated Adoption Agreements" at 81-90.
41. Centacare Catholic Community Services (Adoption Services) *Submission* (11 August 1994).
42. C Amadio and S Deutsch "Open Adoption: Allowing Adopted Children to 'Stay in Touch' with Blood Relatives" (1983) 22 *Journal of Family Law* 59 at 84.
43. Amadio and Deutsch at 84.
44. Amadio and Deutsch at 86.
45. M Berstein, D Caldwell, G Bruce Clark and R Zisman "Adoption with Access or 'Open Adoption'" (1992) 8 *Canadian Family Law Quarterly* 283 at 294.
46. G Robinson *Submission* (26 July 1994); CONCERN for People with Infertility Problems NSW Inc *Submission* (2 August 1994).
47. Post Adoption Resource Centre on behalf of the Benevolent Society of New South Wales *Submission* (5 August 1994).
48. National Children's and Youth Law Centre *Submission* (29 July 1994). Provision for similar agreements, called "child agreements", already existed under the *Family Law Act* prior to amendments to s 63F.
49. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994).
50. E Berzins *Submission* (27 July 1994).
51. Barnardos Australia *Submission* (26 July 1994).
52. L Harvey *Submission* (2 August 1994). Pursuant to the *Adoption Information Regulation 1996* (NSW), once the adopted person is 18 years or older, the birth parent is entitled to receive from DOCS or a private adoption agency various pieces of information including as to the marriage or death of the adopted person: cl 8.
53. Western Australia - Adoption Legislative Review Committee *Final Report* Recommendation 48, para (4). See also the discussion at 83.
54. Under s 24 of the *Births, Deaths and Marriages Registration Act 1995* (NSW) the Registrar registers the memorandum of the adoption order sent to the Registry under s 61 or 63 of the *Adoption of Children Act 1965* (NSW).
55. The Registry has striven to achieve this uniformity believing this to be in the adoptee's best interests. For example, some adoptees have been refused British passports even though one of their adoptive parents are British citizens. The British High Commission has been alerted to their adoptive status by the form or appearance of the adoptees' birth certificates.
56. Barnardos Australia *Submission* (26 July 1994).
57. New South Wales Department of Community Services *Submission* (5 September 1994).

58. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994).
59. Barnardos Australia *Submission* (26 July 1994).
60. Anglican Adoption Agency *Submission* (26 August 1994). See also the Post Adoption Resource Centre on behalf of the Benevolent Society of New South Wales *Submission* (5 August 1994).
61. B and F Peterie *Submission* (14 July 1994).
62. B and F Peterie *Submission* (14 July 1994).
63. A Fish and C Speirs "Biological Parents Choose Adoptive Parents: the Use of Profiles in Adoption" (1990) 49 *Child Welfare* 129.
64. L Harvey *Submission* (2 August 1994).
65. *Adoption of Children Regulation 1995* (NSW) cl 33 and 34.
66. M Iwanek *A Study of Open Adoption Placements* (New Zealand, 1987) at 28-29.
67. J Fratter "Voluntary Agencies' Experience of Making Permanent Family Placements With Contact" in J Fratter, J Rowe, D Sapsford and J Thoburn (eds) *Permanent Family Placement: A Decade of Experience* (BAAF, London, 1991). See discussion of this study in M Adcock, J Kaniuk and R White *Exploring Openness in Adoption* (Significant Publications, England, 1993) at 8.
68. Iwanek *A Study of Open Adoption Placements* at 21-22.
69. Iwanek at 22.
70. See, for example, the results of birth family profiles in R McRoy, H Grotevant and K White *Openness in Adoption: New Practices, New Issues* (Prager, New York, 1988) at 87-108.
71. Centacare Catholic Welfare Services (Adoption Services) *Submission* (11 August 1994).
72. Barnardos Australia *Submission* (26 July 1994). See also Post Adoption Resource Centre on behalf of the Benevolent Society of New South Wales *Submission* (5 August, 1994). This submission makes the point that much of the anxiety experienced by adoptive families with regard to reunions could have been diminished if they had had access during the adoptee's childhood, or during certain critical phases, to specialised counselling or support.
73. Iwanek *A Study of Open Adoption Placements* at 25-26.
74. See for example P Stogdon and G Hall "Some Thoughts on Open Adoption" in Adcock, Kanuik and White *Exploring Openness in Adoption* at 74.
75. Anglican Adoption Agency *Submission* (26 August 1994).
76. A Burnell "Open Adoption: a Post Adoption Perspective" in Adcock, Kanuik and White *Exploring Openness in Adoption* at 88.
77. Burnell at 87.
78. For example, Anglican Adoption Agency *Submission* (26 August 1994).

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

8. Cultural Heritage

INTRODUCTION

8.1 The Commission's terms of reference require it to consider the relevance of ethnic and racial heritage for the purposes of adoption. This term of reference reflects a growing awareness of the significance of ethnic and racial heritage and children's rights to protection of them. Such awareness is evidenced in the international community by two United Nations instruments.

8.2 The *United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*¹ states in Article 24:

All due weight shall be given to both the law of the State of which the child is the national and the law of the respective adoptive parents. In this connection due regard shall be given to the child's cultural and religious background and interests.

8.3 The *United Nations Convention on the Rights of the Child* ("UNCROC")² provides in Article 20 that when considering solutions for care of children without family, including the option of 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.

8.4 In IP 9 and DP 34 the Commission used the terms "ethnic" and "racial" to initiate a discussion as to the importance of continuity of heritage in adoption placements. In research done since the release of DP 34, it has become increasingly obvious that "ethnic" and "racial" are difficult terms to use in a way that would be meaningful in the context of adoption. A better approach, and one the Commission has used in this report, is to focus on "cultural heritage". The reasons for this approach are set out under the heading "Definitions" (paragraphs 8.8-8.22).

8.5 This chapter examines the desirability of continuity in a child's upbringing and background, specifically in relation to "cultural heritage", and the weight to be given to "ethnic, religious, cultural and linguistic" continuity in adoption placements. Any such examination must start from the premise that the child's best interests should be treated as the paramount consideration in adoption arrangements. The question to answer, therefore, is whether it is generally in children's best interests to preserve their cultural heritage and to give children cultural continuity in any adoption placement. Endeavouring to answer this question necessarily involves an appraisal of the value of cultural heritage.

8.6 If it is found to be in children's best interests to preserve their cultural heritage, the next step is to determine how best to implement this principle in adoption placements and to reconcile it with a child's right to permanent care.

8.7 It should be borne in mind that the issue of continuity in cultural heritage is relevant to *all* children: every child has a cultural heritage; it is not a notion confined to an "ethnic minority" or a "racial minority".

DEFINITIONS

8.8 Whilst the Commission's terms of reference specifically refer to "ethnic and racial heritage", a better approach is to focus on "cultural heritage" for the reasons that follow. At first glance it may seem pedantic and unnecessary to trouble so much over semantics, but it will become apparent that there are substantive and significant reasons for doing so.

Racial heritage

8.9 "Race" has been defined as:

1. one of the great divisions of mankind with certain inherited physical characteristics in common (eg colour of skin and hair, shape of eyes and nose). 2. a number of people related by common descent.³

1. a group of persons connected by common descent, blood, or heredity ... 4. a group of tribes or peoples forming an ethnic stock ... 6. the distinguishing characteristics of special ethnic stocks.⁴

It is clear from the above, and definitions in other publications⁵, that race assumes a common ancestry or genetic line and that this is then manifested in physical characteristics.

8.10 It would be possible to treat racial heritage as an area of distinct focus in adoption but there are arguments against doing so.

8.11 Focusing on physical characteristics distracts from what is a more important focus, namely factors that contribute to a person's psyche and sense of self. Certainly, the colour of a person's skin, for example, contributes to a sense of self, but many more contributing factors will be contained in a person's cultural background. In any event, to what extent the sense of self comes from the physical trait itself as opposed to the culture surrounding shared physical traits is a matter for argument. For example, if a person belongs to a black community, his or her concept of self arguably comes from that "belonging" and identification with black culture as much as from actual skin colour.⁶ An analysis of race in isolation may mean that other important elements of a child's life are overlooked.

8.12 On the other hand, in the majority of cases, race and culture will be so inextricably linked that by focusing on cultural heritage a complete picture is formed: a person's race will not be able to be ignored and, as well, all other aspects of a person's cultural identity are included. Cultural heritage subsumes racial heritage.

8.13 And what of the cases where racial and cultural heritages have diverged? Is there something then to be gained by examining the two heritages separately? One can imagine, for example, a child of Greek ancestry born in Australia into a family which has become so completely Australianised that they have preserved nothing of the Greek culture in their lives. The child would identify with and derive his or her psyche from Australian culture. Cultural heritage rather than racial heritage is the significant contributing factor to that child's identity. At the same time, knowledge of his or her ancestry completes the child's sense of self and cannot be ignored. It is recommended, therefore, that "cultural heritage" be defined for the purposes of adoption legislation to include race as one of several factors to consider in understanding identity.

8.14 The above is an example of the situation where geographical dislocation has resulted in a certain ancestry being no longer of primary significance to a person's identity. This could also result from the coming together of different races to form one culture or the fragmenting of a race into different cultures. In these instances racial heritage alone does not give a full picture of aspects of a child's life that should be given due regard when considering adoption.

8.15 There is some overlap in the definitions of "racial" and "ethnic" and a blurring of the distinctions between the two. The definition of race set out above refers to "ethnic stock". "Ethnic" itself has been defined in terms of pertaining "loosely also to a race".⁷ In fact, the etymology of ethnic pertains to race. The use of the term "cultural heritage" rather than "racial heritage" or "ethnic heritage" eliminates potential confusion.

8.16 A focus on racial heritage may be misunderstood as a form of racism. A risk of this occurring became apparent from a number of submissions made in response to DP 34.

8.17 Children of "mixed race" present particular problems if the focus is on racial heritage alone. Rather than trying to classify the child racially, if one looks to the cultural background of the child's

family, and his or her cultural heritage, proper weight will be given to the formative influences on the child's identity.

8.18 In England it has been argued, in relation to dark-skinned children of mixed ancestry, that the concept of mixed race causes confusion because:

it can lead [transracial adopters] to believe that such children are racially distinct from other blacks. Consequently, they may neglect the child's need to develop a balanced racial identity and thereby a well-integrated personality ... Certainly, [these] mixed-race children are regarded as black by society and eventually the majority of such children will identify with blacks, except in instances where reality and self-image have not merged.⁸

If the child's *cultural* background is looked at, that is whether or not the child has been born into, for example, a black culture, such confusion and even misunderstanding can be avoided.

Ethnic Heritage

8.19 "Ethnic" has been defined as:

1. of a racial group.⁹

1. pertaining to or peculiar to a population, esp. to a speech group, loosely also to a race.

2. referring to the origin, classification, characteristics, etc, of such groups.¹⁰

concerning nations or races: pertaining to gentiles or the heathen; pertaining to the customs, dress, food, etc of a particular racial group or cult; belonging or pertaining to a particular racial group.¹¹

2a. relating to community of physical and mental traits possessed by the members of a group as a product of their common heredity and cultural tradition; b. having or originating from racial, linguistic and cultural ties with a specific group.¹²

8.20 The term "cultural heritage" is to be preferred to "ethnic heritage" for the following reasons:

From the above definitions, the overlap between the concepts of "ethnic" and "racial" is again apparent. The distinctions between the two can be very fine. There is also an overlap between the definitions of "ethnic" and "cultural". These convergences of meaning can be confusing. Added to this, the term "ethnic" standing alone is somewhat imprecise and variously defined.

In Australia, "ethnic" has taken on a particular flavour which has tended to narrow its meaning. It is often used in relation to migrants whose native language is not English, and, even more particularly, it often refers to European migrants. The use of descriptions "ethnic music" or "ethnic food" conveys a particular understanding in Australia. Colloquially, "ethnic" can even refer (and sometimes derogatorily) to "those who seek an older and more simple lifestyle, usu[ally] involving the practice of handicrafts and supposed folk ways"¹³ or to something "odd [or] quaint"¹⁴ or "foreign (or) exotic".¹⁵ It has even been defined as "originating in an exotic primitive culture".¹⁶

Focusing on "ethnic heritage" rather than "cultural heritage" also tends to obscure the reality that *all* groups in Australia, whether they be Anglo-Saxon, Aboriginal, Vietnamese, Italian, or whatever other group, have a cultural heritage.

The concept of "cultural heritage" can not only embody the concept of "ethnic heritage" but also offer a subtle and desirable shift in focus towards the sociological factors uniting a community with less emphasis on physical, racial characteristics.

Cultural heritage

8.21 “Culture” has been defined as:

2. the customs and civilisation of a particular people or group.¹⁷

7 *sociol.* the sum total of ways of living built up by a group of human beings, which is transmitted from one generation to another.¹⁸

5b: the body of customary beliefs, social forms, and material traits constituting a distinct complex of tradition of a racial, religious, or social group.¹⁹

8.22 The use of the word “culture” in this context is not to be confused, as some submissions have done, with “culture” in the sense of higher civilization.

RECOMMENDATION 66

“Cultural heritage” should be defined, for the purposes of the legislation, to include:

“beliefs, morals, laws, customs, religion, superstitions, art, language, diet, dress and race”.

In so recommending, the Commission stresses that it is not promoting a definitive concept of “cultural heritage” but one that is appropriate in the specific context of adoption.

VALUE OF CULTURAL HERITAGE

8.23 In summary, there is a growing awareness that having regard to a child’s racial, ethnic, religious, cultural and linguistic background is important when considering the care of a child. In the use of the term “cultural heritage”, the Commission has sought to develop a definition which encompasses all these aspects while avoiding over-emphasis on any one aspect, and which eliminates potential confusion. As to whether it is in the child’s best interests to provide for continuity of his or her cultural heritage in adoption placements involves an appraisal of the value of cultural heritage.

Research

8.24 To a large extent, an assessment of the value of cultural heritage will come from an evaluation of the advantages of cultural continuity, or, approaching from the other side, an evaluation of the effects of disruption to cultural continuity. One needs, therefore, to examine research into the outcomes of transcultural placements, both intracountry and intercountry.

8.25 Studies of the outcomes of transcultural placements must be approached with some caution as research methods (including reliance on tests and questionnaires) may be inadequate in addressing adoptees’ quests for answers to such nebulous questions as “who am I?” and “where do I fit in society?” Among many researchers there is now an increasing awareness that “people’s behaviour is less determined by objective facts than by their own perceptions and how they construe reality”.²⁰ Both Harper and Ahlijah also refer to the likelihood of families who had a “good adoption” being more ready to respond to a questionnaire and therefore being over-represented.²¹

Australian research

8.26 The majority of transcultural placements in Australia have taken place as a result of intercountry adoptions since the mid-1970s. These children are mostly “in the early years of high school, and younger, and as yet the long-term effects and adjustments have not been monitored”.²² Whether it be for this or other reasons, there is a dearth of research material in Australia into the importance of cultural continuity to a child’s identity and self-esteem.

8.27 *Successful cross-cultural adoptions.* Studies by Harper,²³ Calder²⁴ and Harvey²⁵ of families who have adopted cross-culturally found that the adoptions were successful at the time of writing. However, optimism should be tempered by having regard to the following:

initial difficulties were experienced in the adoptions, lasting up to two years;

the “parents’ attitude to the child’s racial past and their commitment to keeping alive the cultural heritage through a continuing process of acculturation”²⁶ are significant factors in regard to the child’s adjustment;²⁷ and

the adoption of children aged three years or older had a much lower success rate (62% as compared with 95% for children under three years of age).

8.28 *Identity formation.* Harvey states that “[i]dentity formation is crucial to future well-being”.²⁸ While supporting adoption of a child of another race and culture by suitable adoptive applicants, he is cautious about the effects of transracial adoption in relation to issues of identity formation. He says:

it will be for future research to determine final outcomes in terms of satisfactory identity formation of these transracially adopted children. Recent research has suggested that transracial and transculturally adopted children may be inherently developmentally and psychiatrically vulnerable (Kim 1980).²⁹

8.29 Chema, Farley, Oakley and O’Brien³⁰ argue for the importance of cultural continuity on the basis that “[a] child cannot ‘exist’ unless he has a past, and he cannot have an identity unless it is continuous.”³¹

Overseas research

8.30 In applying overseas research to Australia one must bear in mind the differing conditions which exist in the USA and Europe as compared with Australia. Triseliotis makes the point that “there are many dangers in extrapolating and transferring research findings from one country to another, especially on social identity formation. This is because the process of social identity formation is largely, though not exclusively, rooted in social and environmental processes which differ from country to country”.³² A certain amount of wisdom on whether or not it is in the child’s best interests to maintain cultural continuity can nonetheless be extracted from the research.

8.31 *Successful cross-cultural adoptions.* Studies by Ahlijah,³³ McRoy, Zurcher, Lauderdale and Anderson³⁴ and Gill and Jackson³⁵ of families who have adopted cross-culturally, and an analysis of a body of research by Triseliotis,³⁶ concluded that the adoptions studied were successful. Once again, however, certain qualifying factors need to be noted:

Ahlijah’s study was based on the responses of adoptive parents who made their own assessments of their adoptions;

Triseliotis found that the children initially displayed developmental, linguistic and behavioural difficulties; he found that more persistent problems were associated with older age on arrival: “[t]he older the children on arrival the more consistent and persistent were the problems”;³⁷ and

Gill and Jackson’s conclusion of “success” has been criticised on the basis that the children’s coping methods were based on denying their racial background: “[i]f a healthy personality is to be formed the psychic image of the child must merge with the reality of what the child actually is”.³⁸

8.32 *Identity formation.* Triseliotis notes that the studies he analysed

suggested certain concerns about the children’s racial and ethnic identification, especially as they moved towards adolescence and away from the protectiveness of their families.

These studies found that the children lacked ethnic identity and many black children perceived themselves to be 'white' in all but skin colour.³⁹

Similarly, McRoy, Zurcher, Lauderdale and Anderson found that the development of a positive sense of racial identity was more difficult in transracial than in intraracial adoptions.

8.33 More recently, McRoy, in research undertaken on his own, has observed that:

[i]dentity development is a complex task for all young adults, but it is especially complex for youth who look differently from their other family members and peers ... Children as young as three become aware of racial differences and soon are able to understand the significance society places on those differences⁴⁰ ... [A]doption agencies should consider cultural compatibility between families and children in making adoption decisions. [W]hen inter-country placements seem to be in the best interests of the child, consideration should be given to finding a family in a country which is culturally more like the child's birth country. The child should not be forced to find ways to adapt - to have to minimise cultural, racial and physical differences.⁴¹

8.34 Tizard reviews a large body of research of transracial (principally intercountry) adoptions and, in relation to issues of identity, summarises that:

the young people do face a major task in establishing for themselves a satisfactory ethno-cultural identity, which links together their upbringing, their physical appearance, and their heritage from their country of origin.⁴²

8.35 Thoburn and Charles likewise review a large body of research of transracial, (principally intercountry) adoptions and summarise the studies as follows:

The majority of children (around 80 per cent) will do "well-enough" although issues of racial, cultural and personal identity are likely to be problematic for a substantial minority, and their educational performance is likely to be below that of other (mainly middle class) adoptees and non-adopted children. Being older at placement, having a history of trauma or physical ill health increase the risk of emotional problems ... [P]roblems are most likely to show themselves in adolescence, and are likely in a minority of cases to be severe and extremely difficult for families and professionals to handle. An unknown proportion of these 80 per cent or so who are generally satisfied by the adoption experience will nevertheless have problems around the issue of identity which may last throughout their lives.⁴³

8.36 Reich states that:

[m]ost adopted children and adults struggle to make sense of the gaps at the core of their identity. [Culturally] [t]ransplanted children are at an even greater disadvantage - they will need as much information as possible to anchor them to reality. Current knowledge confirms that adopted children generally feel more at ease if they resemble their parents physically, intellectually and temperamentally. The greater the disparity between a child's background and upbringing, the more risk there is of producing a sense of dislocation in adolescence and adulthood.⁴⁴

8.37 Melina⁴⁵ makes the point that children being raised within their culture will develop a positive sense of cultural identity naturally. But children who are 'different', and know they are different, need to know that their difference does not make them inferior.⁴⁶

8.38 *Culture shock*. Culture shock occurs when an individual loses the familiar signs and symbols of social intercourse by which they have oriented themselves: the words; gestures; expressions; customs; and social norms. Research has postulated that this is what is suffered by cross-cultural adoptees.⁴⁷ Not only does a cross-cultural adoptee, including those previously in institutional care, suffer losses of

specific relationships or significant objects, they also suffer the loss of a host of important variables ranging from food to weather patterns. The loss may be followed by grief and mourning.⁴⁸

8.39 Harper summarises a large body of research⁴⁹ and concludes that there is “a massive socio-cultural adjustment for the child” and that the child may suffer “another separation, another loss, being moved from a familiar place, language and culture to an unfamiliar strange one”.⁵⁰

8.40 *Transience of adjustment problems.* Kim⁵¹ and Ressler, Boothby and Steinbock⁵² have emphasised the transience of adjustment problems and highlighted the resiliency and capacity of the children to adapt to the behavioural, linguistic and cultural demands of their new home and community.

Pronouncements and practice

8.41 It has been concluded in many spheres that cultural heritage has value and that cultural continuity should be preserved in a child’s life. Evidence of this is contained in the statements of the United Nations and of various bodies charged with either examining adoption practice or adoption administration, in legislation and in practices followed by local and overseas adoption agencies and by some cultures. Examples of these are set out below.

8.42 *United Nations view.* One interpretation of Article 20 of UNCROC is 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. This seems to be a valid interpretation. The Preamble to UNCROC notes that the State Parties to UNCROC have agreed to the Articles therein “taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child”. In other words, it reaffirms the importance of respect for the cultural values of the child’s community.

8.43 *Practices of adoption agencies.* DOCS demonstrates an assumption of the value of cultural heritage and the desirability of cultural continuity in its approach to adoption placements. It currently aims to provide cultural continuity by trying to maintain a pool of adoptive parents with similar ethnic, cultural, religious and racial heritage to the children who are being relinquished for adoption.

8.44 As far as transracial placements are concerned, the British Agency for Adoption and Fostering (“BAAF”), holds the view “that the placement of choice for a black child is always a black family.” The rationale for this policy is that:

[b]lack families can offer [black] children an added dimension, over and above a loving environment, covering such things as continuity of experience, contact with the relevant community, understanding of and pride in the child’s particular inheritance, and skills and support in dealing with racism.⁵³

Hammond, Director of BAAF, also makes the point that:

[w]hile it is undoubtedly true that love knows no racial boundaries - capable adoptive and foster parents, irrespective of their ethnicity, provide loving and caring environments for children in their care ... our concern is for the wider needs of black children, which often only become significant as they grow older and start to separate from their families.⁵⁴

8.45 *Adoption reviews: statements and recommendations.* The Adoption Legislative Review Committee of Western Australia recommended that, in placing children from overseas for adoption, first preference should be given to placing the child with a family “who share a similar ethnic and/or cultural background to the child”.⁵⁵

8.46 In 1992 the Intercountry Adoption Standing Sub-Committee presented to the Standing Committee of Social Welfare Administrators a paper setting out adoption principles. Principle 12 states “the child should preferably be placed in a culturally/ethnically appropriate placement”. On the recommendation of the Standing Committee, the Council of Social Welfare Ministers endorsed this

principle.⁵⁶ The 1995 *Draft National Minimum Principles in Adoption* states that “[a]doption arrangements should recognise Aboriginal customary law and ethnic and racial heritage”.

8.47 The Australian Catholic Social Welfare Commission has urged the Government to adopt a policy that every child placed for adoption shall be placed with adoptive parents of the same ethnic and cultural background as the child.⁵⁷

8.48 The United Kingdom Adoption Law Review (“the Review”) states that:

there is a wide acceptance that racial and cultural origins are important factors which cannot be ignored in the placement and upbringing of children.⁵⁸

It notes that the *Children Act 1989* (UK)⁵⁹ requires local authorities, when making decisions relating to children, to have regard to the child’s religious persuasion, racial origin and cultural and linguistic background.

8.49 The Review refers to key studies in the Netherlands, Denmark, Norway, Sweden and West Germany and analyses results on intercountry adoptions (see paragraph 8.35). It suggests that, as far too little is known about risk factors to give a clear profile of the successful adopter or adoptee, every placement should be handled with great care in order to minimise risks. The Review concludes that:

[i]n the great majority of cases, placement with a family of similar racial origin and religion is most likely to meet a child’s needs as fully as possible.⁶⁰

8.50 The International Social Service (an independent, non-government social work agency based in Geneva) published a statement in its 1986 report *Intercountry Adoption* that the ideal option is for a child to remain with his or her family of birth. The second preference is for the child to stay in the country of birth.

8.51 In 1972, the National Association of Black Social Workers in the United States protested against transracial adoptions indicating 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.⁶¹

8.52 *Practice in other countries and cultures.* In the Islamic culture adoption has been abolished, although fostering is encouraged as a way of providing care for children. However, even with foster care, first priority is given to placing the child with a Muslim family. Placing a child with a non-Muslim family, albeit sensitive to the Muslim culture, is seen as a last resort. Muslim society feels that placing a Muslim child with a non-Muslim family is less than ideal because of the different morality, ethics, dress code and dietary requirements of the Islamic culture. Further, Islamic religious education is extremely important and is given through day-to-day guidance; it is an inseparable part of normal living in Muslim society. Muslims feel that if a child is placed outside the culture the child will become confused and feel a sense of shame at expressing his or her identity.⁶²

8.53 Some countries, for example Poland, Hong Kong, India, Fiji and the Philippines, give priority to applicants of the same cultural origin as the child to be adopted in their intercountry adoption programs.

8.54 *Legislation.* In the United States the *Indian Child Welfare Act 1978* encourages the placement of American Indian children in American Indian Families.

Arguments raised against a need for cultural continuity

8.55 It has been argued that a child adopted from a Third World country loses nothing by way of cultural heritage; that the child in poverty stricken circumstances has no access to culture; that there is no culture in institutional life.

8.56 It is possible that in this argument there is a degree of mistaking “culture” in the sense of “higher civilization” with “culture” in the sense of roots and fundamental identity. In any event, it does not allow for any connection between identifying with a certain cultural (including racial) background, a sense of “belonging” or of not feeling “different”, self-concept, security and self-esteem. Even children in institutions are surrounded by the familiar manifestations of a shared culture, by which they have oriented themselves. In saying this, it is not intended to place a value on same-culture institutional life above that of different-culture home life; the issue being addressed here is strictly to assess the value to children of their cultural heritage and the value of maintaining the continuity of that heritage.

8.57 It has also been argued that it is not relevant to look at the value of cultural heritage in relation to babies because a baby has no cultural heritage: cultural heritage is viewed as something learnt from the total environment after birth.

8.58 Obviously babies do not have great awareness of their culture but they have some awareness which, in the short term, can result in their experiencing adjustment trauma, the extent of which will depend, inter alia, on how dramatic is the change in environment:

Even though a baby is not talking or responding to verbal instructions, she is hearing new words and new sound patterns. She may have moved from a humid, tropical climate to a cool, dry one. Because of differences in foods, the adoptive parents may have different body and breath odours than the child’s previous caretakers. And the foods the baby is given may taste remarkably different from the ones she is used to.⁶³

8.59 In Korea, for example, a baby often sleeps on a mattress on the floor with other members of the household. Being placed in a cot in a room alone to sleep would be an adjustment for that child. Different cultures may have widely varying methods of child care than those to which a baby has been accustomed.

8.60 But more importantly, the loss of cultural heritage as a baby may become significant in the later quest for identity and a sense of self:

[T]he foreign-born child adopted as an infant may go through [stages of grief for loss of her country and culture] when she is old enough to understand that her racial or ethnic background sets her apart from others.⁶⁴

Not only may that child grieve for something lost but may feel a sense of incompleteness in his or her identity having lost his or her natural cultural environment.

8.61 An extension of the argument that no-one is born with a culture, is the argument that:

[c]ulture is essentially a personal interpretation of the interaction of one’s own personality with past events and experiences ... it is not something that exists *per se* but something that develops within the course of events throughout a particular person’s life.⁶⁵

8.62 This view of “culture” does not align with the Commission’s definition of culture. It is placing a great emphasis on the personal as opposed to a *heritage* common to a community. In the latter sense, a person *is* born into a culture and with a cultural heritage and has a sense of belonging by reason of this shared heritage. It is even arguable that persons with a shared cultural heritage also share genetic and tangible personality traits. The Romanians, for example, evidence this belief by their expressed desire that if there is no alternative but for children to be adopted abroad, that they be placed with French and Italian families with whom they will be more culturally compatible. “Romania is predominantly a Latin culture, and this affects language, religion, physical appearance and temperament.”⁶⁶

8.63 The concern has been raised that the only alternative to finding a child a home in another culture or another country is leaving them to die or, at best, leaving them to live out childhoods in institutions and then to be turned out on the streets.

8.64 Obviously this is not an argument against the value of cultural heritage *per se*, but an argument of priorities. While this issue is dealt with more fully in Chapter 10, "Inter-country Adoption", one point can be made here. If it is truly the only alternative, then the child's right to permanent care must take priority over any value attributed to continuity of cultural heritage. However, in the Commission's recommendations it will be seen that the possibility of finding an intracultural placement would be explored first before placing the child transculturally.

8.65 In submissions to the Commission and in the media it has been contended:

that any arguments the end result of which are the denying of an overseas born child a better life are racist in themselves ...⁶⁷

This contention seems to misconstrue motivations for challenging the wisdom of transcultural placements. A reading of the various studies and writings which express concerns about transcultural placements display no evidence of an underlying racism or racial antagonism. On the contrary, they are wholly concerned with the outcome for children who must make major cultural adjustments. The motivation is not to exclude children of one race from entering the family of another (usually white) race but to give the highest priority to the best interests of the child. Furthermore, in questioning the wisdom of transcultural placements, it is being acknowledged that the child's own cultural background has significant value.

8.66 An extension of the racism contention, raised in some submissions, was that any argument against transcultural placements was against the Australian spirit of multiculturalism, and conversely, that transcultural placements would foster multiculturalism. The simple answer to this is that the best interests of the *child* must be the paramount consideration. Any other consideration is ancillary.

8.67 In any event, multiculturalism is about the coexistence of communities; it is not about assimilation of other cultures into the Australian culture. The adoptee needs to adjust to his or her new culture in order to make a successful transition. Thus, although the adoptive family will endeavour to preserve his or her cultural heritage, to a large extent he or she is assimilated into the Australian culture. Also, the number of transcultural placements are simply not high enough practicably to foster multiculturalism. The reality is that the child and his or her family will be living as a minority with the attendant difficulties of that position. Inter-country adoption isolates a child from his or her own culture and requires him or her to adjust to, and live as a minority in, a foreign culture. Is it an offence against the spirit of multiculturalism to query whether this is in the child's best interests? In this context, it is also important to guard against assuming an (essentially racist) attitude that life in Australia is intrinsically better than life in a Third World country (excluding life in an institution).

8.68 In some cultures, such as in Thailand, adoption is not an acceptable concept at all and in other cultures adoption of disabled children is not acceptable. Therefore, in these circumstances often the only alternative for a child in need of care is a transcultural placement. The Commission does not recommend the prohibition of transcultural adoption. The Commission does recommend, however, that the possibility of an intracultural placement be explored first, and failing that, that placement within a culturally compatible family be considered. The third priority would be to place the child with a family able to foster links with the child's heritage and assist the child to develop a positive identity.

Arguments in favour of cultural continuity

8.69 Placing children in need of care within their own culture minimises the possibility of their being subjected to racism. Racism is, regrettably, still a feature of human relations.⁶⁸

[E]ven in tolerant, open Australia, acts of discrimination, harassment, incitement and violence against foreigners, Aborigines, Asians, Arabs, Jews, Muslims - against any number of ethnic groups - are, if not exactly common, hardly exceptional either. And there is some evidence to indicate they are increasing.⁶⁹

Most transracially adopted children encounter prejudice in the form of teasing, comments, or insults. A few experience more violent racism or nationalism. And the teasing and insults can come both from white children who view minorities as inferior, and from members of the child's own ethnic group, who view the child living with a white family as disloyal to his race or ethnic group.⁷⁰

8.70 It seems that the images we develop about ourselves are considerably influenced by the way others see us. In effect, our self-concept is partly based on the perception of others which in turn affects where we think we fit in society.⁷¹ A sense of spoiled identity can develop from the receipt of consistently negative messages, such as those embodied in racist remarks and conduct.⁷²

8.71 Transracially adopted children are often knowledgeable about their cultural origins and proud of them but unprepared for what it feels like to be a member of a minority group. Parents may make a great effort to acquaint their children with their cultural backgrounds but are often unaware that this is not enough to prepare the children for racial discrimination and prejudice. Parents who are not members of a minority group themselves may not understand the implications or importance of race to those who are.⁷³

8.72 Furthermore, as the child:

moves away from parental protectiveness towards adulthood, then community attitudes assume much greater importance, and if hostile and rejecting can prove devastating to the self.⁷⁴

Dalen and Saetersdal noted that:

the shield their adoptive family provides during their childhood is torn apart when they come into their teens and must face many situations on their own ... Their identity is constantly questioned.⁷⁵

8.73 Small makes the point that, in a society which is hostile and oppressively racist to black people:

the black family has to develop coping mechanisms which allow the group to maintain dignity and self-respect and which help the family to survive in a psychologically healthy way. These survival mechanisms of the black family have to be extended to the black community generally in its economic life, education and social relations. These experiences are outside those of white society. Consequently most white families are ill-equipped to provide the environment to prepare the black child for the tremendous task ahead.⁷⁶

8.74 The moves in favour of open adoption provide a justification for ensuring continuity of cultural heritage. Under the *Adoption Information Act 1990* (NSW), adopted children have the opportunity of making contact, and forming relationships with, their birth families once they have turned 18 years of age. A child placed intraculturally, or even in a closely related culture, will possibly find it easier to relate to his or her family of origin in later life than a child who has been brought up in a different culture. Aboriginal people placed with non-Aboriginal families as children have commented on the difficulty and stress they experienced relating to their birth families.⁷⁷

8.75 A woman whose birth father is Malay Chinese and who was adopted by Latvian/Australian parents has written of the difficulties for her of having an appreciation of her cultural heritage with her birth father as it is a culture about which she knows nothing.⁷⁸ Further, it is likely that in open adoption the adoptive parents and birth parents will have contact with each other during the adoptee's childhood. Similarity in the cultural backgrounds of each will facilitate an understanding of, and empathy for, each family for the child's benefit.

8.76 Transcultural placements which involve a change of language may give rise to problems, not only for older children who are already speaking in their own language but for babies who are absorbing

language in readiness to vocalise that learning. Parents who adopt children from a culture which does not share their language are hindered in helping their child through the adjustment period by the language barrier:

The tremendous desolation and loneliness the older child must experience before he or she gradually begins to understand this new language means another extra strain in an already difficult situation.⁷⁹

8.77 Dalen and Saetersdal found that although the children in their study had picked up their new language rapidly, it was not recognised that the children lacked a deeper semantic understanding which later caused difficulties at school.⁸⁰ Moreover, it has been postulated that:

with the loss of their mother-tongue there [may be] ... loss of ... memories because there is no-one who can validate what has happened to them.⁸¹

8.78 Some children adopted transculturally may feel like members of their immediate families but not of their extended families. Because they do not share any historical, genetic or cultural heritage and have never lived with the extended family, they may not feel as if they are valid members of their "clans". Identification with, and feeling of belonging to, the extended family may come more readily if cultural heritage at least is shared. This process gives the adopted child the opportunity of developing valuable relationships with grandparents, aunts, uncles or cousins.

8.79 If a breakdown in a transcultural placement occurs the situation can be worse for children in a different culture from their own:

Coming to another culture results in most cases in loss of the mothering tongue and all the uncommunicable memories associated with it together with loss of the original sense of self identity. If breakdown then occurs the child is again adrift, having lost his/her adoptive family and the experiences shared with them, as a result there is likely to be a reactivation of all the feelings attached to the earlier losses so the sense of worthlessness and isolation is compounded and the fragile sense of identity further eroded.⁸²

8.80 In the context of a discussion concerning the "reactions of vulnerability and disillusionment to" loss of significant personal relationships, Harper comments:

How much worse it must be for a child, particularly one with minority racial characteristics, who has it seems attempted to adapt to another culture and failed.⁸³

CONCLUSION

8.81 It does not seem possible to put a quantitative value on cultural heritage or continuity of cultural heritage. It is generally accepted that cultural heritage *has* value and this is enshrined in both legislation and international conventions. All submissions to the Commission in relation to cultural heritage, whilst diverging in arguing for or against transcultural placements, began with the premise that a child's cultural heritage was something of value.

8.82 There is sufficient research to show that transcultural placements can be successful to preclude prohibition of such placements.

8.83 However, there is also a good deal of research which indicates that, no matter how well a child may ultimately adjust, he or she may well go through "culture shock", difficult periods of adjustment and stages of grieving, anger and frustration. Some may never adjust. Some may adjust well throughout childhood only to begin to feel marginalised as they move into adolescence and adulthood and away from the protection of the family. There is also insufficient long-term research to predict confidently the outcomes of transcultural placements. In these circumstances it would seem to be in the child's best interests not to place upon the child the burden of cultural adjustment, in addition to any general burdens of being an adoptee, if this can be avoided.

8.84 Further, transcultural placements carry with them the possibility of the child being subjected to racism, may make open adoption more difficult and a breakdown in the placement more traumatic.

8.85 Therefore, the child's right to permanent care must be reconciled with the clear value of cultural continuity. This can best be achieved by putting into place a hierarchy of placement options.

IMPLEMENTING CULTURAL CONTINUITY IN ADOPTION PLACEMENTS: A CULTURAL HERITAGE PLACEMENT PRINCIPLE

8.86 It will be seen in Chapter 9 that there is already in place in relation to placements of Aboriginal children into foster care an Aboriginal Child Placement Principle⁸⁴ which seeks to provide, where possible, for continuity in the child's cultural heritage. The Commission recommends that, similarly, an order of priorities be applied to every placement to endeavour to preserve continuity in the cultural heritage of every child.⁸⁵ For ease of reference this could be termed the Cultural Heritage Placement Principle.

RECOMMENDATION 67

Legislation should require DOCS or the agency to take all reasonable steps to establish the cultural heritage of the child to be adopted.

RECOMMENDATION 68

A Cultural Heritage Placement Principle should be applied to every placement for adoption. The Cultural Heritage Placement Principle should take the following form:

When a child in need of permanent care is to be placed outside his or her birth family, then the order for priority of placement should be:

with an applicant or applicants of the same cultural heritage as the child;

with an applicant or applicants of a similar or compatible cultural heritage as the child;

with an applicant or applicants of a different cultural heritage from the child, who has or have demonstrated:

the capacity to assist the child to develop a healthy and positive cultural identity;

a willingness to learn about and teach the child about his or her cultural heritage;

**a willingness to foster links with that heritage in the child's upbringing;
and**

the capacity to help the child should he or she encounter racism or discrimination in school or in the wider community.

8.87 It is recognised that problems with implementation of the above approach may arise because of a shortage at a particular time, in the adoption "pool", of prospective adoptive parents with the same cultural background as a child in need of care.⁸⁶ However, just because there are potential difficulties, it does not mean that there should not be put in place a hierarchy of options *at all*. Any placement dilemmas which arise should be accommodated within the general principle that a child's cultural heritage is valuable and continuity of that heritage should be preserved where possible.

8.88 Should birth parents be able to request that their child *not* be placed in a family of the same cultural background as themselves? Birth parents should be entitled to express their wishes in this regard, although any such request should be a matter for consideration by the Court. Ultimately the child's best interests must prevail. If it was thought to be in the child's best interests, in the particular circumstances of the case being considered, that the child not be placed intraculturally, then the Court should have the discretion to make an order placing the child transculturally, in accordance with the second and third levels of the hierarchy of options.

FOOTNOTES

1. Adopted by the General Assembly of the United Nations in 1986.
2. Adopted by the General Assembly of the United Nations on 20 November 1989 and ratified by Australia on 22 August 1991.
3. *The Everyday Oxford Dictionary* (OUP, Oxford, 1981).
4. *The Macquarie Dictionary* (2nd ed, Macquarie Library, NSW, 1991).
5. *The Oxford Dictionary of English Etymology* (OUP, Oxford, 1966); *Chambers English Dictionary* (CUP, Cambridge, 1988); *Webster's Third New International Dictionary* (Merriam-Webster, USA, 1986).
6. J Triseliotis "Inter-country Adoption: A Brief Overview of the Research Evidence" (1991) 15 *Adoption and Fostering* 46 at 48-49.
7. *The Macquarie Dictionary*.
8. J Small "Trans-racial Placements: Conflicts and Contradictions" in S Ahmed and J Cheetham (eds) *Social Work with Black Children and their Families* (Batsford, London, 1986).
9. *The Everyday Oxford Dictionary*.
10. *The Macquarie Dictionary*.
11. *Chambers English Dictionary*.
12. *Webster's Third New International Dictionary*.
13. *The Macquarie Dictionary*.
14. *The Macquarie Dictionary*.
15. *Chambers English Dictionary*.
16. *Webster's Third New International Dictionary*.
17. *The Everyday Oxford Dictionary*.
18. *The Macquarie Dictionary*.
19. *Webster's Third New International Dictionary*.
20. J Gray and R Cox "Evaluating the Diploma in Social Work" *Report to CCETSW* (1991) quoted in Triseliotis "Inter-country Adoption: A Brief Overview of the Research Evidence" at 46.
21. F Ahlijah "Intercountry Adoptions: In Whose Interest?" dissertation submitted for the degree of MSc, Oxford University (1990); J Harper "Love is not Enough: Breakdown in Intercountry

Adoption" paper presented at *Inter-Country Adoption Workshop* (NSW Committee on Adoption, Sydney, October 1985).

22. M Frith "For the Love of a Child" *Canberra Times* (26 November 1994) at C1.
23. J Harper "Intercountry Adoption of Older Children in Australia" (1986) 10 *Adoption and Fostering* 27: study of 27 Australian families who had adopted older (defined as four years and over) children from overseas. Harper qualifies her findings with the observation that the sample was too small and skewed to make generalisations about outcomes.
24. R Calder "Families for Children: A Study of the Adoption Experiences of Older Age Foreign Born Children and their Australian Families" in G P Mullins (ed) *The Year of the Child: International Responsibilities*, Proceedings of the Public Seminar at University of Adelaide, Publication 67, (Department of Continuing Education, University of Adelaide, May 1979) at 59. (Small qualitative study of six Australian families with older aged intercountry adoptions.)
25. I J Harvey "Australian Parents for Vietnamese Children: a Social-psychological Study of Inter-country Adoption in Australia" (Thesis, School of Behavioural Sciences, Macquarie University, October 1980); "Transracial Adoption in Australia" (1982) 6 *Adoption and Fostering* 43: follow up study of 102 Vietnamese children, placed in 93 families in New South Wales.
26. J Harper "Inter-country Adoption of Older Children in Australia" at 30.
27. Harvey notes this factor as a "willingness to teach the child his identification with racial heritage": "Transracial Adoption in Australia" at 48.
28. Harvey "Transracial Adoption in Australia" at 48.
29. I J Harvey "Adoption of Vietnamese Children: An Australian Study" (1983) 18 *Australian Journal of Social Issues* 68, citing S P Kim "Behavior Symptoms in Three Transracially Adopted Asian Children: Diagnosis Dilemma" (1980) 59 *Child Welfare* 213 at 213-24.
30. R Chema, L Farley, F H Oakley and M O'Brien "Adoptive Placement of the Older Child" (1970) 49 *Child Welfare* 450.
31. Chema, Farley, Oakley and O'Brien at 451.
32. Triseliotis "Inter-country Adoption: A Brief Overview of the Research Evidence" at 46.
33. Ahlajah "Intercountry Adoptions: In Whose Interest?"
34. R G McRoy, L A Zurcher, M L Lauderdale and R N Anderson "Self-esteem and Racial Identity in Transracial and Inracial Adoptees" (1982) 27 *Social Work* 522.
35. O Gill and B Jackson "Transracial Adoption in Britain" (1982) 6 *Adoption and Fostering* 30.
36. R McRoy and L Zurcher *Transracial and Inracial Adoptees* (Charles C Thomas, Springfield, Illinois, 1983): McRoy and Zurcher found no relationship between measures of racial identification and self-esteem; but a follow up study found that children growing up in a racially dissonant context tended to experience an exaggerated feeling of differentness: McRoy and Zurcher "The Identity of Transracial Adoptees" (1984) 65 *Social Casework* 1. Triseliotis asks "[h]ow can a child experience an exaggerated feeling of 'differentness' without affecting his or her self-esteem?": "Inter-country Adoption: A Brief Overview of the Research Evidence" at 49. C Bagley "Chinese Adoptees in Britain: A Twenty Year Follow-Up of Adjustment and Social Identity" (1991) (Unpublished paper): a study of 44 women which found few identity problems. M Dalen and B Saetersdal "Transracial Adoption in Norway" (1987) 11 *Adoption and Fostering* 41 and B Saetersdal "What became of the Vietnamese Baby-Lift Children?" paper delivered at the *International Conference on Adoption* (Melbourne, 1988): "whereas most of the adoptees

adjusted well 'both psychologically and socially during childhood', as they reached adulthood they felt themselves driven into a more 'marginal position' as they faced more direct situations of discrimination."

37. Triseliotis "Inter-country Adoption: A Brief Overview of the Research Evidence" at 48.
38. Small "Transracial Placements: Conflicts and Contradictions" at 88.
39. Triseliotis "Inter-country Adoption: A Brief Overview of the Research Evidence" at 48-49.
40. R G McRoy "Significance of Ethnic and Racial Identity in Inter-country Adoption within the United States" (1991) 15 *Adoption and Fostering* 53.
41. McRoy at 59. Similarly, Fopp has assessed a large body of research and concludes that if it is not possible for a child to stay with his or her birth family, "a child has a right to be considered for another family in his/her own country. [T]his possibility should be explored fully before a family in another culture is considered": P Fopp "The Rights of the Child in Intercountry Adoption" paper given at the Australian Conference on Adoption in R Oxenbury (ed) *Changing Families* (Adelaide, May 1982) at 274. This Conference endorsed the principle that the care of children within their own cultural group is the first option. (Conference recommendations and statements from the final Plenary Session, 19 May 1992).
42. B Tizard "Intercountry Adoption: A Review of the Evidence" (1991) 32 *Journal of Child Psychology and Psychiatry* 743 at 755.
43. J Thoburn and M Charles *A Review of Research which is Relevant to Intercountry Adoption Inter-Departmental Review of Adoption Law (Background Paper No 3)* (Department of Health, Welsh Office and Scottish Office, London, January 1992) at 27.
44. D Reich "Children of the Nightmare" (1990) 14 *Adoption and Fostering* 9 at 13. Reich is a counsellor at the Post-Adoption Centre, London.
45. L R Melina *Raising Adopted Children* (Harper Perennial, New York, 1986).
46. Melina at 176.
47. M Ward "Culture Shock in the Adoption of Older Children" (1980) 48 *The Social Worker* 8; A Furnham and S Bochner *Culture Shock: Psychological Reactions to Unfamiliar Environments* (Methuen London and New York, 1986).
48. Furnham and Bochner at 163.
49. Harper "Intercountry Adoption of Older Children in Australia". The overview of studies included: C Rathburn, L Virgilio and S Waldfogel "The Restitutive Process in Children Following Radical Separation from Family and Culture" (1958) 28 *American Journal Orthopsychiatry* 408; C Rathburn, H McLaughlin, C Bennett and J A Garland "Later Adjustment of Children Following Radical Separation From Family and Culture" (1965) 34 *American Journal Orthopsychiatry* 604: US study of 35 children from Europe and Asia whose age range was from 5 months to 10 years; four levels of adjustment were designated: disturbed (6%), problematic (30%), adequate (49%), superior (15%).

M Welter (1965) comparison of 36 foreign born adoptees with matched American adoptees aged 4 to 12 years; no significant differences found.

Kim (1977, 1978): US study of 406 Korean and black-Korean children divided into one group of 195 (adopted before one year old) and another group of 211 (adopted at six years or older). This study found that although all had made a good adjustment, the younger group had adapted better in every respect. However, the follow up study revealed both sexes reported to be

extremely concerned with their physical appearance, complaining of perceived negative characteristics: they tended to reject their own racial background.

Kim, Hong and Kim (1979) study of Korean children: in the group of 12 adopted after the age of three years there were many learning and behavioural problems which they thought were related to the difficulties of English language acquisition and acculturation as well as the shock of transcultural transplantation.

Feigleman and Silverman (1983/84) study of 372 adopted white American, Afro-American, Korean and Colombian children between ages of 7 and 25 years, who had been in their adopted homes at least six years: this study found that the children's problems and adjustments were similar to those of the white intracountry adoptions, with the exception of the Afro-American group; their poor adjustment was attributed to factors other than those associated with transracial adoption.

Cederblad (1982): Swedish study of 27 children from Korea, India and South America; this study found that during the first year, acute regression and disturbed behaviour was the norm but that these symptoms tended to settle during the second year; three children remained disturbed.

50. Harper "Inter-country Adoption of Older Children in Australia" at 28.
51. Kim "Behavior Symptoms in Three Transracially Adopted Asian Children: Diagnosis Dilemma".
52. E M Ressler, N Boothby and D J Steinbock *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements* (Oxford University Press, New York, 1988).
53. C Hammond "BAAF and the Placement Needs of Children from Minority Ethnic Groups" (1990) 14 *Adoption and Fostering* 52 at 53.
54. Hammond at 53.
55. Western Australia - Adoption Legislative Review Committee *Final Report: A New Approach to Adoption* (February 1991) at 134.
56. Council of Social Welfare Ministers *National Minimum Principles in Adoption*, June 1993 at para 1.12. See also Council of Social Welfare Ministers *Draft National Minimum Principles in Adoption*, July 1995 at para 1.6.
57. Australian Catholic Social Welfare Commission *Intercountry Adoption* (Discussion Paper, August 1991).
58. United Kingdom - Department of Health, Welsh Office and Scottish Office *Intercountry Adoption* (Discussion Paper No 4, January 1992) at 78.
59. *Children Act 1989* (UK) s 22(5)(c).
60. United Kingdom - Department of Health, Welsh Office and Scottish Office *Intercountry Adoption* at 78.
61. National Association of Black Social Workers *Position Paper* (1972) cited in T Perry "Race and Child Placement: The Best Interests Test and the Cost of Discretion" (1991) 29 *Journal of Family Law* 51 at 112, note 209.
62. I Casa Naja "Adoption" paper presented at the seminar *The Role and Contribution of the Muslim Family in a Multicultural Society* (Islamic Council of NSW, Chullora, 19 December 1994).
63. Melina *Raising Adopted Children* at 19.

64. Melina at 178.
65. W Griffiths "Intercountry Adoption: Education Issues" in G P Mullins (ed) *Intercountry Adoption*, Proceedings of the Public Seminar at University of Adelaide 9-10 July 1977, Publication No 58 (Department of Continuing Education, University of Adelaide, 1977) at 46.
66. Reich "Children of the Nightmare" at 12.
67. G Brennan in Frith "For the Love of a Child" at C1.
68. C Picton "Australia and Intercountry Adoption: Community Attitudes and Research" in P Fopp (ed) *Intercountry Adoption and Sponsorship, Proceedings of a Special Interest Seminar* (International Council on Social Welfare Regional Conference, Sydney, 1979) at 29-34.
69. C Rubenstein "Anti-racist Law Plugs Gap in our Safeguards" *The Australian* (1 June 1994) at 11.
70. Melina *Raising Adopted Children* at 171; Inter-Country Adoptive Parents Working Party "Aussie Kids Adopted From Overseas" video produced by the Staff Development Centre Audio-Visual Services, Eastern Sydney Area Health Service, 1989: "[w]hile the children did not dwell on problems related to colour or facial features, they had all experienced them and developed strategies to deal with them, but it was obvious that the process had been painful and not easy to accommodate".
71. E Goffman *Stigma: Notes on the Management of Spoiled Identity* (Prentice-Hall, London, 1963).
72. E Goffman and G Mead *Mind, Self and Society from the Standpoint of a Social Behaviorist* (University of Chicago Press, 1934).
73. McRoy and Zurcher suggested that children brought up in racially integrated communities are less likely to feel different or experience difficulties: *Transracial and Inracial Adoptees* (1983); Bagley found that the impact of racism was such that it cancelled out well-meaning efforts by adoptive parents: "Chinese Adoptees in Britain: A Twenty Year Follow-Up of Adjustment and Social Identity" (1991); D Ngabonziza asks "[i]f such prejudice or discrimination is widespread in relation to other racial or ethnic groupings it must be asked whether the child would not be better off in a poorer but more accepting environment in its own country": "Inter-country Adoption: In Whose Best Interests?" (1988) 12 *Adoption and Fostering* 35 at 39.
74. Triseliotis "Inter-country Adoption: A Brief Overview of the Research Evidence" at 51.
75. Dalen and Saetersdal "Transracial Adoption in Norway" at 43.
76. Small "Transracial Placements: Conflicts and Contradictions" at 85-86.
77. C Edwards and P Read *The Lost Children* (Doubleday, Sydney, 1989) at 34.
78. E A Berzins *Submission* (27 July 1994) at 14.
79. A Loenan and R Hoksbergen "Inter-country Adoption: the Netherlands; Attachment Relations and Identity" (1986) 10 *Adoption and Fostering* at 22.
80. Dalen and Saetersdal "Transracial Adoption in Norway" at 42.
81. Inter-Country Adoptive Parents Working Party "Aussie Kids Adopted from Overseas"; Harper "Love is not Enough: Breakdown In Intercountry Adoption" at 5.
82. Harper "Love is not Enough" at 7.
83. Harper "Love is not Enough" at 7.

84. See *Children (Care and Protection) Act 1987* (NSW) s 87.
85. The *Adoption Regulation 1995* (NSW) cl 34 makes provision for the Director-General or principal officer of a private adoption agency to make all reasonable efforts to place the child, if practicable, in accordance with the birth parents' or guardian's expressed wishes as to the ethnicity of the adoptive parents. However, this is not a clause ensuring cultural continuity and it only relates to situations where the person giving consent has specifically requested that the child be placed with a person of an ethnic group nominated by the consent-giver.
86. It should also be noted that expressed wishes of the person giving consent need to be taken into account. For example, the person giving consent can express his or her wishes in respect of the religious upbringing of the child: *Adoption of Children Act 1965* (NSW) s 21(1)(c)(i)(b); *Adoption of Children Regulation 1995* (NSW) cl 33, Schedule 1, Form 1.

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

9. Aboriginal and Torres Strait Islander Children

INTRODUCTION

9.1 Chapter 8 examined the relevance of a child's cultural background in adoption placements. Aboriginal children and Torres Strait Islander children are, on the surface, simply children with two particular, different, cultural backgrounds. Therefore, in looking at the best interests of Aboriginal and Torres Strait Islander children in need of permanent care, the initial reaction is to deal with the issues within the broader context of Chapter 8. However, although all the issues relating to the value of cultural continuity are equally applicable to Aboriginal and Torres Strait Islander children, there are significant reasons for considering separately the placement of such children. These reasons are as follows:

First, Aborigines and Torres Strait Islanders are indigenous persons; they are not part of any group migrating to Australia from Europe and Asia since 1788 and should not be treated as such.

Secondly, adoption, as it is currently defined, is an unknown institution in Aboriginal customary law. Torres Strait Islander law, on the other hand, recognises a form of customary adoption. The ramifications of this are discussed more fully under the headings "Adoption and Aboriginal customary law" and "Adoption and Torres Strait Islander customary law".

Thirdly, and to some most importantly, adoption law has a history of impacting in a unique and damaging way on the Aboriginal and Torres Strait Islander people. The Australian welfare system's past treatment of Aboriginal and Torres Strait Islander children and their families has left a bitter legacy which needs to be understood and borne in mind in order to deal constructively with issues of Aboriginal child welfare. This background to current issues of adoption law reform is elaborated below.

ABORIGINAL CHILDREN

Background

9.2 Aboriginal families have been, and continue to be, adversely affected by child welfare policies in Australia. From 1883 until 1969, initially under the Aborigines' Protection Board and later under the Aborigines' Welfare Board, it was government policy in New South Wales and other States, to remove forcibly Aboriginal children from their families.¹ It is estimated that 6,000 - 10,000 children were removed from their families up to 1969 and that more were taken in the 1970s.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. Formal recognition of, and enquiry into, this treatment of Aboriginal communities is finally transpiring in the present National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families.³

9.3 The chairperson of the Ngunnawal Land Council in Canberra, Mrs Matilda House, told the Inquiry that the practice of separating mixed-blood children from their families was a way of:

socially engineering a class of people who were not one thing or another but who could be trained like monkeys [to be domestics and labourers].⁴

9.4 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.⁵ Various Australian governments' policies of that time would clearly fall within the terms of the Convention.⁶ 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.⁷

9.5 The policy of assimilation is illustrated by the following statement from the Report of the Aborigines Protection Board for 1911:

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. The only solution of the problem, therefore, is to deal effectively with the children; and, while not unduly interfering with the relationship between parent and child, to see that they are properly trained to spheres of future usefulness, and once away from the Reserves not to allow them to return - except, perhaps, in the case of those who have parents, on an occasional visit.⁸

9.6 This policy is reflected further in the Second Reading Speech in the Legislative Council on the *Aborigines Protection Amending Bill* (which effectively placed the Aborigines Protection Board *in loco parentis* to Aboriginal children):

Although there has been a diminution, so far as the full bloods are concerned, and probably an increase in the half-castes and three-quarter-castes, yet it is a lamentable state of affairs that we should practically have a camp - which, to all intents and purposes, appears to be white - of children who are brought up in laziness and vicious surroundings, when they ought practically to be merged in the general population of the state.⁹

9.7 The policy of removal of children continues to be a source of much suffering in Aboriginal communities. It seems that the experiences children had in homes were rarely, if ever, positive. The children were 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:

[e]very 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.¹⁰

9.8 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 customary law

9.9 The Commission has been advised consistently that adoption, as it is currently defined, is an unknown institution in Aboriginal customary law. The separation of children from birth families and the absolute transfer of parental rights are incompatible with the basic tenets of Aboriginal culture.

9.10 In its submission to the Commission, the Aboriginal Children's Service stated that:

[m]ore 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.¹¹

9.11 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'.¹²

9.12 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 *Adoption Act 1984* (Vic) 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.¹³

9.13 The Commission recommends that a similar acknowledgement be made in the New South Wales legislation. This is both symbolically and practically important: symbolically, because of past policies; and practically, because those administering adoption law should be certain of the parameters in relation to the adoption of Aboriginal children.

RECOMMENDATION 69

The legislation should contain a statement that the 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.

9.14 Bearing in mind the troubled background to child welfare law in New South Wales, and acknowledging that adoption is an unknown institution in Aboriginal customary law, the adoption of Aboriginal children nonetheless must be considered. While the numbers are small,¹⁴ some birth parents do request that their Aboriginal children be placed for adoption. There is no clear view within the Aboriginal community about whether or not there should be prohibition of adoption of Aboriginal children and the Commission's view is that it may not be in an Aboriginal child's best interests to preclude adoption altogether. Nor is it right to deny the parent of an Aboriginal child an option available to all other parents. Therefore, the Adoption Act needs to provide for the appropriate treatment of Aboriginal children in need of permanent care in a way which preserves the child's cultural heritage and identity and serves the child's best interests.

Who is an Aboriginal child?

9.15 The initial issue which arises is the identification of Aboriginal children. The proper identification of Aboriginal children in need of care will ensure that those children for whom it matters are having their needs met in a way appropriate to the Aboriginal culture. For this reason, Adoption legislation needs to define who is an Aboriginal child. However, it should be noted at the outset that non-Aboriginal definitions of Aboriginality have for many years been a source of resentment within the Aboriginal community.

9.16 Prior to 1967, each State had its own definition of Aboriginality.¹⁵ In the early 1970s the Federal Government formulated a definition that found acceptance among most Aboriginal people. 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.¹⁶

9.17 This definition has been embodied in New South Wales legislation such as the *Aboriginal Land Rights Act 1983* (NSW). The *Children (Care and Protection) Act 1987* (NSW) adopts the *Aboriginal Land Rights Act* definition.¹⁷

9.18 The issue is whether adoption legislation should follow this definition or depart from it. This definition has its difficulties in identifying Aboriginal children.

Identification as an Aborigine

9.19 First of all, a baby or very young child is not yet able to identify as an Aborigine. The Working Party of the Standing Committee of Social Welfare Administrators recommended that in such a case identification by either parent is to be substituted for self-identity.¹⁸ This does not overcome the situations where a birth parent, either Aboriginal or non-Aboriginal, does not declare his or her child's Aboriginality either intentionally or because he or she does not know the child is Aboriginal.

9.20 An older child who may be capable of identifying as an Aborigine may yet not do so. Older children who are wards of the State and who are subsequently adopted may be unaware of their Aboriginality. If the child has been in non-Aboriginal foster care, and removed from the Aboriginal culture for a long period, the child is unlikely to assert an Aboriginal identity. In some instances, received negative messages may discourage the child from identifying as an Aborigine. As well, children are still forming their identities and may be influenced by the question itself as to their identification as an Aborigine.

Acceptance by community

9.21 Where a birth parent is considering relinquishing his or her child for adoption, it would not be uncommon, in those circumstances, for the birth parent's community to be unaware, and not made aware by the birth parent, of the child's birth. This may be because the birth parent has lost contact with his or her community or has deliberately concealed the fact of the birth from the community. Privacy issues may arise which prevent others, such as DOCS or a private adoption agency, making the Aboriginal community so aware. Obviously, if the relevant Aboriginal community is unaware of the child's birth there can be no acceptance of the child as an Aborigine by that community.

9.22 In that case, a definition of Aboriginality which relies in part on acceptance by the relevant Aboriginal community can operate against the best interests of a child. The child may be of Aboriginal descent and may be identified as Aboriginal by the consenting parent. But if the consenting parent does not, for personal reasons, want to seek the community's acceptance of the child, one of the essential

components of the three-pronged definition is not satisfied. The child is not then defined as an Aborigine.

Other legislative definitions

9.23 The *Family Law Act 1975* (Cth) has been amended to include a definition of “Aboriginal peoples” as “the peoples of the Aboriginal race of Australia”.¹⁹ The *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth)²⁰ and the *Adoption of Children Act 1994* (NT)²¹ also define “Aboriginal” as “a person who is a member of the Aboriginal race of Australia”. Prima-facie, reference to “race” only would seem to mean that an “Aboriginal” is a person of Aboriginal descent. However, this simple interpretation was not accepted in *Gibbs v Capewell*.²²

9.24 In that case, Drummond J considered the meaning of the term “Aboriginal person” for the purposes of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). His Honour held that in order for someone to be described as an “Aboriginal person” within the meaning of that term in the Act, some degree of Aboriginal descent was essential, although by itself a small degree of such descent was not sufficient. Where a person had only a small degree of Aboriginal descent but genuinely identified him or herself as an Aboriginal person and was recognised as such by an Aboriginal community, his Honour held that such a person was an Aboriginal person as a matter of ordinary speech and for the purposes of the Act. However, his Honour further held that where a person had only a small degree of Aboriginal descent, genuine self-identification as an Aborigine alone or communal recognition as such by itself may suffice, according to the circumstances. His Honour stressed that, in his opinion, “Parliament had done nothing more than give this expression the same meaning it has in ordinary speech”.²³

9.25 To clarify, definitions resting on “race” comprise descent as the essential factor but further involve an examination of the degree of descent. If the degree of descent is whole or substantial nothing more is required. If the degree of descent is small, cultural considerations determine whether or not the person is Aboriginal. In contrast, definitions resting on “descent” do not depend on degrees of descent and determine Aboriginality wholly in relation to physical factors. Cultural considerations are not relevant.

9.26 Would a definition which rests on “descent” be too far out of step with the legislative direction taken in three significant pieces of legislation, each of which defines Aboriginality in terms of “race”? It would not for the following reasons:

By relying on factors of “race” in defining Aboriginality, Parliament has already demonstrated that they are prepared to diverge from a three-pronged definition, that is, a definition requiring descent, self-identification *and* community acceptance. A definition which depends on the single criteria of descent is by no means extreme.

Gibbs v Capewell considered the meaning of “Aboriginal person” in the context of legislation affecting adults. Had the subject matter been legislation affecting the welfare of children, the outcome may have been different.

The points made above in relation to the difficulties of requiring self-identification and community acceptance in the context of the adoption of children continue to be relevant here.

Given the constraints on babies and children identifying themselves as Aboriginal, it could be argued that the meaning which the expression “Aboriginal child” has “in ordinary speech” is a “child of Aboriginal descent”.

9.27 The undesirability, from an Aboriginal viewpoint, of analysing degrees of descent for the purposes of defining who is an Aboriginal person is discussed below.

Support for a “descent” definition

9.28 It may be considered by some (non-Aborigines) a difficult question as to whether the offspring of one Aboriginal parent and one non-Aboriginal parent is an Aborigine or non-Aborigine. People who have difficulty with this question may consider that the solution is to have a definition which includes criteria of self-identification and community acceptance. However, a widely held Aboriginal opinion on this issue is clear and is explained by Sommerlad as follows:

The nature of Aboriginal identity is misunderstood by most whites. They fail to understand why a child of mixed parentage should identify as an Aboriginal rather than a white. Social workers are reluctant to place an Aboriginal child who is indistinguishable by his physical appearance with an Aboriginal family since they consider this situation will create identity problems for the child. The major point that whites fail to grasp is that in a racist society an individual is either white or black. One cannot be part black, part white. An Aboriginal child will soon learn from white classmates that he is not one of them, that he is different, and that he belongs to the black community. Even if he looks white. The position taken by Aborigines on this issue is therefore that any child of Aboriginal parentage, no matter what his physical appearance or his degree of Aboriginality is an Aborigine.²⁴

9.29 The Aboriginal Children's Service is one significant Aboriginal body which has expressed the firm view to the Commission in consultation that an Aborigine is, quite simply, a person of Aboriginal descent.

Difficulties with a "descent" definition

9.30 Justice Cohen of the NSW Supreme Court has commented that there is a risk that a definition of Aboriginality which depends on descent alone could in some circumstances work to the detriment of the child. The example he gave was where foster parents of a child of five or six years of age, whom they had fostered since she was four months old, applied to adopt her. At the time of the application it was then found that the man identified as the birth father was Aboriginal, that is, who identified himself as such. The mother was not Aboriginal. Whilst it subsequently transpired that this man was not the birth father, if he had been, the child would have been Aboriginal. Justice Cohen's concern was that the adoption by the (non-Aboriginal) foster parents could not then have proceeded, even though, in Justice Cohen's view, it was clearly in the child's best interests.²⁵ The Commission acknowledges this concern but makes two points in regard to it.

9.31 First, if the child was Aboriginal by reason of descent from an Aboriginal father, it would not necessarily mean that the adoption could not have proceeded. If the birth parents consented to the adoption, an Aboriginal Placement Principle would come into effect, as discussed below, making placement within the Aboriginal community or with Aboriginal parents priorities. However, as also discussed below, notwithstanding the child's Aboriginality, it would be open to the court to conclude that it was in the child's best interests to leave the child in her present home. This could occur if the foster parents were able to demonstrate a capacity to assist the child to develop a healthy and positive cultural identity. The governing principle is that the child's best interests are paramount.

9.32 Providing the birth parents give their consent to the adoption, a "case conference" is conducted by DOCS, with the participation of an Aboriginal adoption worker, in response to every request by foster parents to adopt their Aboriginal foster child. A decision on the matter then goes to a Divisional Manager for approval and then to the Director-General for final DOCS approval (before obtaining court approval). A possible outcome of this case conference is a decision that it is in the child's best interests to remain as a foster child in his or her current home but not to be adopted. Alternatively, DOCS may reach a decision that it is in the child's best interests to be adopted by his or her non-Aboriginal carers rather than to be placed in an Aboriginal home.

9.33 Secondly, if identification by the birth mother was substituted for the child's self-identification as an Aborigine (the child being too young to properly consider this aspect) the child apparently would not have been identified by the mother as Aboriginal. This may not necessarily have been in the child's best interests. As the child grew towards adolescence and began asking inevitable questions about her social history, discovery of an Aboriginal father at that point may have been disorienting. It is arguably

far better to have acknowledged the child's Aboriginal background as soon as it was known and then to have fostered links with that cultural heritage. It is not in a child's best interests to ignore aspects of the child's identity. These issues are discussed in Chapter 8.

Conclusion

9.34 Defining an Aboriginal child as one of Aboriginal descent eliminates the problems discussed above. Furthermore, it accords with the views of many Aboriginal people, as outlined by Sommerlad, and with the views expressed by a number of Aboriginal organisations. In light of the past treatment of Aboriginal families, and in the interests of reconciliation, it is justified to respect those views. It is appropriate *in the context of adoption* to define an Aboriginal child as one of Aboriginal descent.

RECOMMENDATION 70

The legislation should define an Aboriginal child as one of Aboriginal descent.

Identifying Aboriginal children

9.35 Difficulties in *identifying* (as distinct from defining) an Aboriginal child whose Aboriginality is either unknown or undeclared by the birth parent will exist regardless of whether the definition of Aboriginality is a broad one of descent or a more restricted one of descent coupled with identification and acceptance.

9.36 When faced with the task of identifying a child as Aboriginal, DOCS is restricted in the enquiries it can make because of the privacy issues involved in an adoption. DOCS takes a pragmatic approach, obtaining a social history of the family and interviewing the birth parent or parents in relation to their cultural backgrounds. Whilst it is not practicable to do more than this, the Commission recommends that this practice be expressed in legislation so that a clear obligation is placed upon DOCS or a private adoption agency to establish to the best of its ability whether or not the child is an Aboriginal child.

RECOMMENDATION 71

The legislation should require DOCS or an agency to make reasonable inquiry as to whether the child to be adopted is an Aboriginal child.

Aboriginal Child Placement Principle

Should legislation include an Aboriginal Child Placement Principle?

9.37 The Adoption Act currently has no specific provision for the placement of Aboriginal children.²⁶ DOCS 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.²⁷ The issue to be considered is whether legislation should direct the approach to take in relation to the adoption of Aboriginal children or remain silent on the subject, or whether there is a more appropriate and practicable alternative.

9.38 Submissions by Aboriginal people to the Commission have suggested that the ideal is for there to be separate legislation providing for the exclusive jurisdiction of Aboriginal law for child welfare proceedings, along the lines of the *Indian Child Welfare Act 1978* (USA). It is beyond the terms of this reference to consider such legislation. Nonetheless, the Commission wishes to draw attention to the existence of the *Indian Child Welfare Act 1978* (USA) and to focus on the possibility of similar legislation for Australia. The Final Report of the New South Wales Aboriginal Children's Research Project called for specific legislation:

A Commonwealth Aboriginal Child Welfare Act may be the only way to protect all Aboriginal children against undue welfare intervention. With the success of the *Indian Child Welfare Act 1978* (USA) in safeguarding Indian children, this option deserves urgent

investigation by the Commonwealth government in conjunction with Aboriginal communities.²⁸

9.39 Failing exclusive jurisdiction over Aboriginal children, the Commission has been advised that the Aboriginal community would like to see legal recognition of Aboriginal customary law placements. However, it is inappropriate to give this recognition within the legislation. Adoption legislation is built upon a foundation of legal transfer of parental rights and the consequences which flow from this, including alteration of birth certificates. In contrast to this, placement of a child in accordance with Aboriginal customary law does *not* involve any legal transfer of parental rights. Such a notion has no place within Aboriginal concepts of family and child care. The Adoption Act assumes a non-Aboriginal concept of family, being the nuclear family.

In Aboriginal society, on the other hand, the role of the extended family, based on the often complex system of kinship relationships and obligations, is of fundamental importance in bringing up children.²⁹

9.40 Until such time as there is either exclusive jurisdiction or legal recognition of Aboriginal customary placements, Aboriginal communities wish to see the inclusion of a placement principle within adoption legislation which affords the child's community the opportunity to adopt that child. This may seem at odds with the fact that adoption is not part of Aboriginal culture, but so long as adoption *does* exist as a care option for Aboriginal children, the safeguards of a placement principle operate in the child's best interests.

9.41 The Commission respects this wish and supports the view expressed by the Australian Law Reform Commission, in its report *The Recognition of Aboriginal Customary Laws*:

[L]egislation 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.³⁰

9.42 For the reasons given in the beginning of this chapter, it is inappropriate simply to apply the Cultural Heritage Placement Principle, outlined in Chapter 8, to the placement of Aboriginal children.

RECOMMENDATION 72

The legislation should deal expressly with the placement of Aboriginal children by the inclusion of an Aboriginal Child Placement Principle.

What form should an Aboriginal Child Placement Principle take?

9.43 An Aboriginal Child Placement Principle, developed in the late 1970s, has found varied expression in legislation and policy throughout Australia. In New South Wales it is incorporated into the *Children (Care and Protection) Act 1987* (NSW).³¹ DP 34 and Research Report 7 ("RR 7")³² set out the various embodiments of the principle and outline the ways in which they differ. Basically the principle 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.³³

9.44 A placement principle whose order of priority commences with placement of the child with members of the extended family and which then looks to the kinship network, may be inappropriate within an adoption Act. This order of preference for care of an Aboriginal child occurs in Aboriginal customary law and is appropriate to the *fostering* of a child. The Commission was concerned that, given that adoption as defined by the Adoption Act is not part of Aboriginal culture, it was misguided to legislate for an order of preference for the *adoption* of a child which starts with adoption by a child's extended family. The reality is that the extended family will foster the child, or care for the child in accordance with customary law, but is unlikely to adopt the child in accordance with non-Aboriginal law.

9.45 However, following further consultations, it has become apparent that while the Aboriginal community endorses this approach philosophically, there is concern to secure safeguards for placement of Aboriginal children in the community. Customary law is dynamic and Aboriginal communities are willing and able to accommodate new situations as they arise.

9.46 Accordingly, the first preference for placement of an Aboriginal child should be with adoptive parents belonging to the community, or one of the communities, to which the birth parent or birth parents belong.³⁴ Reference to "birth parent" rather than to the "consenting parent" allows for the situation where only one of the birth parents is Aboriginal. Also, reference to "communities" allows for the situation where the birth parents, although both Aboriginal, do not belong to the same community.

9.47 The advantage of this option as a first preference is that it is a broad one encompassing immediate family, extended family and kinship networks. The birth parent's community is his or her tribe and is geographically rooted. In this sense, a person's community is considered to be "home" and is therefore the option most likely to return a child to be adopted to his or her roots. Also, the community is an entity which interacts in a social way, providing a nurturing environment closest to the child's birth family but broad enough to maximise the chances of finding adoptive parents for the child.

9.48 If it is not practicable or not in the child's best interests to place the child in accordance with the first option, the second preference for placement of the child should then be with adoptive parents of another community.

9.49 If it is not practicable or not in the child's best interests to place the child in accordance with either the first option or the second option, then the Court should have the discretion to make an order placing the child with non-Aboriginal applicants. This will, of course, enable the Court to deal best with situations such as that encountered by Justice Cohen. In that case, the Court should be satisfied that the applicants have the capacity to assist the child to develop a healthy and positive cultural identity and are willing to learn about, and teach the child about, his or her Aboriginal heritage and foster links with that heritage in the child's upbringing.

9.50 In any circumstances where DOCS or the agency may be experiencing difficulty, or have concerns about, placing the child in accordance with any of the options, a preliminary hearing may be necessary. The Court could make a determination on the practicability of a placement or whether it would serve the child's best interests. Any interested party concerned, for example, to see the child placed either with a particular Aboriginal community, or in a non-Aboriginal placement would have the right to seek a preliminary hearing.

RECOMMENDATION 73

If, on reasonable inquiry, DOCS or the agency is satisfied that a child is Aboriginal, DOCS or the agency should apply the following Aboriginal Child Placement Principle in placing the child:

The first preference for placement of an Aboriginal child should be with an applicant or applicants belonging to the community, or one of the communities, to which the birth parent, or birth parents, of the child belongs.

If it is not practicable or not in the best interests of the child to place him or her in accordance with the first preference, then the child should be placed with an applicant or applicants of another Aboriginal community.

If it is not practicable or not in the best interests of the child to place him or her in accordance with the first or second preferences, then the child should be placed with a non-Aboriginal applicant or applicants. The Court must be satisfied that the applicant or applicants have the capacity to assist the child to develop a healthy and positive cultural identity and are willing to learn about, and teach the child about, his or her Aboriginal heritage and foster links with that heritage in the child's upbringing.

RECOMMENDATION 74

In considering an application for adoption of an Aboriginal child, the Court must be satisfied that the Aboriginal Child Placement Principle has been properly applied.

9.51 Should birth parents be able to request that their Aboriginal child *not* be placed in an Aboriginal family? As for the placement of a child from any cultural background, birth parents should be entitled to express their wishes in this regard, but any such request should be a matter for consideration by the court. Ultimately the child's best interests must prevail.

Aboriginal involvement in the adoption process

Involvement before consent to the adoption is given

9.52 There are sections of the Aboriginal community who feel that if there is any hope of breaking the cycle of displacement, loss of culture and identity crises experienced by Aborigines, adoption should not be an option for child care at all for Aboriginal children. The Commission is unable at this stage to recommend prohibiting adoption of Aboriginal children altogether under the legislation. However, the most effective way of reconciling the need for adoption for *some* children with the need to respect Aboriginal policy and culture is to provide for a consultation process, giving the Aboriginal community the opportunity of discussing with a birth parent options other than adoption.

9.53 This approach was endorsed by the Advisory Committee in 1984 when reviewing adoption policy and practice in New South Wales. The Committee stated:

Although it remains the right of the surrendering mother to make the choice of adoption, this should only be arranged when she has had the fullest opportunity for consultation with Aboriginal workers and assistance in considering proper alternatives.³⁵

9.54 The *Adoption Act 1984* (Vic) includes a provision whereby no order for adoption of an Aboriginal child will be made unless the birth parent:

has received, or has in writing expressed the wish not to receive, counselling from an Aboriginal agency ...³⁶

The *Adoption Act 1988* (SA) contains a similar provision.³⁷ It is significant that in these two States, which make counselling with an Aboriginal agency a legislative requirement prior to taking consent, there has only been one reported adoption of an Aboriginal child in South Australia and none in Victoria during the last five years.

9.55 Within a framework of counselling and consultation by an Aboriginal agency, a placement principle can work as a very valuable adjunct in exploring the possibility of keeping an Aboriginal child within his or her own community. This is to be seen as the aim of the legislation in relation to Aboriginal children. Accordingly, the Commission makes the following recommendation.

RECOMMENDATION 75

Where DOCS or a private adoption agency has determined that a child to be placed for adoption is Aboriginal, prior to taking consent to the adoption a consultation should be arranged between the birth parent(s) and an approved Aboriginal agency for the purpose of exploring the possibility of arranging care for the child in accordance with Aboriginal customary law.

RECOMMENDATION 76

If a birth parent refuses to consult face to face with the Aboriginal agency, the birth parent should be provided, at least seven days before the taking of a consent, with an information kit prepared by the Aboriginal agency and setting out the matters that would have been canvassed by it in a consultation. When signing the consent form, the birth parent must sign an acknowledgement that he or she has read and understood the matters contained in the information kit.

Involvement after consent to the adoption is given

9.56 Two difficult questions arise in relation to Aboriginal involvement in the adoption placement process. Where should the power of placement of an Aboriginal child lie? If it is to remain ultimately with non-Aboriginal agencies or government departments, to what extent should the Aboriginal community be involved in the decision-making process?

9.57 Principles of Aboriginal self-determination or sovereignty suggest that Aboriginal people should have authority to determine placement of Aboriginal children. The Aboriginal Children's Service recommended that no adoption of an Aboriginal child should take place without its approval and that it be involved in all placement arrangements in adoption.³⁸

9.58 In the absence of a Commonwealth Aboriginal Child Welfare Act, responsibility for the placement of an Aboriginal child in New South Wales must remain with DOCS. However, it is essential that Aboriginal people be properly consulted and fully involved in the adoption.³⁹ Involvement should of course include the actual placement decision. Again, however, the Director-General of DOCS needs to retain the ultimate decision-making power (subject to approval by the court). Once a consent to adoption is taken, the Director-General becomes the guardian for that child. It is therefore proper that the approval for placement of the child rests with him or her.

9.59 The current practice in relation to placement of Aboriginal children by DOCS is for a DOCS Aboriginal worker to be involved at all stages of the placement process. The Australian Law Reform Commission concluded in its report *The Recognition of Aboriginal Customary Laws* that:

[T]he right of relevant Aboriginal people and organisations to be consulted in decisions involving Aboriginal children should be explicitly endorsed in legislation.⁴⁰

RECOMMENDATION 77

The legislation should require the involvement of both an Aboriginal adoption worker employed by DOCS, or the private adoption agency, and an Aboriginal agency at all times in the placement process following taking consent for the adoption of the child.

Finding Aboriginal adoptive parents

9.60 Under the current system, DOCS actively seeks Aboriginal adoptive parents for Aboriginal children. In DOCS's view, the provision contained in the Adoption Act allowing people married by Aboriginal tradition to adopt⁴¹ has been helpful in approving Aboriginal couples as adoptive parents. This is dealt with in Chapter 6 and in RR 7.

RECOMMENDATION 78

Section 19(1A)(c) of the Adoption Act (which allows people married by Aboriginal tradition to adopt) should be retained.

9.61 Despite DOCS's policy to place Aboriginal children in Aboriginal homes, in the last five years only 18 of 35 Aboriginal children placed for adoption were placed with Aboriginal families.⁴² DOCS has particular difficulty finding Aboriginal families for children with special needs. The inclusion in adoption legislation of a placement principle, which involves counselling and consultation, will ensure that everything possible is done to find a suitable home for Aboriginal children with Aboriginal families.

TORRES STRAIT ISLANDER CHILDREN

Introduction

9.62 Torres Strait Islanders number approximately 33,000, with the majority of Torres Strait Islanders living on the mainland of Australia, particularly Queensland. In New South Wales there are approximately 5,000 Torres Strait Islanders.⁴³ There are no statistics available breaking down this number into children and adults but clearly the number of Torres Strait Islander children in New South Wales would be small. More particularly, the incidence of Torres Strait Islander children being relinquished for adoption is rare.⁴⁴

9.63 It is unlikely that a Torres Strait Islander would approach an adoption agency to arrange care for his or her child. Normally, an adoption would be arranged in accordance with customary law. This would be arranged either in New South Wales or, if there was no appropriate adoptive parent available locally, then the birth parent would travel to Queensland or the Torres Strait Islands, depending on where the extended family resided. Nonetheless, it is conceivable that legal adoption may be sought and this possibility should be addressed in the legislation.

9.64 There are good reasons for affording separate treatment to adoption in the Aboriginal culture and adoption in the Torres Strait Islander culture as Torres Strait Islanders "are a distinctive people from Aborigines, with a distinctive history and culture".⁴⁵ Two distinctions in particular can be made. First, the historical context in which to consider adoption and Torres Strait Islander culture differs from that of Aboriginal culture. Torres Strait Islanders have not experienced to the same extent the negative impact which Aborigines suffered as a result of dislocation from their traditional lands and the attempted extermination of their culture and themselves as a race of people. The Torres Strait Islanders' experience with European contact was largely a happy one, or at least less traumatic, initially with explorers and later with the London Missionary Society in 1871. Torres Strait Islanders have always remained on their homelands and their culture and traditions have continued relatively intact.⁴⁶

9.65 The second distinction to make between a treatment of the two cultures is the way in which customary adoption laws differ.

Adoption and Torres Strait Islander customary law

9.66 Unlike Aboriginal law, Torres Strait Islander law recognises adoption in a form that is in some respects similar to New South Wales adoption law. Adoption in Torres Strait Islander communities involves the permanent transfer of parental rights to adoptive parents. Further, there is a reluctance to tell children of their adoptive status.⁴⁷ In contrast to Australian adoption law, however, adoption is almost always within the same blood lines, with members of the extended family or otherwise with close friends. Consequently, adoptive parents are never strangers to the biological parents. Adoptive parents may be single or married, and may already have children of their own. Torres Strait Islander adoption also differs from Australian adoption in that, while there is a permanent transfer of parental rights, the adoption is characterised by notions of reciprocity and obligation.

9.67 Adoption provides stability to Torres Strait Islander society by developing bonds between families. It is therefore seen as having a useful, even powerful, function and occurs frequently in Torres

Strait Islander society.⁴⁸ It also “bears a much deeper spiritual meaning than non Torres Strait Islanders would normally attach to adoption”.⁴⁹

Who is a Torres Strait Islander child?

9.68 As with Aboriginal children, Torres Strait Islanders are united in the view that a Torres Strait Islander child is one of Torres Strait Islander descent.

9.69 The reasons set out in paragraphs 9.15-9.34 for recommending that an Aboriginal child be defined as one of Aboriginal descent are equally applicable to Torres Strait Islander children. It is also significant that recent amendments to the *Family Law Act 1975* (Cth) have defined “Torres Strait Islanders” as meaning “the descendants of the indigenous inhabitants of the Torres Strait Islands”.⁵⁰

9.70 Similar difficulties as those that arise in identifying Aboriginal children may arise in identifying Torres Strait Islander children. Similarly, DOCS or the agency should be obliged to establish to the best of their abilities whether or not a child is a Torres Strait Islander.

RECOMMENDATION 79

A Torres Strait Islander child should be defined as one of Torres Strait Islander descent.

RECOMMENDATION 80

The legislation should require DOCS or an agency to make reasonable inquiry as to whether the child to be adopted is a Torres Strait Islander.

Torres Strait Islander Child Placement Principle

Should legislation include a Torres Strait Islander Child Placement Principle?

9.71 In relation to Torres Strait Islander children, to date only South Australia has legislated for a placement principle in equivalent terms to the Aboriginal Child Placement Principle.⁵¹ The question that arises in relation to the adoption of Torres Strait Island children is whether the legislation ought to contain a placement principle or whether it would be sufficient simply to apply the Cultural Heritage Placement Principle outlined in Chapter 8.

9.72 Torres Strait Islanders are fiercely proud and protective of their culture. It is believed that the means to preservation of the culture is through the strength of the family. At least in part, it is for this reason that Torres Strait Islanders do not arrange customary adoptions outside the culture and do not want to see Torres Strait Islander children legally adopted outside the culture. It is therefore equally appropriate and justifiable that there be in place a Torres Strait Islander Child Placement Principle parallel to that of the Aboriginal Child Placement Principle. This also accords with the wishes of the Torres Strait Islander community.⁵²

RECOMMENDATION 81

The legislation should deal expressly with the placement of Torres Strait Islander children by the inclusion of a Torres Strait Islander Child Placement Principle.

What form should a Torres Strait Islander Child Placement Principle take?

9.73 The Commission recommended in paragraph 9.46 that the first preference for placement of an Aboriginal child should be to place the child with the community, or one of the communities, to which the birth parent or birth parents belong. In relation to Torres Strait Islander children, the Commission recommends taking a slightly different approach for the reasons which follow.

9.74 Customary adoption is arranged, almost always, with the extended family. It is most important to Torres Strait Islanders that where possible an adoption be within bloodlines. The birth parent's community is a broader entity including extended family and other members not related by bloodlines. Therefore, if a legal adoption is being arranged, efforts should first be made to place the child within the extended family. There is also a strong possibility that the extended family will agree to adopt the child legally rather than lose the child to a family outside the bloodline. Therefore the Commission makes the following recommendation.

RECOMMENDATION 82

If, on reasonable inquiry, DOCS or the agency is satisfied that a child is a Torres Strait Islander, DOCS or the agency should apply the following Torres Strait Islander Child Placement Principle:

The first preference for placement of a Torres Strait Islander child should be with the child's extended family.

If it is not practicable or not in the best interests of the child to place him or her in accordance with the first preference, then the child should be placed with an applicant or applicants belonging to the community, or one of the communities, to which the birth parent or birth parents belong.

If it is not practicable or not in the best interests of the child to place him or her in accordance with the first or second preferences, then the child should be placed with an applicant or applicants of another Torres Strait Islander community.

If it is not practicable or not in the best interests of the child to place him or her in accordance with the first, second or third preferences, then the child should be placed with a non-Torres Strait Islander applicant applicants. The Court must be satisfied that the applicant or applicants have the capacity to assist the child to develop a healthy and positive cultural identity and are willing to learn about, and teach the child about, his or her Torres Strait Islander heritage and foster links with that heritage in the child's upbringing.

RECOMMENDATION 83

In considering an application for adoption of a Torres Strait Islander child, the Court must be satisfied that the Torres Strait Islander Child Placement Principle has been properly applied.

9.75 As discussed in paragraph 9.50 in relation to the placement of an Aboriginal child, a preliminary hearing may be necessary to consider the appropriate application of the Torres Strait Islander Child Placement Principle.

9.76 The Commission recognises that difficult questions may arise when a decision has to be made regarding the placement of a child who is the offspring of parents from two different cultures. This may be particularly difficult where the child is the offspring of one Aboriginal parent and one Torres Strait Islander parent. In these circumstances the facts of the particular case must be examined and the responsibility for the decision must rest with the Court.

9.77 As with birth parents of an Aboriginal child, birth parents of a Torres Strait Islander child should be able to request that their child *not* be placed in a Torres Strait Islander family. However, any such request should be a matter for consideration by the Court. Again, the child's best interests must prevail.

Torres Strait Islander involvement in the adoption process

Involvement before consent to the adoption is given

9.78 The Commission recommends that the Torres Strait Islander community be given the opportunity to discuss with a birth parent the option of adoption as weighed against other options for care of the child, in the same way as is recommended for the Aboriginal community.

RECOMMENDATION 84

Where DOCS or an agency has determined that a child to be placed for adoption is a Torres Strait Islander, prior to taking consent to the adoption, a consultation should be arranged between the birth parents and an approved Torres Strait Islander agency for the purpose of exploring the possibility of arranging care for the child in accordance with Torres Strait Islander customary law.

RECOMMENDATION 85

If a birth parent refuses to consult face to face with the Torres Strait Islander agency, the birth parent should be provided, at least seven days before the taking of a consent, with an information kit prepared by the Torres Strait Islander agency and setting out the matters that would have been canvassed by it in a consultation. When signing the consent form, the birth parent must sign an acknowledgement that he or she has read and understood the matters contained in the information kit.

Involvement after consent to the adoption is given

9.79 As is the case with the placement of Aboriginal children, a Torres Strait Islander agency should be involved in the adoption process. This is especially important as there is no Torres Strait Islander adoption worker employed by DOCS or the private adoption agencies. The involvement of a Torres Strait Islander agency would be essential in identifying the extended family and providing contacts to find the best placement for the child.

RECOMMENDATION 86

The legislation should require the involvement of a Torres Strait Islander agency at all times in the placement process following taking consent for the adoption of the child.

Legal recognition of customary adoption

9.80 Torres Strait Islanders have been involved in formal discussions with the Queensland State Government since 1990 with the aim of having Torres Strait Islander adoptions recognised by Queensland adoption legislation.

9.81 There are four main reasons for wanting legal recognition of customary adoption.

First, it would overcome the problem of birth certificates not reflecting the customarily adopted status of a child. These problems emerge when enrolling children for schools, and so forth, and as adults, when applying for passports, drivers' licences and marriage certificates. Also, given the traditional secrecy of customary adoption, adopted children have suffered confusion and distress on obtaining their birth certificates and finding out their "real name" and the names of their "real parents".⁵³

Secondly, it would avoid disputes over estates where the adoptive parent has died intestate. Torres Strait Islanders rarely make wills. Where the deceased parent has biological as well as adopted children, disputes can arise between the siblings over their entitlement to share in their parent's estate. Legal recognition of a customary adoption would clarify the adopted child's legal right to the estate.

Thirdly, it would help to clarify the position in the case of custody disputes where adopted children were being reclaimed by their birth parents. This is a greater problem in the Torres Strait Islander community than elsewhere in Australia.⁵⁴

Fourthly, as customary adoption is a practice which “contributes significantly” to Torres Strait Islanders’ “sense of identity as a people and a clear sense of their connections to each other and their homeland islands”, it is feared that “an erosion of their identity will happen unless their traditional practices are given legal recognition”.⁵⁵

9.82 The Chief Justice of the Family Court, Justice Nicholson, visited Torres Strait to consult with the community on, among other things, recognition of customary adoption. His Honour “was concerned, as were the Torres Strait Islanders themselves, about traditional Torres Strait adoption fitting into a law not really based on concepts of that sort”.⁵⁶

9.83 Similarly, the Queensland Government has been reluctant to recognise Torres Strait Islander adoptions within adoption legislation because of the belief that Torres Strait Islanders would be disadvantaged by applying closed Queensland adoption legislation to open Torres Strait Islander adoption practice. In a meeting arranged by the Queensland Government, an amendment to the *Adoption of Children Act 1964* (Qld) was mooted to include a separate section for Torres Strait Islanders. This section would give customary adoption the same legal effect in terms of new birth certificates and inheritance rights for adoptees as “Western” adoption but the applicable definitions and purposes would be different. Ultimately it was felt that the proper solution was likely to be a separate piece of legislation covering customary adoption.⁵⁷

9.84 However, Justice Nicholson went on to say:

[o]ne of the things that I have been urging on the Federal Attorney-General is that the Family Law Act should be amended, especially to require the court to take into account the custody of children, law and custom of the indigenous people of Australia, including these islands.⁵⁸

Justice Nicholson has specifically called on the Federal and State Governments to clarify the legal position of traditional adoption in order to avoid continuing confusion and uncertainty.

9.85 The *Family Law Act 1975* (Cth) has recently been amended to deal expressly with Torres Strait Islander children, but not so as to give actual legal recognition to customary adoptions. Section 68F(2)(f) requires the Court to consider the child’s background, including any need to maintain a connection with the lifestyle, culture and traditions of Torres Strait Islanders in determining what is in the child’s best interests.

9.86 The Commission appreciates that:

[t]he failure to recognise [customary Torres Strait Islander adoption] has given rise to considerable difficulties over issues such as inheritance, who appears on birth certificates and sometimes gives rise to subsequent custody proceedings...⁵⁹

However, the Commission is concerned that it may not be doing Torres Strait Islanders a service to recognise customary adoption within adoption legislation. Legal recognition of customary adoption would be to address the problems outlined above. But adoption legislation does not deal with intestacy or custody, only with birth certificates. Other than recording the customary adoption details on the child’s birth certificate, none of the other provisions of the Act would be intended to apply. The rationale, then, for using existing adoption legislation as the place to recognise customary adoption is simply because the subject matter is the same. Looked at in this way it does not seem an appropriate use of the Act and may even confuse the situation by giving rise to arguments that other provisions *should* apply. This is neither desired by Torres Strait Islanders nor is it necessarily desirable. Furthermore, Justice Nicholson emphasised that:

[t]he problem should be seen as a national one and not one for the individual States and Territories, unless they are able to develop some co-operative basis for an approach to such problems.⁶⁰

9.87 For the above reasons, the Commission does not recommend that the legislation give recognition to customary Torres Strait Islander adoption.

INTERNATIONAL LAW

9.88 RR 7 discusses at length Australia's international obligations in relation to child welfare. The significant international instruments which are relevant to the adoption of Aborigines and Torres Strait Islanders are referred to below.

9.89 The *United Nations Convention on the Rights of the Child* ("UNCROC") grants specific rights to indigenous children and must be respected by adoption legislation. The Preamble to UNCROC takes due account of:

the importance of the traditions and cultural values of each people for the protection and harmonious development of the child.

Decisions with regard to the welfare of Aboriginal and Torres Strait Islander children ought to be made with reference to Aboriginal and Torres Strait Islander traditions and cultural values.

9.90 Article 30 of UNCROC stipulates that:

[i]n 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.

That is, 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. Putting into effect placement principles will comply with Australia's international obligations.

9.91 Article 20 of UNCROC provides that signatories to UNCROC are obliged to ensure alternative care, including the option of adoption, for a child:

temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment...

Article 20(3) provides:

When considering solutions [for the care of a child], 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.

The value for a child of finding an adoption placement which will give him or her cultural continuity is discussed in Chapter 8.

9.92 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.

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 UNCROC. This includes the right to enjoy one's culture provided by Article 30 and the right to "alternative care" provided by Article 2. 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. Again, both the application of placement principles and the involvement of Aboriginal and Torres Strait Islander agencies would satisfy Articles 5, 20 and 30.

9.93 The Draft Declaration on the Rights of Indigenous People ("the Draft Declaration") is currently being examined by the Commission on Human Rights in the United Nations.⁶¹ When it is finalised,⁶² the Draft Declaration will not be binding in international law but it will have moral force in Australia. Article 6 states:

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].

9.94 This article expressly provides that indigenous children should not be removed from their families and communities under any pretext, presumably including adoption. Australia will be morally bound to take into account this article when considering alternative care options for Aboriginal and Torres Strait Islander children. It requires every possible effort to be made to place indigenous children within their own culture, unless it is clearly in the child's best interests not to do so.

FOOTNOTES

1. C Edwards and P Read *The Lost Children* (Doubleday, Sydney, 1989); B Cummings *Take This Child ...* (Aborigines Studies Press, Canberra, 1990); R Chisholm "Aboriginal Children: Political Pawns or Paramount Consideration" in J Jarrah (ed) *Child Welfare: Current Issues and Future Directions* (Social Welfare Research Centre Reports and Proceedings, No 34, July 1983) at 43; R Chisholm *Black Children: White Welfare* (Social Welfare Research Centre Reports and Proceedings, No. 52, April 1985) at 10-32.
2. New South Wales - Department of Community Services *Learning from the Past: Aboriginal Perspectives on the Effects and Implications of Welfare Policies and Practices on Aboriginal Families in New South Wales* (Report prepared by Gunjil Jindibah Centre, Southern Cross University, October 1994).
3. Human Rights and Equal Opportunity Commission *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Terms of Reference, August 1995).
4. J Brough "Canberra Built in 'Mother's Womb'" *Sydney Morning Herald* (18 July 1996) at 2.
5. *Convention on the Prevention and Punishment of the Crime of Genocide* Article II(e).
6. It would be impossible to argue that Australia was actually in breach of the Convention prior to 1961 as the Convention did not come into force until that year.
7. C D Rowley *The Remote Aborigines* (Penguin, Australia, 1972) at 115.
8. *Report of Board for the Protection of Aborigines for Year 1911* at 2 (New South Wales Parliamentary Papers, 1912, Vol 1 at 718).
9. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 24 November 1914 at 1354.

10. 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, 1982).
11. Aboriginal Children's Service *Submission* (12 July 1993) at 2 and 6.
12. Y Walker "Aboriginal Concepts of the Family" (1993) 18 *Children Australia* 26 at 26.
13. *Adoption Act 1984* (Vic) s 50(1).
14. Seven Aboriginal and Torres Strait Islander children were placed for adoption in New South Wales in 1994-1995. Reliable separate statistics for the two cultural groups are not available. Of these seven, two were adopted by Aboriginal parents: Australian Institute of Health and Welfare *Child Welfare Series: Adoptions Australia 1994-95* No 14 (AGPS, Canberra) at 24.
15. R Sykes *Black Majority* (Hudson Publishing, Melbourne, 1989) at 10; 1996 Aboriginal Children's Research Project *Identifying Aboriginal Children in Non-Aboriginal Substitute Care* (Discussion Paper 5, July 1982) at 6-7.
16. Sykes at 25.
17. *Children (Care and Protection) Act 1987* (NSW) s 3(1): "'Aboriginal' has the same meaning as it has in the Aboriginal Land Rights Act 1983".
18. Australian Working Party of the Standing Committee of Social Welfare Administrators *Aboriginal Fostering and Adoption: Review of State and Territory Principles, Policies and Practices* (October 1983).
19. *Family Law Act 1975* (Cth) s 68F(4).
20. *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s 4(1).
21. *Adoption of Children Act 1994* (NT) s 3(1).
22. (1995) 128 ALR 577.
23. *Gibbs v Capewell* (1995) 128 ALR 577 at 580.
24. E Sommerlad "Homes for Blacks: Aboriginal Community and Adoption" in C Picton (ed) *Proceedings of First Australian Conference on Adoption* (The Committee of the First Australian Conference on Adoption, Sydney, 1976) 159 at 164.
25. Justice B J K Cohen *Submission* (29 July 1994) at 9.
26. *Adoption Regulation 1995* (NSW) cl 34 makes provision for the Director-General or principal officer of a private adoption agency to make all reasonable efforts to place the child, if practicable, in accordance with the birth parents' or guardian's expressed wishes as to the ethnicity of the adoptive parents.
27. New South Wales - Department of Community Services *Placement of Aboriginal Children for Adoption* (Draft Policy Statement, 8 May 1987). See New South Wales Law Reform Commission *The Aboriginal Child Placement Principle* (Research Report 7, 1997) Appendix B.
28. Aboriginal Children's Research Project (NSW) *Draft Principal Report* (March 1982) at 161 cited in Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) at para 365.
29. Australian Law Reform Commission *Aboriginal Customary Law: Child Custody, Fostering and Adoption* (Research Paper 4, 1982) at 1.

30. ALRC Report 31 at para 366.
31. *Children (Care and Protection) Act 1987* (NSW) s 87.
32. NSWLRC RR 7 Chapters 4 and 5.
33. R Chisholm "Aboriginal Children and the Placement Principle" (1988) 31 *Aboriginal Law Bulletin* 4 at 4.
34. This is provided for by s 50(2)(c) of the *Adoption Act 1984* (Vic).
35. New South Wales - Parliamentary Advisory Committee *Review of Adoption Policy and Practice in New South Wales* (Report, December 1984) at 89.
36. *Adoption Act 1984* (Vic) s 50(2)(b).
37. *Adoption Regulations 1989* (SA) reg 4.
38. Aboriginal Children's Service *Submission* (12 July 1993).
39. This principle was endorsed by the Australian Working Party of the Standing Committee of Social Welfare Administrators *Aboriginal Fostering and Adoption: Review of State and Territory Principles, Policies and Practices* at 42. It was also endorsed by the New South Wales - Department of Community Services *A Review of Substitute Care Service for Aboriginal People in New South Wales: Report Prepared by the Aboriginal Review Committee* (September 1995) at 5.
40. ALRC Report 31 at para 75.
41. *Adoption of Children Act 1965* (NSW) s 19(1a)(c).
42. RR 7, in Chapter 7, analyses factors affecting the application of the Aboriginal Child Placement Principle in fostering placements.
43. In the 1991, census the population was recorded at 4,886. The Aboriginal and Torres Strait Islander Commission believes that a census taken today would put the number at something higher than this. ATSIC believes that the reason for this is that, in 1991, many Torres Strait Islanders were wary of the census and unsure of what use would be made of it. With gradual changes in attitudes towards indigenous peoples, Torres Strait Islanders would possibly now feel confident to declare their racial background in a government census.
44. There has been one placement in New South Wales in the last 5 years.
45. A Nicholson "Indigenous Customary Law and Family Law" address given to the *Indigenous Customary Law Forum* (Canberra, 18 October 1995) at 16.
46. P Ban *Report to Queensland Government on Legal Recognition of Torres Strait Islander Customary Adoption* (Lina TSI Corporation, Queensland, 1990) at 8.
47. P Ban "The Quest for Legal Recognition of Torres Strait Islander Customary Adoption Practice" (1993) 60 *Aboriginal Law Bulletin* 4 at 4.
48. Ban (1993) at 4.
49. Nicholson "Indigenous Customary Law and Family Law" at 16.
50. *Family Law Act 1975* (Cth) s 68F(4).

51. *Children's Protection Act 1993* (SA) s 5 and 6. In the *Adoption of Children Act 1964* (Qld) s 18A provides a general guideline for the placement of children with an "indigenous or ethnic background". The Director "shall have regard to the indigenous ... background ... and shall approve a prospective adopter who ... has a similar indigenous ... background". The Queensland Department of Family Services has a policy of placing Torres Strait Islander children with Torres Strait Islanders.
52. This was conveyed to the Commission in consultations with the Aboriginal and Torres Strait Islander Commission, Mrs M Toomey of the Department of Family Services, Queensland, Mrs E Gaffney and Mr F Tapim.
53. Ban (1990) at 17.
54. Ban (1990) at 18.
55. P Ban "Developments in the Legal Recognition of Torres Strait Islander Customary Adoption" (1996) 78 *Aboriginal Law Bulletin* 14 at 15.
56. J Larkin "Torres Strait Totems" *Sydney Morning Herald Good Weekend* (20 May 1995) 38 at 41.
57. Ban (1996) at 15.
58. Larkin "Torres Strait Totems" at 41.
59. Nicholson "Indigenous Customary Law and Family Law" at 17.
60. Nicholson at 17.
61. United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-sixth session (20 April 1994).
62. The projected date for finalising the Declaration is 2004.

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

10. Intercountry Adoption

SYNOPSIS

10.1 Following an introduction and a brief history of intercountry adoption, this chapter will outline current legislation and the current procedure for adopting a child from overseas. This gives the context for exploring possible changes to intercountry adoption.

10.2 The concept of intercountry adoption, as distinct from the way in which it is practised, is then evaluated in order to assess whether New South Wales should participate at all; to highlight any misgivings; and to raise issues which may affect future thinking.

10.3 In examining the concept of intercountry adoption, frequent reference is made to *The United Nations Convention on the Rights of the Child* ("UNCROC") and the *Hague Convention on Protection of Children and International Co-operation in Respect of Intercountry Adoption* ("the Hague Convention"). In order to understand fully the relevance of these international conventions to the conduct of intercountry adoption in New South Wales, each is outlined in some detail.

10.4 The next section of the chapter then evaluates current practices in intercountry adoption in New South Wales to establish where changes should be made or where there should be legislative endorsement of current practice. There are many issues involved and each is dealt with separately under the following sub-headings:

financial aspects and preventing trafficking in children;

parent support groups;

the role of DOCS and accreditation of non-government organisations;

adoption information;

preparation, assessment and counselling;

post-placement reports;

recognition of adoption orders;

older-aged adoptees;

birth names;

multiple placements; and

immigrants and adoption.

10.5 To the extent relevant or appropriate in relation to each, the discussion under each of the above sub-headings:

looks at an issue in the context of present practice;

highlights where international conventions require certain standards or safeguards;

evaluates whether current standards or practices are inadequate or fail to comply with international conventions;

looks at the way in which other States or countries have approached an issue;

outlines the provisional proposals for reform set out in DP 34;

considers submissions received addressing the provisional proposals for reform;

discusses ways in which safeguards can be introduced and standards lifted or maintained, taking into account submissions; and

recommends legislative reforms accordingly.

10.6 Finally, the chapter discusses the role of the Department of Immigration and Ethnic Affairs ("DIEA"). This department is an important participant in intercountry adoption. DIEA determines whether or not an overseas adoptee will be allowed entry to Australia, pursuant to the *Migration Act 1958* (Cth) ("the Migration Act") and *Migration Regulations 1994* ("the Migration Regulations"). Although the DIEA has an integral role in the conduct of intercountry adoption, this area is not dealt with until the end of the chapter because the terms of reference for this report do not extend to making recommendations in relation to immigration legislation and practice. This section of the chapter comments on changes that may need to take place in order to accommodate changes in adoption law and in order to comply with international obligations. It also draws attention to difficulties in the application of migration law to adoption. Lastly, in order to complete an understanding of intercountry adoption, this section explains the way in which an intercountry adoptee gains entry into, and citizenship of, Australia.

10.7 The Commission has confined its recommendations to legislative reform. Some aspects of intercountry adoption practice cannot appropriately be governed by legislation and, therefore, although discussed in this chapter, specific recommendations in relation to these have not been made. Nonetheless, the Commission urges that all agencies¹ processing intercountry adoption should endeavour to observe the standards and safeguards discussed.

10.8 Specifically in relation to Australia's international obligations, in some respects they should be made law in New South Wales, and recommendations have been made accordingly. In other respects, it is not practical to incorporate them in legislation. However, New South Wales adoption practice should, at least, conform to international standards to which Australia is a signatory.

10.9 The only practical control that New South Wales can have over the conduct of certain areas of intercountry adoption, such as in relation to the taking of consents in the overseas ("sending") countries, is in the licensing of our agencies and in the choice of sending countries and programs within those sending countries. Generally, these are matters for DOCS to decide and regulate. For example, in deciding whether or not to license an agency to carry out intercountry adoption, DOCS should consider whether the agency's practices conform to Australia's international obligations. Where issues can be regulated by imposing licensing conditions in the legislation, recommendations have been made accordingly.

10.10 All the Commission's recommendations appear throughout the chapter under the relevant headings. In addition, for easy reference, the recommendations are grouped at the end of the chapter in the order in which they first appeared.

INTRODUCTION

10.11 Intercountry adoption now accounts for approximately half of all adoptions in New South Wales². It is arguably the most sensitive and complex area of adoption. It involves all the issues relating to domestic adoptions as well as a range of other issues. Moreover, it involves Australian immigration law and policy; the laws and policies of the overseas countries; and obligations under international conventions.

10.12 Because the children are being placed internationally, and almost always interracially, issues relating to cultural heritage arise. Also, many children have "special needs" because they are

older and/or have disabilities. Many of the children, including babies, are likely to be physically and/or emotionally vulnerable because of early physical and/or emotional deprivation.

10.13 Intercountry adoption has frequently been associated with intense controversy. At one end of the spectrum, there is the view that it is a form of exploitation of Third World countries by First World countries and should be discontinued. At the other end of the spectrum, there is the view that intercountry adoption is a humanitarian act, towards both individual children and the sending countries, and thus is a form of overseas aid; it should be encouraged to develop and expand. There are numerous intermediate positions.

10.14 Intercountry adoption is a more complex arena than local adoption in two further respects. First, there are organisations specifically formed for the purpose of supporting Australian adoptive parents of overseas born children and they play a significant role in intercountry adoption. Secondly, the role of DOCS in intercountry adoption is comparatively limited and sometimes ambiguous.

HISTORY OF INTERCOUNTRY ADOPTION

10.15 The concept of intercountry adoption has its origins in the aftermath of the two World Wars, but particularly after World War II, when the disruption of families in war-torn countries resulted in large numbers of abandoned and orphaned children. Children from Germany, Greece and the Baltic States were sent by religious organisations for adoption in other European countries and in the USA. From 1953 large numbers of orphaned or abandoned children from the Korean war were adopted overseas. In Australia, however, intercountry adoption is a relatively recent practice: prior to 1975 there were few intercountry adoptions. It only became a recognised avenue of adoption following the airlift in 1975 of Vietnamese war orphans to Western nations: the 292 children who came to Australia were adopted by Australian families³.

10.16 Since then, adoption of children from Asia and Latin America has become well established in Australia, but for reasons which have diversified from this early reaction to a specific crisis.

10.17 Intercountry adoption has endured as a response to the needs of children orphaned, abandoned or relinquished because of military conflict, poverty or stigmas attaching to illegitimacy, disablement or mixed race.

10.18 But another momentum has, since the 1970s, overtaken the original impetus for intercountry adoption. Economic, demographic, cultural and political changes in Australia in the last twenty years have resulted in fewer unwanted births, less pressure to relinquish ex-nuptial children for adoption and later discovery of infertility due to couples delaying starting a family. The two-fold effect of these factors is a marked decrease in the availability of Australian-born children for adoption and many couples finding themselves too old to adopt locally born babies. As a result, increasing numbers have turned to intercountry adoption to begin or extend their families.

10.19 It can be seen, then, that intercountry adoption is a shifting, evolving phenomenon, responding to both domestic and international forces. The Commission can only review the practice, and make recommendations, in the context of what is happening now. It is inevitable that further changes will occur in the future and for this reason it is an area that needs constantly to be reviewed.

10.20 There have been recent changes in international parameters and further changes are imminent. Australia has now, and is most likely to acquire in the near future, further international obligations affecting intercountry adoption practice and policy. These include existing obligations under UNCROC and foreshadowed obligations under the Hague Convention.

CURRENT LEGISLATION

10.21 When the the Adoption Act was drafted, intercountry adoption was virtually unheard of in New South Wales. Consequently, the Act did not address the situation where applicants resident or domiciled in New South Wales wished to adopt a child from another country. The only specific

reference to overseas adoptions was to be found in s 46 ("Recognition of foreign adoptions"), and s 47 ("Declarations of validity of foreign adoptions"). Section 46 allows for recognition of an adoption order made in another country provided the adopters had been resident for 12 months or more, or domiciled, in that country. An adopter who qualifies under s 46 can apply to the Court under s 47 for a declaration of validity of the foreign adoption order.

10.22 In 1987 the Adoption Act was amended to include s 65A ("Report for applicants where child overseas"). This section gives authority to the Director-General of DOCS to assess applicants for intercountry adoption and to prepare an assessment report.

10.23 The Adoption Regulation⁴ includes clauses in the area of intercountry adoption. These are as follows:

clause 6(2) provides that a person may submit an expression of interest to adopt a child from overseas;

clause 12 deals with assessment of applicants for overseas adoption;

clause 13(c) enables the Director-General, or principal officer of a private adoption agency, to limit an approval to adopt to a child from a specified country or to a child of a specified race or ethnic group;

clause 16(c) sets up an overseas section for an adoption register of applicants;

clause 21(c) provides that Form 3 is the appropriate consent form to use for general consent to the adoption of a non-citizen child; the Minister administering the *Immigration (Guardianship of Children) Act 1946* (Cth), or his or her delegate, as guardian of a non-citizen child, must consent to that child's adoption; and

clause 29(2) provides that a report about the child's social, developmental and medical history and the social, developmental and medical history of the child's family must be obtained before an intercountry adoption can take place.

10.24 There are other clauses which apply to local and intercountry adoptions alike, but there are no further clauses specifically directed at intercountry adoption.

CURRENT PROCEDURE

10.25 The role of DOCS is central to all adoptions within New South Wales, including intercountry adoption. Whereas private adoption agencies such as Barnardos, Centacare and the Anglican Adoption Agency also play significant roles in local adoptions, there are no private adoption agencies involved in intercountry adoptions.

10.26 A person wishing to adopt a child from overseas must submit to DOCS an expression of interest⁵. DOCS forwards an information video to interested people together with an information newsletter, an adoption booklet and an "expression of interest" form. The utilisation of a video is recent and has been positively received. Applicants feel more comfortable watching an information video in their own homes rather than attending a session with approximately 300 other people. As well, the video can, of course, be rewound and played again as necessary⁶.

10.27 DOCS assesses each completed "expression of interest" form and invites enquirers to attend an adoptive parent education and training course⁷. Following their attendance at this course, interested persons are invited to complete an application to adopt, nominating the country from which they wish to adopt⁸. At this time, DOCS encourages applicants to join one of six parent support groups. The exception to this is if the applicant wishes to adopt from a country with which DOCS itself has a program and with which there is no parent support group involvement. The countries to which this applies are Fiji, the Philippines and Romania. Although the parent support

group for Ethiopia is based in Queensland, New South Wales applicants wishing to adopt from that country must nonetheless join the Queensland group.

10.28 The role of parent support groups in intercountry adoption is discussed in detail in paragraphs 10.139-10.163. Briefly, however, parent support groups play an integral role in intercountry adoption procedure. It is usually the parent support group which has established the adoption program in the overseas country and has built up a relationship with the overseas agency or orphanage involved. In most cases, it is the Australian parent support group with whom the overseas agency or orphanage principally liaises. Choice of parent support group will depend on the country from which the applicants wish to adopt as each parent support group has programs in one or more countries, with only limited overlap.

10.29 The parent support group usually helps the applicants prepare documentation. One group will also arrange translation and two of the groups will arrange notarisation. Some of the groups also forward documentation to the sending country. Documentation required to be forwarded to the sending country includes financial information, medical information and birth and marriage certificates relating to the applicants.

10.30 The process of assessing the applicants for their suitability to adopt begins following lodgement of an application to adopt⁹. This process usually takes three to six months. Applicants are interviewed several times over this period by a private social worker, contracted by DOCS or a DOCS District Officer where no private social worker is available. At the completion of the interviews the social worker prepares an assessment report, known as the "home study", which is forwarded to DOCS. Basing its decision on the home study, health reports, police check and referee's report, DOCS either approves the applicants as suitable to adopt a child or a particular child, or declines to give approval. If the applicants are approved to adopt, the home study is forwarded to the sending country for consideration for placement of a child with the applicants. One parent support group forwards the home study to the sending country, but otherwise it is forwarded by DOCS¹⁰.

10.31 Allocation of a child to particular applicants is a matter for the sending country. The sending country notifies either DOCS directly, or the parent support group, that a particular child has been allocated to particular applicants. DOCS conducts an "allocation interview" with the applicants and, if the applicants agree to accept the allocation, they sign an "Agreement and Undertaking" to accept and support the child.

10.32 Before travelling overseas to collect their child, applicants must apply for a *Class 102 (Adoption) Visa and Entry Permit* pursuant to the *Migration Regulations 1994 (Cth)* granting the child entry into and permanent residence in Australia. The visa will only be granted if, among other things, DOCS has approved the applicant to adopt the child. Immigration issues are discussed in detail in paragraphs 10.251-10.276.

10.33 The applicants contact DOCS on their return to Australia with the adopted child. A post-placement interview is conducted and a report made. Two post-placement interviews take place in the first six months of the child's placement in Australia after which a decision is made to proceed to obtaining an adoption order in the New South Wales Supreme Court. However, the adoptive family can ask for as many additional post-placement interviews and can access as much post-placement support as it needs without any further charge¹¹.

10.34 The applicants must apply to the Supreme Court of New South Wales for an Adoption Order. It is not sufficient if the child has been adopted under the laws of the sending country, since foreign adoption orders are only recognised in New South Wales if the adopter had been resident for 12 months or more or domiciled in the country in which the adoption order was made¹². Usually two post-placement reports, prepared over the course of six months, as well as a report by the Director-General¹³, are submitted by DOCS to the Court in the adoption proceedings.

THE CONCEPT OF INTERCOUNTRY ADOPTION

10.35 Australia has not yet ratified the Hague Convention, although it is expected to do so in 1997¹⁴. With Australia poised to ratify, it may seem that an evaluation of the concept of intercountry adoption has been pre-empted. We appear to be committed as a nation to participation in the practice and, more relevantly, New South Wales appears to be committed, having supported a proposal for ratification. However, there are a number of points to make in this regard:

Although New South Wales has indicated its approval at a national level for ratification of the Hague Convention, there is nothing in this which gives rise to any legal or moral obligation for New South Wales to continue to participate in intercountry adoption.

Even if New South Wales continues its current involvement in intercountry adoption, it is proper for the Commission to highlight any general misgivings it may have concerning the practice.

The point is made above that intercountry adoption is a changing arena. What is considered appropriate now may not be appropriate in the light of future developments. In reviewing intercountry adoption the Commission has a duty to raise issues which may affect future thinking.

10.36 Therefore, the Commission has evaluated the concept of intercountry adoption, as opposed to the way in which it is practised, in order to assess whether New South Wales should participate at all, to highlight any misgivings and to raise issues which may affect future thinking. This evaluation is contained in the following paragraphs 10.39-10.83.

10.37 The Commission's conclusion is that, when practised in accordance with strict regulations and guidelines, intercountry adoption has a legitimate role to play as a means for providing care for children who cannot be cared for in their country of birth. Although the international community has felt sufficient concerns about the unregulated growth of intercountry adoption to assent to a number of Declarations¹⁵ and Conventions establishing principles and standards of practice, intrinsically these Declarations and Conventions condone the continuance of intercountry adoption.

10.38 *However*, as UNCROC and the Hague Convention make clear, intercountry adoption must be seen as "a safety-net program for children whose needs cannot be better met in other ways"¹⁶.

One of the aspects which should be satisfied before a child is placed for adoption in New South Wales is that that child cannot be placed with a family within the birth country. The Commission cautiously agrees with the view that "long-term institutional care is generally recognised as the least desirable outcome for children who have permanently separated from their original family"¹⁷.

Controversial aspects of intercountry adoption

Cultural heritage

10.39 Chapter 8 deals with cultural heritage and issues of identity and self-esteem as well as issues concerning racism and language barriers. That chapter outlines some of the potential problems of transcultural placements. Clearly, almost all intercountry adoptions would be across cultural boundaries. The problems transcultural adoptees may encounter are potentially magnified when there is not only loss of birth culture but loss of birth country as well.¹⁸ Furthermore, issues of identity establishment are complicated by the unlikelihood of the child being able to access information on his or her roots and of making contact as an adult with the birth family:

While loss is a key issue for all members of the adoption triangle, for intercountry adoptees the pain of loss may be so unbearable that it is denied, dissociated and deeply repressed. Loss may include absence of information about date and place of birth, as well as birth parents and the knowledge that this personal data may never be found. Under such circumstances search and reunion is an impossible and frightening option, since the assumption of the adoptive family's culture makes the intercountry adoptee a stranger to their own culture and the language gap increases their

alienation from their origins and reinforces their unknowable familial past. Such losses go beyond the bearable and strike at the very existence and essence of the self.¹⁹

10.40 Many intercountry adoptees are older-aged (over two years). Chapter 8 discusses research findings which indicate that older-aged cross-cultural adoptees experience greater adjustment difficulties. "Most studies report that the older the child at placement the greater the probability of failure."²⁰

10.41 If an adoption does break down, it can be particularly distressing and damaging for children who have been uprooted from their own culture and country, particularly if they have to be placed in residential care, even for a short period, in an unfamiliar country.

Openness

10.42 Chapter 7 discusses the advantages of openness in adoption, most particularly for the child. Separating a child from his or her birth parents and relatives by national boundaries places enormous obstacles in the way of a true open adoption. Some of these obstacles, aside from the obvious geographical one, include:

a lack of identifying information;

inaccurate records;

a lack of acceptance in the sending country for searching;

cultural embarrassment or taboos;

language barriers; and

barriers created by the assumption of a culture different from the birth culture.

10.43 Furthermore, as it is the overseas country which allocates children to adoptive parents, it is not possible for adoption agencies in New South Wales to take into account wishes of the birth parents in the selection of adoptive parents, as is done for local adoptions.

Intercountry adoption as a form of aid

10.44 Intercountry adoption is justified by some as a humanitarian response to the plight of needy children. It has been argued, however, that this is an incorrect response to the ills of the developing world.²¹ It acts as something less than a bandaid solution to the problem of 80 million homeless children world wide.²² It is argued that the money spent on intercountry adoption (an average of \$20,000 per adoption and sometimes more) could be spent far more effectively on various forms of aid including sponsorship; provision of medical services; development of infrastructure and agricultural programs; building and improving orphanages and smaller residential care units; promotion of local fostering and adoption; and programs to prevent family breakdown and support vulnerable families.²³ Furthermore, if intercountry adoption is developed as a program of some priority it may impede the development of more effective and broadly based solutions.²⁴

10.45 Approaching intercountry adoption as a form of aid carries with it a danger of placing on the child an implied burden of being grateful for having been "saved":²⁵

This can lead to a situation in which the child may feel that his gratitude can never equal what has been done for him and the debt becomes impossible to repay ... Associated with this is the fact that in seeking to parent an older child of different race who has suffered abandonment and deprivation in his birth country and whose future by Western standards may seem bleak, there may be the tendency to view the child in terms of his condition rather than for himself as an individual.²⁶

10.46 There is also a need to guard against replicating the misguided and damaging past treatment of Aborigines which involved taking Aboriginal children from their families. Non-Aboriginal Australians deemed it to be in the children's best interests to remove them from what were judged, from a Western viewpoint, to be inferior circumstances.

Discrimination in the birth country

10.47 It has been argued that intercountry adoption can save a child from serious discrimination in his or her own country. For example, in Korea illegitimacy carries with it a significant stigma. Illegitimate children are precluded from having their names written in the family register and thereby may be seriously prejudiced in many aspects of their life.

10.48 Things can and do change, often far more rapidly than can be anticipated. In Korea, until recently, adoption was shrouded in secrecy because of the stigma attached to illegitimacy. Approximately eight years ago the unexpected happened when the Eastern Child Welfare Department, responding to demand, established a searching organisation to bring about contact between the birth family and adopted children. Again in Korea, prior to 1962, there were no non-relative local adoptions because of the importance placed on bloodlines. By 1988, there were 2,300 local adoptions. Ironically, it is claimed that:

[t]his increase in local adoption is largely due to the good work of intercountry adoption agencies who have tried to place children locally.²⁷

10.49 Whatever the reasons, probably including an improving economy, standard of living and general education, the establishment of a searching organisation and the growth of local non-relative adoption evince changing attitudes.

10.50 Although there is still stigma attaching to illegitimacy in Sri Lanka, there is evidence that this is beginning to decrease in urban areas. Programs have recently been started to support single mothers. In Colombo, for instance, a home has been established to enable single mothers to keep their children. It is being found that, although the stigma of bearing an illegitimate child remains a disincentive for single mothers, many will keep their children if economic support is provided.²⁸ There is no reason why these changes will not continue nor why such changes could not occur in other countries.

10.51 In Romania, during the Ceausescu regime, large numbers of children were abandoned or relinquished to orphanages.²⁹ The reasons can be attributed, among other things, to poverty, the illegality of contraception and abortion, the lack of welfare provisions for single parents and the stigma of illegitimacy. In the six months subsequent to the fall of the regime, 1,200 children were restored to their birth families. Social welfare reforms have been introduced to enable parents to keep their children and to reduce the incidence of unwanted pregnancies. Increased living standards have enabled Romanians to adopt. While these sociological factors are not related to issues of discrimination, it is further illustration of how seemingly fixed circumstances can change, and change rapidly.

10.52 Romania also furnishes a lesson about exercising caution before resorting to the solution of intercountry adoption in response to a crisis. Immediately following the fall of the dictatorship and before social reform could be implemented, Westerners rushed to adopt from the orphanages. Between August 1990 and July 1991, 10,000 children were sent overseas.³⁰ It later became apparent that some children who had been left in the orphanages for temporary care only had been taken out of the country.³¹

10.53 We only have to compare the situation in New South Wales as recently as the 1960s with prevailing social and economic conditions to be persuaded that significant changes can evolve:

Increasingly ... a direct correlation is being established between improved standards of living in a country, lowering of the stigma of illegitimacy, improving services to single parents and a diminishing number of babies available for adoption.³²

Adopting children from deprived and abusive backgrounds

10.54 Most intercountry adoptees would have spent some time in an institution, almost certainly experiencing emotional deprivation. Some would have suffered abuse. As a result, many children will be developmentally and psychiatrically vulnerable. Often the experience of trauma is manifested in behavioural problems. Added to this, a significant number of children arrive suffering from disabilities and health problems, including the effects of malnutrition.

10.55 Obviously, parenting a child from this sort of background is extremely difficult. The adoptive parent can be faced with the dilemma of having to discipline instances of misbehaviour, but being reluctant to punish children who have suffered so much already. The child may find it difficult to bond and communicate and their responsiveness to the new parents and environment may be hampered by disability or ill health. Mussen reports that "extreme neglect in [the first year of life] may result in damage to the child's future capacity for developing satisfying relationships with other people".³³ Although not conclusive, research on children who have suffered malnutrition and deprivation in infancy and childhood has found some difficulties in social behaviour as compared with non-deprived children.³⁴ In many cases the child will appear to adjust quickly but "the pain will almost certainly re-surface at some stage".³⁵

10.56 There would also be difficulties in parenting an older child whose past is locked away from the parent. Adoptive parents usually have very little background information on the child and, until the child acquires the parents' language, he or she cannot communicate above a basic level. It is then not uncommon for memories to be lost with loss of the mother tongue or for the memories to be repressed or denied. It can be threatening for parents to be thus excluded and more difficult to understand their child's reactions and fears. Many adoptive parents would have little understanding or even knowledge of what the child has been through and would, therefore, have difficulty helping a child put his or her early experiences into context.³⁶

10.57 In drawing attention to these factors, the Commission is not mounting an argument that intercountry adoption can never work. The salient point is that adopting a child from a deprived or abusive background is potentially difficult. This signals the importance of preparation and counselling for prospective adoptive parents, and post-placement support, which is discussed below. It also lends support for the contention that it is important for one carer to stay at home for an extended period of time following the adoption. This is discussed in Chapter 6.

Creating conditions for trafficking in children

10.58 There is no doubt that trafficking in children does exist and that intercountry adoption creates a market which, in the corrupt extreme, allows for the iniquitous practice of buying and selling children.³⁷ So long as intercountry adoption is an accepted practice, there will be people sufficiently desperate for a child to go outside the system and people sufficiently corrupt to make money from this need.

10.59 Australian legislation does not permit private adoptions by non-relatives. It is these adoptions which have been associated with most of the abuses which take place in intercountry adoption. However, we should not feel complacent that trafficking could not involve Australian adoptive parents. Some Australians have obtained children through a lawyer or other intermediary, in some instances thereby wittingly or unwittingly becoming involved, directly or indirectly, in the buying and selling of children.³⁸ Relinquishment or abandonment papers can be forged for illegally obtained children.

10.60 Up until recently, there were particular concerns with programs in Brazil because adoptions were in effect private and highly susceptible to abuse.³⁹ Significant reforms were introduced in 1990, most notably government regulation, in an effort to eliminate corruption. It should be further noted that, contrary to the perception that if there was no intercountry adoption hundreds of children would languish in institutions, "... there is a huge waiting list of nationals wanting to adopt infants and young children up to four years of age".⁴⁰ The placement of a child in a foreign substitute family is intended by law to be an exceptional solution; Brazilian families have priority over foreigners.⁴¹ Brazilian Code of Minors, Article 31. Carvalho da Silva, senior adoption worker in Sao Paulo, records:

[i]n my personal experience with adoptions, I have seen infants adopted by foreigners when the judicial authorities did not uphold the principle of Brazilian national's [sic] priority, or in cases of illegal adoptions (of which foreigners should be especially cautious).⁴²

10.61 Correspondence from the National Service of Minors (SENAME) in Chile, a dependant body of the Justice Ministry, expresses concern about loopholes (its word) in adoption legislation which permit avoidance of its assessment of a proposed adoption. Although all applications for foreign adoption are meant to go through SENAME, independent adoption is still possible in Chile. "Foreign couples will turn to social workers, lawyers, nuns, or merchants and pay them elevated prices to find a child for them in a short period of time."⁴³ An agent of the applicants can approach the Court directly to obtain an adoption order for a particular child. New South Wales has been involved in a program in Chile, although DOCS has now closed this program down because of misgivings about it.

10.62 In Costa Rica adoptions can be processed directly by the Family Court, where the process is initiated by an attorney representing the adoptive family. In these adoptions there is no government involvement or supervision. The problem with this type of adoption is that:

the biological family relinquishes the child directly to a third party or to a lawyer, without necessarily receiving counselling before deciding if this is the best solution for both mother and child. A decision made in this way, without the benefit of counselling, often results in an economic transaction, in which the child is a commodity.⁴⁴

10.63 However, where the adoption is processed by the adoption section of PANI, a statutory welfare authority, birth family members are counselled, there is an established procedure to follow before a child is declared abandoned and social workers and psychologists are involved in the placement of the child.

10.64 In Peru, where adoptions are by private petition to a Minors' Court, the number of attorneys working in the adoption field increased from five or six in 1984, just prior to when intercountry adoption first started to be promoted, to over 40 in 1994. Attorneys' fees range from \$8,000-\$10,000 per adoption. De Sztrancman and Sztrancman Waisblack, Adoption Coordinators in Peru, document kidnapping of children, trafficking, irregular adoptions, forgery of papers and corrupt procedures.⁴⁵

10.65 In relation to the perceived necessity of intercountry adoption, the Regional Expert Meeting on *Protecting Children's Rights in Intercountry Adoptions and Preventing Trafficking and Sale of Children* recommended that:

a reassessment of the need for ICA [intercountry adoption] 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".⁴⁶

10.66 There are some who wish to see a prohibition of all intercountry adoption to eliminate any risk of child trafficking. However, it is possible to participate in intercountry adoption without exposing the process to the risk of child trafficking. This requires vigilant adherence to strict

standards, some of which already exist and some of which will need to be implemented. As raised below in paragraphs 10.268 and 10.269, DIEA has a responsibility to work alongside New South Wales' adoption laws in this common aim.

Problems of ensuring voluntary relinquishment

10.67 Arguably, the problem of ensuring that relinquishment of the child and consent to the child being adopted overseas are voluntary is not so much a problem with the concept of intercountry adoption as a problem with practice. However, the process of relinquishment is potentially more vulnerable to abuse in intercountry adoption because of factors relating to financial incentives and levels of education and literacy.⁴⁷ "Certainly, many mothers ended up signing documents permitting the adoption of their children without even knowing what they were doing": Carvalho da Silva at 129. Certainly the international community has been sufficiently concerned to address specifically this area in both UNCROC and the Hague Convention.⁴⁸

Creating conditions for abandonment

10.68 The concern that intercountry adoption creates conditions for abandonment is tied in with trafficking of children in so far as financial incentives may be involved:

In a country of widespread urban poverty ... women may be tempted or obliged to sell some of their children for [the] purpose of adoption in order to support the rest of the family, or may be encouraged to have children to supply the existing ICA [intercountry adoption] market.⁴⁹

10.69 The pressure on impoverished parents to relinquish or abandon a child may not necessarily involve financial gain. The existence of intercountry adoption may appear as an easy answer to the strain of trying to provide for a number of offspring, compared with the cost of seriously pursuing alternative ways of coping or alternative forms of child care.

10.70 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.⁵⁰

10.71 De Sztrancman and Sztrancman Waisblack report that:

[m]any Peruvian mothers, finding themselves in a situation of poverty and misery, hand over their children for the double advantage of getting some money and not having to take care of the children any longer. Children born in Peru in such excessive numbers, are viewed as legitimate exportable property. With today's existing laws and procedures, this export is carried on as a type of contraband, in a sordid process of corruption, falsifications, and legal chaos.⁵¹

Creating conditions to discourage local adoptions

10.72 Some agencies or institutions depend substantially on the income they receive from intercountry adoption fees. Overseas applicants pay higher fees and come through organisations

that provide generous funding for children's homes. The danger in this is that there is greater incentive for agencies and institutions to promote intercountry adoptions rather than local adoptions. There is evidence to suggest that this does occur.⁵²

Bypassing needy Australian children

10.73 Focusing on intercountry adoption deflects attention from Australian children with "special needs" who are either in institutional residences or in temporary foster care awaiting placement. Centacare and Barnardos report difficulty placing local "special needs" and older children, with too few people in the "pool" willing to take such children. In most cases, adoptive parents have to be found by active recruitment, including advertising. DOCS do not have a "pool" for "special needs" children, but recruit for each particular child through a newsletter. Prospective intercountry adopters are informed of the DOCS "special needs" program but, according to DOCS, the majority are not prepared to take a "special needs" child. While most children can eventually be placed, in some cases the child may have to wait in residential care for up to two years.

Matching

10.74 In intercountry adoption, matching:

is often virtually non-existent ... Usually matching has to take place on the basis of very limited non-psychological characteristics, like age and gender of the child and family constellation of the would-be adopters. In intercountry adoption financial and practical circumstances virtually preclude the possibility of meeting and getting to know one another before the child is actually placed in the family.⁵³

10.75 This situation contrasts with the care with which adoptive parents are matched with local adoptees. This aspect of intercountry adoption has obvious implications for the potential success of the placement, particularly when it is compounded by differences between parents and child in skin colour and cultural background. In addition, Loenen & Hoksbergen argue that "responsiveness", said to be the most crucial factor in the development of attachment relationships,⁵⁴ is affected by the "matching" of child with parent. "Familiarity with each other, the environment, all help to facilitate responsiveness."⁵⁵

Arguments supporting intercountry adoption

10.76 UNCROC, in its Preamble, recognises "that the child, for the full and harmonious development of his or her personality, should grow up in a family environment ..." If this can only be achieved through placing that child with a family in another country then this alternative must be considered. Both UNCROC and the Hague Convention envisage that this alternative may be appropriate for children who cannot be cared for in families in their country of birth. Australia has shown its support for the principles contained in UNCROC by ratifying it and likewise has shown support for the Hague Convention by foreshadowing ratification.

10.77 Certainly there are strong arguments that family life in a foreign country is to be preferred to life in an institution in the birth country. K Choularton, Chief Psychologist for the Department for Community Welfare, South Australia, argues that children are "less at risk with a family than they would if they were left in institutional care or in a succession of temporary foster homes".⁵⁶

10.78 The potential and inherent problems of transcultural placements are referred to in paragraphs 10.39 to 10.41 and discussed fully in Chapter 8, "Cultural Heritage". On the other hand, the conclusion reached in Chapter 8 was that there was sufficient evidence of successful transcultural placements to preclude prohibition of such placements.

10.79 While it is no doubt true that intercountry adoption can be no more than a bandaid solution to the enormous problem of Third World poverty, it is also valid to argue that at least it enables *some* children to be provided with a permanent family who may otherwise not have had one.

10.80 In answer to the argument that provision should be made for the children in their own country, Baker responds that "it is true that children orphaned or abandoned ... can often, by persistent casework, be found a home in their extended family. Nevertheless, numbers of orphaned refugee children do languish for years in holding camps, with no permanent carers".⁵⁷

10.81 The Australian Intercountry Adoption Network ("AICAN") argues that intercountry adoption does not permit sending countries to avoid their responsibilities to children for three reasons. One, intercountry adoption provides a solution for only a small number of children. Two, intercountry adoption has "served as a catalyst for the development of indigenous services and has provided a rallying point for assistance to children who are not adopted".⁵⁸ And three, those countries with which Australia currently has programs are not neglecting other measures such as foster care, orphanages or promoting local adoption. The point has also been made that adoption organisations and adopting parents contribute to child welfare in the sending countries by making donations, by financially sponsoring children who remain in their communities and by giving financial support to community projects.

10.82 It is argued that banning intercountry adoption may mean an emergence of illegal activity by would-be parents. This possibility cannot justify continuing intercountry adoption if it was otherwise thought to be contrary to the best interests of children. However, there is some merit in the view that if an activity is likely to be carried on despite prohibitions it is better to bring that activity out in the open and assiduously monitor and regulate it.

10.83 It is by now apparent from the above references to UNCROC and the Hague Convention that these two international agreements have a pivotal role in the conduct of intercountry adoption. It is important, therefore, to examine each in some detail.

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

10.84 *The United Nations Convention on the Rights of the Child* ("UNCROC") was adopted by the General Assembly of the United Nations on 20 November 1989. Australia ratified UNCROC on 22 August 1991. It is now part of international law and binds Australia as a nation state. All countries, but one, with whom Australia has intercountry adoption programs have ratified UNCROC. Taiwan is the exception; it therefore has no obligations under UNCROC.⁵⁹

Article 21

10.85 Article 21 lays the foundation that the best interests of the child must be paramount in adoption. It then contains a prescription of the issues that need to be considered in intercountry adoption. In substance, they are as set out in the following paragraphs 10.86 to 10.91

10.86 *Adoptions must be authorised only by competent authorities after obtaining the necessary consents, given after counselling where necessary.*⁶⁰ This has a parallel article in Article 4 of the Hague Convention. These articles are discussed under the heading "Financial aspects and preventing trafficking in children".

10.87 *Intercountry adoption must only be considered if the child cannot be placed in a foster or adoptive family or cannot be cared for in the child's country of origin.*⁶¹ UNCROC treats intercountry adoption as a last option, *after* foster care, adoption or care "in any suitable manner" in the child's country of origin. It is arguable that "in any suitable manner" includes being cared for in an institution (contrast the Hague Convention, as discussed below).

10.88 Current Australian child welfare policy promotes the belief that family care is generally preferable to institutional care. Although this principle may be accepted without question when considering intracountry placement, this may not necessarily be the case when family care can only be achieved by sending a child overseas. The above exercise of weighing the advantages against the shortcomings of intercountry adoption demonstrates that the issue is a complex one. The Commission has concluded, however, that intercountry adoption has a valuable role to play as a

safety-net program for children whose needs cannot be better met in other ways. It is also recognised that the Hague Convention places a high priority on a child growing up in a family environment and, if ratified by Australia, must carry weight in conjunction with the responsibilities imposed by UNCROC.

10.89 *The child concerned by intercountry adoption must enjoy safeguards and standards equivalent to those existing in the case of national adoption.*⁶² This provision means that the same level of safeguards and standards that are applied to domestic adoptions must likewise be applied to intercountry adoptions, not that the safeguards and standards need to be identical. Application of this principle to adoption practice in New South Wales was proposed in DP 34, for which submissions gave unanimous support.⁶³ In formulating recommendations for legislative reform, the Commission has had regard to this principle. As well, agencies conducting intercountry adoption should ensure that their practices conform with the principle.

10.90 *All appropriate measures must be taken to ensure that a placement does not result in improper financial gain for those involved.*⁶⁴ The application of this Article is discussed in detail in under the heading "Financial aspects and preventing trafficking in children".

10.91 *Participating countries must promote the objectives of Article 21 by concluding bilateral or multilateral agreements and must endeavour to ensure that the placement of a child in another country is carried out by competent authorities.*⁶⁵ The latter part of this Article, the role of "competent authorities", is discussed under the heading "The role of DOCS and accreditation of non-government organisations".

Other Articles of relevance

10.92 A number of other articles of UNCROC, though not limited to adoption, are nonetheless relevant to it. Article 35 requires participating countries to take appropriate action to prevent the abduction or sale of, or traffic in, children for any purpose or in any form. Ways in which to comply with this Article are discussed under the heading "Financial aspects and preventing trafficking in children".

10.93 Article 7(1) grants to the child "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 intercountry adoption as a last resort when there is no possibility for the child to be cared for by his or her natural parents. It is also relevant to the concept of open adoption. 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 UNCROC. Conversely, it places on Australia an obligation to make every effort to obtain as much information as possible on a child's birth parents and background when that child is removed from his or her birth country and taken to Australia. This issue is discussed in detail in paragraphs 10.192 to 10.198. This Article could also be relied upon to mount an argument that Australia has a moral obligation to channel funds towards programs which assist to keep families intact. To the extent that the funding of intercountry adoption conflicts with this obligation, arguably the former must take precedence.

10.94 The effect of Article 12 in relation to adoption is that due weight must be given to the views of a child old enough to form his or her own views and that the child must be given the opportunity to be heard in any adoption proceedings. This has a parallel in the Hague Convention in Article 4(d). These Articles are discussed further in paragraphs 10.135 to 10.136.

10.95 Intercountry adoption should also be seen in the light of Articles 8 and 30. Article 8 gives a child the right to preserve his or her own identity, including nationality, name and family relations. Article 30 gives a child belonging to an ethnic, religious or linguistic minority the right to an upbringing which gives him or her full access to a community with other members of the group, enjoyment of his or her own culture, practice of his or her own religion and use of his or her own language. These Articles add weight to the argument that intercountry adoption should be used only as a last resort.

10.96 UNCROC raises a number of issues in relation to our current practice of intercountry adoption, which are discussed below under the heading "An Evaluation of Current Practices in Intercountry Adoption".

HAGUE CONVENTION ON PROTECTION OF CHILDREN AND INTERNATIONAL CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

10.97 Although UNCROC already dealt, to some extent, with issues relating to intercountry adoption, at the Hague Conference of October 1988, the United Nations considered and adopted a proposal to develop a Hague Convention on intercountry adoption. The reasons for this were as follows:

intercountry adoption was seen to be posing serious problems;

there had been a dramatic increase in international adoptions since the late 1960s;

serious and complex human problems, such as trafficking in children, were aggravated by the phenomenon of intercountry adoption;

there were insufficient existing domestic and international legal instruments to regulate the area; and

there was seen to be a need for a multilateral approach.⁶⁶

10.98 The Hague Convention was completed on 29 May 1993⁶⁷ and came into force on 1 May 1995, after being ratified by three countries. As at 30 July 1996, it had been ratified by 11 countries.⁶⁸ Once Australia becomes a Contracting State, intercountry adoption will have to take place essentially within the framework of minimum standards and procedures provided for in the Hague Convention.

Scope of the Hague Convention

10.99 The Hague Convention is to apply only as between Contracting States and only in relation to adoptions which create a permanent parent-child relationship. The problems, both real and perceived, which the Hague Convention addresses are discussed below.

10.100 The objects of the Hague Convention are:

to ensure that intercountry adoptions take place in the best interests of the child;

to prevent the abduction or sale of, or traffic in, children; and

to secure the recognition in Contracting States of adoptions made in accordance with the Hague Convention⁶⁹.

Requirements for intercountry adoptions

10.101 The Hague Convention places a high priority on a child growing up in a family environment and recognises that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her birth country.

10.102 It has been argued that the Hague Convention thus places intercountry adoption ahead of foster care or institutional care in a child's country of origin⁷⁰. However, this interpretation ignores the following strong indications that, while intercountry adoption has a role to play, it should be considered a measure of last resort for the following reasons:

An underlying "last resort" principle is reflected by an inclusion in the Preamble:

Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin.

It runs counter to UNCROC which treats intercountry adoption as a last resort if a child cannot be cared for in his or her birth country. The final paragraph of the Hague Convention Preamble states that it will "take into account the principles set forth in international instruments". By making specific reference to UNCROC and the 1986 Declaration:

it is made clear that these two are intended to be the starting point for [the Hague Convention] without the need for reproducing all the relevant provisions of those instruments⁷¹.

Article 4 provides that an intercountry adoption will only take place "after possibilities for placement within the State of origin have been given due consideration".

10.103 In relation to this last point, it is acknowledged that only "due consideration" is required which is a less exacting requirement than that provided for by UNCROC. But in the light of the Preamble and the relationship of the Hague Convention to UNCROC, it seems that the proper interpretation is that intercountry adoption may provide appropriate care for a child, *if* the child cannot be cared for in a family in his or her country of birth.

10.104 Article 4 also provides that an adoption cannot take place until the Central Authority of the "State of origin" has established that the child is adoptable. It must also obtain the required consents, which must be freely given after the birth of the child and not induced "by payment or compensation" of any kind. It must also ensure that the consents have not subsequently been withdrawn. Counselling must also be provided to the birth parent or caretaker and to the child, if sufficiently mature. These requirements are discussed under the heading "Financial aspects and preventing trafficking in children".

10.105 Article 29 prohibits adopting parents from having contact with birth parents until the requirements of Article 4 have been met and until they have been deemed suitable to adopt.⁷² Contact in compliance with conditions established by the competent authority in the State of origin is permissible. This also is discussed in paragraph 10.138.

10.106 The "receiving State" must determine that the adoptive parents are suitable to adopt, and have been counselled as necessary, and that the child will be given immigration clearance.⁷³

Central authorities and accredited bodies

10.107 The Hague Convention requires that countries establish a Central Authority as a supervisory and information body⁷⁴. Federal States, such as Australia, may have more than one Central Authority⁷⁵. However, where a country appoints more than one Central Authority (such as would be the case in Australia), it must also designate the Central Authority to which any communication may be addressed for transmission to the appropriate [State-based] Central Authority. Agreement has been reached in Australia between the States, Territories and the Commonwealth that the Commonwealth Attorney-General's Department will be the Principal Central Authority and each State and Territory will have a State Central Authority. The Principal Central Authority's role will be a minimalist one: it will negotiate intercountry adoption programs with overseas countries and play a coordinating role in intercountry adoption. The role of the State Central Authority will be in the day-to-day conduct of the intercountry adoption programs. This is discussed further in paragraph 10.164 and following.

10.108 The primary function of the Central Authorities is to provide information to each other about their adoption laws in general, and specifically about the adoption process in respect of a particular child. They must take steps "to prevent improper financial or other gain in connection with an adoption". They also have a specific role to play in relation to prescribed procedural requirements in an adoption.⁷⁷

10.109 Central Authorities may be public authorities or accredited agencies⁷⁸. Accredited bodies 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 intercountry adoption"⁷⁹. These must be accredited by the State in which they operate which will also stipulate the functions which they can perform. In New South Wales, DOCS will be designated as the Central Authority within that State. However, submissions to the Commission have proposed that existing parent support groups be accredited to carry out delegated functions in intercountry adoption⁸⁰. Australian Society for Intercountry Aid for Children (NSW) Inc *Submission* (31 August 1994) at 2 and 6. This possibility, and the role that parent support groups may play if Australia ratifies the Hague Convention, is discussed in paragraphs 10.166 to 10.191.

Automatic recognition of overseas adoption orders

10.110 Criticism has been levelled at the present requirement for adoptive parents to obtain an Australian adoption order, even if they have an overseas order⁸¹. If Australia ratifies the Hague Convention, an adoption order certified by the competent authority in the State of adoption as having been made in accordance with the Hague Convention must be recognised by Australia⁸². Such recognition may be refused only if the adoption is manifestly contrary to public policy, taking into account the best interests of the child⁸³.

10.111 If the country in which the adoption occurs is not a party to the Hague Convention, then, as legislation presently stands, an Australian adoption order will still be needed. This aspect is discussed further below in paragraphs 10.225-10.229. It may be that certain countries that are not parties to the Hague Convention have not necessarily made a commitment to ensuring intercountry adoption is abuse-free and that, in relation to those countries, the need to obtain an Australian Order of Adoption may be appropriate.

Adoption information

10.112 The Hague Convention requires the competent authorities of a Contracting State to ensure that information concerning the child's origin and medical history is preserved⁸⁴. Its disclosure to the child is a matter for the law of the Contracting State holding the information. This provision will require certain countries to alter their practices in relation to the recording and preservation of adoption information. Problems relating to the current practices of some countries with whom Australia has adoption programs are discussed below.

Significance of the Hague Convention for New South Wales

10.113 It has been necessary to outline the Hague Convention in detail as it is almost certain that intercountry adoption in Australia will be operating within that framework in the near future. Granted the role of international law is sometimes uncertain owing to the lack of international enforcement mechanisms⁸⁵, nonetheless the obligations that Australia will undertake in ratifying the Hague Convention must be taken seriously:

Before the international community [Australia] is accountable for compliance with the obligations it has accepted. It will be no excuse that the legal subject in question is conventionally part of the responsibility of State law-making authorities. This is especially so in Australia as the High Court has made it clear that, in most cases at least, such default may be corrected by the Federal Parliament so long as what was involved was a true matter of international concern amongst the nations and peoples external to Australia⁸⁶.

10.114 In the light of the above comment, New South Wales should conduct intercountry adoption in accordance with UNCROC and the Hague Convention. But at any rate, it is only proper that, if New South Wales is to participate in intercountry adoption, it follow standards of practice at least as high as those set out in international agreements.

10.115 What is set out above is an explanation of the Hague Convention's articles with only bare reference to the problems which the Hague Convention addresses. Some of these problems currently exist in the conduct of intercountry adoption in New South Wales and may continue to exist if the area remains unregulated. These problems are discussed in detail below.

AN EVALUATION OF CURRENT PRACTICES IN INTERCOUNTRY ADOPTION

10.116 The appraisal of the concept of intercountry adoption above highlights areas where the practice of intercountry adoption is in need of legislative safeguards. The following examination of the way in which intercountry adoption is conducted in New South Wales establishes where changes need to be made or where there should be legislative endorsement of current practice.

Financial aspects and preventing trafficking in children

10.117 Under both UNCROC and the Hague Convention, if a sending country has ratified either or both of these treaties, it has an obligation to prevent improper financial or other gain in connection with an adoption.⁸⁷ Australia, in its position as a receiving country, has a similar obligation.

10.118 Article 21(d) of UNCROC and Articles 8, 11 and 32 of the Hague Convention deal specifically with financial aspects of intercountry adoption and are intended, in combination with other Articles, to combat trafficking in children. The documented existence of trafficking, and the very real possibility of Australian participation in corrupt adoption practice, inadvertent or otherwise, is outlined in paragraphs 10.58 to 10.66. Pursuant to obligations under these treaties, and as matters of ethics and commonsense, adoption legislation needs to make certain prohibitions in relation to financial aspects of intercountry adoption. Foremost of these is that the placement must not result in improper financial gain for those involved.

What constitutes "improper financial gain"?

10.119 At the extreme end of the scale of improper financial gain is the sale of, and trafficking in, children. This is specifically targeted in Article 35 of UNCROC. It is an area of serious and very real concern in the international community. The risks of bodies or individuals in New South Wales inadvertently or deliberately being parties to such transactions, and measures for prevention, are referred to in paragraph 10.66.

10.120 If the sale of and trafficking in children constitutes one end of the scale, at the opposite end "improper financial gain" may be difficult to define. Questions arise as to when costs charged by the sending country are so high as to have crept into the realm of "improper financial gain". Similarly, when do requests from the sending country for donations of money or goods become so imperative to the continuation of the program, or so onerous, as arguably to constitute "improper financial gain"?

10.121 Clearly, payments made to the birth parents for relinquishment of their child are improper. The risk of such payment inducing relinquishment or influencing the decision to relinquish is too great. Even if a decision to relinquish had been made independently of receiving "financial assistance", the connection between the two is so close as to be offensive. But at any rate, Article 32(2) of the Hague Convention specifically provides that only costs and expenses may be charged or paid. It would be difficult to classify a payment to a birth parent as a cost or expense of the adoption. Furthermore, Article 4(c)(3) of the Hague Convention provides that consent to an adoption must not have been induced by payment or compensation of any kind.

10.122 Payments made to an agent or intermediary may be equivocal. If an agent receives payment for locating an adoptable child this would be an improper financial gain and not a "cost or expense" of processing the adoption. If payment represents reasonable remuneration for work done in the processing of the adoption, such as for conveying documents, then this may be acceptable.

10.123 However, the participation of an agent or intermediary in the adoption process increases the risk of unethical practice and the risk of improper financial gains. It is not necessary to involve

intermediaries and preferable for the adoption to proceed directly between the adoption authorities. This is discussed more fully in paragraphs 10.149-10.153.

10.124 The various fees and costs, particularly legal costs, charged by the sending countries are acknowledged to be high in many cases. RR 6 sets out the costs of each program, but to quote some extreme examples, legal expenses in Brazil and Ecuador are \$US5,000, with an additional \$US1,000 for translation in Brazil; in Chile, lawyer's fees are \$US4,000-6,000 with an additional \$US1,500-2,000 payable in court costs. The difficult question in these cases is at what point do these costs exceed reasonable remuneration and become "improper financial gain"? And if charges are thought to be unreasonably high, what power does New South Wales have to refuse to pay or to influence a reduction?

10.125 As referred to earlier, Australia, in its position as a receiving country, has an existing obligation under UNCROC and a likely future obligation under the Hague Convention to prevent improper financial or other gain in connection with an adoption. This is the source of New South Wales's right and obligation to scrutinise and dissect all charges being made by a sending country.

10.126 Some parent support groups require that the adoption costs be paid in advance. In some cases all, or a portion of, monies paid in advance are not refundable if the applicants withdraw from the program. As referred to above, Article 32(2) of the Hague Convention provides that only costs and expenses of the adoption may be charged or paid. It can be argued that there is nothing in this that precludes requiring payment in advance, providing that what is required to be paid is a properly assessed cost or expense to be incurred.

10.127 However, if that cost or expense turns out not to be incurred by DOCS or an adoption agency then any excess monies must be refunded to the applicants. Keeping unexpended amounts of applicants' money as profit or to defray other costs not directly related to the adoption in question would be improper and contrary to Article 32(2). An exception to this may be in relation to the agency's administrative costs. Such a fee may be legitimately based on recovery of the costs to the agency of an average adoption. Otherwise, assessment of administrative costs in each adoption may be an unwieldy exercise. At any rate, the agency should be obliged to account fully to the applicants for all monies expended on their behalf in the adoption.

RECOMMENDATION 87

Section 50 of the Adoption Act (which makes it an offence to make, give or receive payments or reward for the making of any arrangements for adoption, other than authorised expenses or fees, and which applies equally to local and intercountry adoptions) should be retained.

RECOMMENDATION 88

Payment of expenses reasonably incurred, including reasonable legal expenses and expenses incurred by the sending country, but excluding compulsory donations, should continue to be authorised under the legislation.

RECOMMENDATION 89

Legislation should stipulate that unexpended monies paid in advance by applicants must be refunded at the completion of an adoption.

Donations

10.128 Almost all intercountry adoption programs with which New South Wales is associated require a donation to the orphanage involved. Most, if not all, adopters have no criticism of this requirement and would not hesitate to make the donation even if it were not compulsory. The Commission has the following reservations:

By making the donation compulsory, the orphanage is making an indirect gain from the process, regardless of its altruistic motives and the benefits which flow to the children. Because it does not represent a direct cost of the adoption process, the payment falls into a "grey" area of financial gain. In addition, it is arguable that Article 32(2) of the Hague Convention makes a *compulsory* donation unlawful.

The payment is usually made to the orphanage via the body which depends on the continued allocation of children from that orphanage to its members. The temptation to allocate children to those countries or programs who best provide for the orphanage's needs must be acknowledged as a flaw in this system.

Some adoptive parents feel that a compulsory donation taints the adoption process with a "commodity transaction" flavour which they find distressing.

10.129 The work that the parent support groups do in fund raising, in sending aid and in encouraging sponsorship of children is highly commendable.⁸⁸ As well as making life better for many children, the parent support groups have made a valuable contribution to the establishment of goodwill between Australia and the sending countries. Continuation of this role should be encouraged.

10.130 However, the Commission's concern with the present system of donations could be allayed by making two changes. First, the role of fund raising and the giving of aid should be separated from the role of processing an adoption so that each role resides in two separate entities. This avoids potential conflicts of interest both on the part of the parent support group and on the part of the overseas agency or orphanage. Secondly, DOCS or some other suitable NSW or national body should negotiate with the adoption authorities of the sending countries for the abolition of compulsory donations on the understanding that voluntary donations and sponsorship would be actively encouraged.

10.131 Article 11 of the Hague Convention is straightforward and provides that an accredited body shall pursue only non-profit objectives. Compliance with this article is discussed in paragraph 10.184 under the heading "The role of DOCS and accreditation of non-government organisations".

10.132 There are other articles of the Hague Convention which, although they do not specifically refer to financial aspects, are intended to prevent trafficking in children.

10.133 Article 4(a) provides that an adoption shall only take place if authorities have established that the child is adoptable. Obviously this is to ensure that a child has not been kidnapped or left in temporary care only or that the child does not have family who could look after him or her. While it is to some extent beyond the control of New South Wales to establish whether or not a child is truly available to be adopted overseas, New South Wales has serious responsibilities in this regard. There is no reason why the adoption agency could not and should not insist on proof from the adoption authority in the sending country that the child has been abandoned or orphaned or that consents to the adoption have been obtained.

10.134 Article 4(c) sets out the requirements for the giving of proper consent to the adoption, including a requirement for counselling as necessary, and that the consent is informed, freely given and has not been induced by payment or compensation of any kind. This Article ties in with the obligation to ensure the child is adoptable. Again, there is no reason why the adoption agency could not and should not insist on proof from the adoption authority in the sending country that proper consents, given in accordance with Article 4(c), have been obtained.

10.135 Article 4(d) makes provision for taking consent from the child or giving consideration to the child's wishes and opinions. The growing recognition of children's rights to participate in legal proceedings that affect them brings into focus the respect that should be accorded to an adoptee's views about the adoption and whether or not he or she consents to the adoption. This is dealt with in more detail in paragraphs 5.124-5.129. The conclusions reached in that chapter included that no order of adoption should be made regarding a child who has attained the age of 12 years against

that child's wishes, unless there are special reasons related to the best interests of the child why the adoption order should be made. Further, a child who is capable of forming his or her own views should be given the opportunity to express those views, to be given due weight in accordance with the child's age and maturity.

10.136 As explained above, international conventions require that the standards set for intercountry adoption must be equivalent to those that apply to local adoptions. As well, standards set for taking into account the intercountry adoptee's wishes should accord with Article 4(d). In order to meet these two requirements, the agency should endeavour to satisfy itself that, having regard to the age and maturity of the child:

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 under the laws of the sending country;

where a child's consent to the adoption is required he or she has freely given consent to his or her adoption *overseas*, without the inducement of payment or compensation of any kind; and

consideration has been given to the child's wishes and opinions.

10.137 Ideally, the agency should sight a copy of the signed consent.

10.138 Article 29 prohibits contact between applicants and birth parents prior to an adoption order being made. Again, this is to ensure that there is no improper financial or other inducement for relinquishment, or pressure of any sort placed upon birth parents to relinquish and to ensure that an adoption is not privately arranged.⁸⁹ This is an essential prohibition.

RECOMMENDATION 90

Legislation should prohibit applicants from having any contact, direct or indirect with birth parents until the child has been allocated to those applicants by the overseas adoption authority and the allocation has been approved by DOCS and accepted by the applicants.

Parent Support Groups

Overview

10.139 New South Wales citizens wanting to adopt a child from overseas proceed primarily through DOCS. DOCS's central role in intercountry adoption, and the way in which an application proceeds through DOCS, is set out in detail in paragraphs 11.7 to 11.10 of DP 34. Applicants must also become members of one of the seven available adoptive parent support groups. These parent support groups have a significant role to play in processing and effecting an intercountry adoption. What follows is an analysis of this role.

10.140 In setting out any shortcomings in the current system, the Commission does not want to detract from the contributions made by the parent support groups over many years. Both RR 6 and the discussion below elucidate the ways in which parent support groups fulfil invaluable roles in supporting and assisting adoptive parents pre- and post-adoption; in providing a focus for adoptive families to interact, socialise and support each other; in establishing and maintaining programs; in amassing information on countries and programs; and in providing aid and promoting goodwill between Australia and sending countries.

10.141 The 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 intercountry adoptive parents. The groups were also intended to provide a forum for the adoptees and adoptive parents to remain in contact with one another. There has developed an equally significant facet to the parent support groups in their involvement in aid programs and the sponsorship of children not available for adoption.

10.142 There is no simple description of the process of intercountry adoption in all countries and in all programs within those countries. The interaction of the parent support group, applicants, overseas agency and DOCS varies according to which parent support group is involved and the country to which the application is being made. In order to understand fully the way in which intercountry adoption operates, the Commission has researched the nature, roles and activities of each of the parent support groups. The Commission has also examined the role of DOCS in relation to each group. For ease of reading, this study is contained in RR 6 rather than included in the body of this chapter.

10.143 The Commission sees the following involvement of parent support groups in intercountry adoption as questionable.

Allocations

10.144 The selection of adoptive parents for a particular child rests entirely with the adoption authority in the child's country of origin. Although in theory DOCS should be advised directly by the sending country of an allocation, in many programs it is the practice of the sending country to give allocation information directly to the parent support group. This is because the parent support groups, not DOCS, have developed the contacts with the agencies and orphanages through the adoption of their own children and in the efforts they have made in maintaining personal links, including regular visits to the sending country. The development and nurturing of these contacts have been significant in the maintenance of the programs.

10.145 However, forwarding details of a proposed allocation to the parent support group, rather than DOCS, is not ideal for three reasons:

First, there is the potential for the parent support group to pass on allocation details to, and discuss the allocation with, the applicants prior to DOCS assuming this role. Although DOCS enjoin the groups not to do this, it does in fact occur with some frequency. It is most important that applicants are assessed and counselled in relation to a specific child and that a suitably qualified person undertakes this role. This should occur before applicants have had a chance to form an attachment to, or to fix upon, a child and before applicants have discussed the allocation with others.

Secondly, in receiving information second-hand, there is always the danger that important details may have gone astray or have been misunderstood, and DOCS may thereby be hindered in properly assessing an allocation.

Thirdly, parent support groups are inhibited in pressing for further information if details given in the first instance are inadequate. The reason for this is that the groups understandably have an interest in sustaining their programs and in not "rocking the boat".

10.146 As a natural consequence of the close working relationships between parent support groups and individuals in overseas agencies and orphanages, some parent support groups become involved in discussions about proposed allocations, including discussion of who is the most suitable applicant next in line on the parent support group's list.

10.147 It is not appropriate for parent support groups to be involved in any way in the decision making process of a placement. Advice and opinions offered by the parent support group would be well-intentioned and founded on years of experience in the processing of adoptions. But what is required, to maximise the chances of the most beneficial placement for the child, is assessment and "matching" by a professional qualified in a social science, such as social work or psychology and specialising in adoption work. As well as making professional assessments, these adoption workers are able to recognise cases where counselling is needed and then to take appropriate action.

Record-keeping

10.148 Some parent support groups require applicants to provide them with their personal documents, the home study and post-placement reports. One parent support group also requires applicants to forward to it all documentation concerning the child received from the sending country. Submissions to the Commission indicate that, when put in this position, there are applicants who feel too vulnerable to refuse to comply but are uneasy about doing so. The groups have implemented various security measures which are outlined in RR 6. Nonetheless, there are significant privacy issues in a volunteer group having custody of sensitive material, while not being subject to any external safeguards or control. In relation to information concerning the child, it seems neither necessary nor appropriate for this to be received or retained by a parent support group.

Agents

10.149 All the parent support groups use agents in the sending countries to assist in the adoption. As detailed in RR 6, the roles and involvement of the agents vary with each group and may involve acting as couriers for documentation, assisting applicants when they arrive in the sending country or, in some instances, more active involvement in locating children available for adoption. It is in this last capacity, that there is potential for abuse of the intercountry adoption process.

10.150 Certainly in Chile and Brazil, it is possible for an agent to approach a court directly to obtain an adoption order. In countries where adoptions are arranged only through authorised adoption organisations, there is anecdotal evidence of approaches being made by parent support groups' agents to an organisation with details of a particular applicant. The agents allegedly lobby the organisation for placement of a child with those applicants. Whether or not this is substantiated, the Commission is concerned with the *potential* for abuse.⁹⁰ At one extreme, there is the danger of seeking out children who may not be available for adoption or of pressuring parents to relinquish. At the lesser extreme, there is the undesirable approach of finding a child for adoptive parents rather than suitable adoptive parents for a child.

10.151 At a slightly less serious level, agents who are involved in the adoption process can exert various pressures on applicants when they are in the sending country, and at their most vulnerable, to meet the agent's further ("unexpected") expenses or to make *ad hoc* donations to the orphanage, at the risk of losing their allocation if they don't comply.⁹¹

10.152 This potential for abuse can be eliminated, or at least minimised, by instituting a number of safeguards:

Allocations should be made by the authorised adoption agency only and notification of all allocations should go directly to DOCS. Allocations should not be on behalf of or by an agent.

Allocations should be in respect of children in the official care of authorised agencies, either in institutional or foster care, for whom there is a proper consent to adoption or an official abandonment declaration or who are orphaned.

Agents in the sending country should have no involvement in the adoption process itself. The use of agents in intercountry adoption should be limited to assisting applicants, who have been approved to adopt a particular child, during their stay in the sending country.

10.153 A further safeguard against abuses is suggested in paragraph 10.175 In essence, it is that adoption programs should be government-to-government.

The home study

10.154 It is inappropriate for a parent support group to be given the original home study of the applicants for forwarding to the sending country, since if this is done DOCS has no control over, and no way of knowing, whether or not the assessment is amended in any way. Granted, the original home study has DOCS's seal affixed to it but it may still be possible to make amendments. It is also inappropriate for a parent support group, despite having experience in a country's methods and

attitudes, to direct DOCS to amend a home study or to dictate content or style. The home study is a document produced by an experienced professional which, in both content and style, is considered by that professional to be accurate, instructive and appropriate.

Conclusion

10.155 The parent support groups have provided valuable organisational back-up to DOCS, which devotes limited resources to intercountry adoption. The relationship is, however, vulnerable to deficiencies because it operates in a regulatory void. DOCS has very little real control over, or even knowledge of, the organisation and functioning of the parent support groups. DOCS has imposed some general conditions on the operation of all parent support groups, but these conditions are not legal requirements.⁹²

10.156 DOCS has a written "agreement" with one of the parent support groups, the effect of which is discussed in RR 6. Otherwise, DOCS has no formal relationship with any of the parent support groups or formal control over their practices. The definition of the roles of each appears to be unclear and the interaction of DOCS with each of the groups is variable and often *ad hoc*.

10.157 The groups, for their part, have no legislative or other authoritative framework in which to operate and very little guidance on how best to marry the needs of their members with the best interests of the children. Private adoption agencies like Centacare, Barnardos and the Anglican Adoption Agency are accountable to the Director-General of DOCS⁹³ and their functions are governed by regulations under the Adoption Act. In contrast, parent support groups are not licensed and are not governed by the Adoption Act. The result of this is that they are not accountable to any authority and the nature of, and limits on, their functions and activities are self-determined. The wide range of approaches to adoption practice across the groups is evidence of the range of opinions and attitudes as to what constitutes a proper role for the groups. These approaches, however well-intentioned, may not always be conducive to ensuring the child's best interests are paramount.

10.158 It is not sufficient to argue that children's best interests will be satisfied by providing them with a loving home. The equation is complicated by many more factors. These have been discussed above and include the following:

Provision of a loving home to one child will not be in the best interests of all children if the process has inadvertently kept alive a market where children can be bought and sold, and even kidnapped, for this purpose.

It can be more damaging to a child if a placement breaks down because of insufficient professional preparation, counselling, assessment and matching. It is naive and dangerous to believe that any family will love any child and that *any* placement of a child in need of a home will benefit that child.

There is clear evidence that a cross-cultural placement, particularly of older children, can involve difficulties. Again, professional counselling and assessment is essential to ensure an understanding in the adoptive parents of the importance of cultural issues and a commitment to preserving cultural heritage.

10.159 The above criticisms of the way in which the system is currently operating is not an attack on the bona fides of parent support groups. The shortcomings in the current practice of intercountry adoption are, to a large extent, a result of the uncertainty as to roles and obligations, and the lack of regulation. The insufficient resources of DOCS and its consequent reliance upon parent support groups has also contributed to the active involvement of these voluntary associations of adoptive parents in the adoption process and to the extent of their autonomy.

10.160 The Commission's task is to devise a framework which will harness the skills, experience and other contributions of the parent support groups while ensuring that the practice of intercountry adoption conforms to an established and regulated set of standards and procedures. The way to do

this is to provide for the conduct of intercountry adoption by accredited agencies in conjunction with DOCS and to permit existing parent support groups to apply to be accredited as intercountry adoption agencies. This is discussed in detail under the heading "The role of DOCS and accreditation of non-government organisations".

The recommended role of parent support groups

10.161 Existing parent support groups not wishing to become accredited could continue to provide pre- and post- adoption support to adoptive families and aid and sponsorship to sending countries. These roles are a useful adjunct to the practice of intercountry adoption and the continued participation of parent support groups in this way should be encouraged.

10.162 The roles of DOCS and accredited bodies would be complemented best if parent support groups assumed all or some of the following roles. It would be beneficial and appropriate for parent support groups to:

- provide a focus for the common interests of members and provide moral and social support;
- assist applicants with the collation and completion of documentation;
- provide information and education;
- hold social functions, including fund raising events;
- arrange cultural events;
- arrange activities to bring adoptees and their adoptive families together;
- provide aid and sponsorship to overseas countries; and
- lobby for the establishment of programs in new countries or the recognition of further agencies in existing countries.⁹⁴

10.163 For the reasons outlined in paragraphs 10.144 to 10.157 it would be not prudent for parent support groups to:

- be involved in the forwarding of the applicant's file;
- be involved in either allocations or the receipt of notifications of allocations;⁹⁵
- retain documents relating to the processing of an adoption or information concerning an allocated child or an adoptee;
- receive or forward the home study; or
- be involved in the processing of adoptions in any way.

The role of DOCS and accreditation of non-government organisations

10.164 The international community is approaching consensus that governments must assume greater responsibility for the practice of intercountry adoption and have clearly vested roles and duties. This is not to say that only a government body should conduct intercountry adoption; it is a statement of where ultimate responsibility must lie. By the same token, the roles of *all* participants in intercountry adoption now need to be delineated and, to some extent, divided among separate entities.

10.165 As outlined in paragraph 10.107, Article 6 of the Hague Convention requires Contracting States to designate one or more Central Authorities in the case of Federal States. Assuming Australia ratifies the Hague Convention, it is intended that the Federal Government will appoint State and Territorial Central Authorities which, in turn, can accredit bodies to carry out adoptions. It is intended that DOCS would be appointed the Central Authority in New South Wales.

10.166 In DP 34, it was proposed that DOCS should control all aspects of intercountry adoption within New South Wales in accordance with Australia's international obligations.⁹⁶ Twenty four submissions were received which addressed this proposal. One submission supported the proposal outright.⁹⁷ Four submissions opposed the proposal outright.⁹⁸ The remainder of the submissions were concerned that DOCS is insufficiently resourced to control all aspects of intercountry adoption. In many submissions, the proposal was understood to mean that DOCS would single-handedly administer and maintain the intercountry adoption programs with no delegation to other bodies and no role for accredited agencies or parent support groups.

10.167 The Commission agrees that DOCS does not have the resources to run intercountry adoption itself. What was intended by the proposal was that, by controlling intercountry adoption, DOCS would receive all expressions of interest and be the final decision-making authority with respect to all assessments, allocations and placements. But as well, accredited agencies would be needed to take responsibility for a great deal of the administrative workload. Parent support groups would have a different, but likewise valuable, role to play. Accredited agencies would work with the sending countries with the imprimatur of DOCS.

10.168 This framework was in effect suggested by 18 of the submissions. These submissions, concerned with DOCS's inability to handle a greater workload than that which it already has, advocated agencies or approved groups continuing to assist DOCS in the administration of intercountry adoption. The majority supported delegation of tasks to *accredited* bodies. One submission supported "the need for DOCS to maintain statutory responsibility for monitoring the program, assessing and approving applicants, and approving allocations".⁹⁹

10.169 All the parent support groups, in consultations with the Commission, supported the notion of accreditation. Two of the groups suggested a range of accreditation from being accredited to be fully involved in the adoption process through to a limited intermediary role between DOCS and the sending country.¹⁰⁰

10.170 The operation of a private adoption agency in conjunction with the relevant government department in the conduct of intercountry adoption has apparently worked well in South Australia. Since 1979 Australians Aiding Children, a licensed non-government agency, has operated with autonomy in relation to a number of areas of intercountry adoption while the South Australian Department for Family and Community Services controls the programs and assumes responsibility for certain other areas. The latter includes decision-making in relation to the approval of prospective adoptive parents, the issuing of approval (or non-approval) letters and approval of allocations made by overseas agencies.

10.171 The Fogarty Report examined the South Australian arrangement and concluded that:

[s]uch a division of responsibility is ... critical to public accountability. Responsibility for the conduct of intercountry adoption must rest with a government agency.¹⁰¹

10.172 Provided overall responsibility for intercountry adoption rests with DOCS, the Commission sees no reason why appropriate non-government bodies could not be accredited to participate in intercountry adoption. The opportunity to accredit private non-government bodies will meet criticisms of DOCS which relate to issues of resourcing, namely staff levels, staff turnover and the ability to process adoptions expeditiously and provide sufficient supervision and support.

10.173 DOCS itself supports this approach, as does the Federal Government and all other State and Territory governments. In anticipation of ratifying the Hague Convention, an Intercountry Adoption

Working Party of the Subcommittee of the Standing Committee of Community Services and Income Security Administrators has approved a document intended to be enacted as a regulation under the Family Law Act¹⁰² setting out criteria for the accreditation of bodies wanting to provide intercountry adoption services. If these draft criteria are not passed as regulations, the document can serve as a blueprint for each State and Territory to accredit bodies to provide intercountry adoption services.¹⁰³ At any rate, the document is intended as setting minimum requirements: individual States or Territories could provide for more stringent conditions and requirements if they so wished. The document includes, inter alia, criteria for eligibility, conditions of accreditation and functions of an accredited body. Without intending to deal exhaustively with the functioning of an accreditation system or an accredited body, or to canvass the content of the draft document of the Intercountry Adoption Working Party, the Commission is concerned to emphasise that certain aspects ought to be considered and dealt with in accrediting bodies to carry out intercountry adoption. These are discussed below.

10.174 Articles 14 to 21 of the Hague Convention provide for the involvement of Central Authorities in the arranging and approval of intercountry adoptions. Article 22 permits accredited bodies to perform the functions of the Central Authority. Article 22 also allows certain approved persons to arrange intercountry adoptions, but only under the supervision of the Central Authority and with accountability to the Contracting State. Furthermore, such persons are not permitted to prepare the reports on the applicants and the child which are required by Articles 15 and 16 and are not permitted to receive an application to adopt. All applications to adopt a child resident overseas must be made to the Central Authority.¹⁰⁴ If a Contracting State intends to allow individuals to process adoptions it must declare this intention to the depositary of the Hague Convention.

10.175 The significance of the inclusion of these articles is to avoid privately arranged adoptions, which are the most vulnerable to abuses. A key factor in Australia's current high standards of intercountry adoption is the prohibition of private adoptions. If this is taken a step further whereby intercountry adoption programs are to be government-to-government, the possibility of corrupt practice is minimised. This would mean that DOCS and the accredited bodies would work only with the appropriate government body, and with accredited or government-authorised bodies in the sending country. Adoption arrangements would not be made with individuals or directly with an orphanage, unless the orphanage was an accredited or government authorised body.

10.176 Article 22, while allowing participation of individuals, appears to discourage such participation by applying stringent requirements and restrictions. At a meeting of the Special Commission charged with drafting the Hague Convention, there was extensive debate about the inclusion of "independent" or "private" adoptions in the Hague Convention:

A substantial number of participants were against [their inclusion], ... arguing that they facilitate abuses, such as child trafficking and improper financial gain ... Moreover, the opponents recalled that [Article 21(e) of UNCROC] only refers to authorities and organs, and for this reason ... excludes implicitly "independent or "private" intermediaries.¹⁰⁵

10.177 Other participants, notably the United States of America, argued that inclusion of independent adoptions would allow them to be controlled and supervised. After considering the arguments for and against:

the Special Commission decided to look for a compromise solution ... [Independent] adoptions should be included in principle, to facilitate the ratification of the [Hague] Convention by as many States as possible; but at the same time the necessary safeguards had to be established in order to avoid any results that might jeopardise the best interests of the child.¹⁰⁶

10.178 On balance, the Commission is unable to recommend that individuals or unauthorised bodies be involved in arranging intercountry adoptions.

10.179 Accordingly, with respect to the role of DOCS and the role of non-government bodies the Commission makes the following recommendations.

RECOMMENDATION 91

DOCS should be designated by appropriate Federal laws as the Central Authority in New South Wales having the authority, within New South Wales, over intercountry adoption given to Central Authorities by the Hague Convention.

RECOMMENDATION 92

No person or body other than DOCS should be permitted to:

receive expressions of interest;

decide whether or not to approve an applicant;

issue approval/non-approval letters;

seal the home study as an original;

administer the appeal process in circumstances of non-approval; and

approve an allocation made by the overseas authority.

10.180 The intercountry adoption program in the sending country should be conducted by a government body which is charged with the arrangement of adoptions by that country, or an organisation which is sponsored or recognised as an adoption agent by the relevant Government welfare body.¹⁰⁷ DOCS should sight written evidence verifying the authority of the body or organisation to arrange adoptions.

RECOMMENDATION 93

Existing parent support groups and any other non-government organisation should be eligible to apply to be accredited to undertake the arrangement of intercountry adoptions.

10.181 Accreditation would obviously depend on the organisation being able to demonstrate its competence to carry out properly the tasks associated with intercountry adoption.

10.182 Application for approval as a private agency carrying out intercountry adoptions should be pursuant to s 10-16 of the Adoption Act and Part 2 of the Adoption Regulation and operation as such should be subject to those sections and regulations. In addition, however, an adoption agency carrying out intercountry adoptions would need to meet certain other criteria both to provide the safeguards which the Commission has identified as necessary and in order to satisfy Australia's international obligations.

10.183 For the maintenance of high standards in the conduct of intercountry adoption, an accredited body should not be aligned to any interest group.

10.184 Article 11(a) of the Hague Convention requires that an accredited body be a non-profit organisation. Again, adherence to this requirement ensures the maintenance of high standards in the conduct of intercountry adoption. This requirement is met by s 10 and 11 of the Adoption Act which provide that only a charitable organisation may apply for approval as an adoption agency.

RECOMMENDATION 94

Sections 10 and 11 of the Adoption Act (which provide respectively that a charitable organisation can apply for approval as a private adoption agency and that the Director-General may grant or refuse the application) should be retained.

10.185 Article 11(b) of the Hague Convention requires that an accredited body be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption. Schedule 2 of the Adoption Regulation refers to the qualifications of the Principal Officer to work in adoption but not specifically in intercountry adoption, nor is reference made to the qualifications of staff other than to professional consultants.

RECOMMENDATION 95

Legislation should require an accredited body to be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.

10.186 Article 11(c) of the Hague Convention requires that an accredited body be subject to supervision by [DOCS] as to its composition, operation and financial situation. Schedule 2 of the Adoption Regulation provides for the requisite supervision by DOCS, although query whether there is sufficiently unambiguous power to supervise an agency's financial situation. Paragraph 16 of Schedule 2 permits the Director-General to inspect all records maintained by the agency, which would have to include financial records. There is no other implicit or explicit power to supervise an agency's financial situation.

RECOMMENDATION 96

Legislation should explicitly give DOCS the power to supervise an accredited body's composition, operation and financial situation and to require that an accredited body provide DOCS with audited annual accounts.

10.187 Pursuant to Article 32 of the Hague Convention, the directors, administrators and employees of an accredited body must not receive remuneration which is unreasonably high in relation to the services rendered. This, of course, accords with goals to ensure that intercountry adoption remains free of profit-making.

RECOMMENDATION 97

Legislation should provide for licensing requirements which restrict the directors, administrators and employees of an accredited body from receiving remuneration which is unreasonably high in relation to the services rendered.

10.188 Article 35 of the Hague Convention requires the competent authorities of the Contracting States to act expeditiously in the process of an adoption. Once a decision has been made that an intercountry adoption is in a child's best interests, the expeditious completion of the adoption will further the child's best interests. Accordingly, the Commission makes the following recommendation.

RECOMMENDATION 98

Legislation should provide for licensing requirements which require DOCS and accredited bodies to act expeditiously in the process of an adoption.

10.189 On the basis that the legislation contains the restrictions and requirements recommended above, and on the basis that DOCS retains the final decision-making authority with respect to all assessments, allocations and placements, it would be appropriate, and in accordance with the provisions of the Hague Convention, for an accredited body to be authorised to perform the functions set out under Recommendation 99 below.

RECOMMENDATION 99

Legislation should provide for licensing requirements which authorise accredited bodies to perform the following functions:

- to conduct information, preparation and education seminars;**
- to assess expressions of interest;**
- to arrange for assessment of applicants and preparation of the home study by an appropriate professional;**
- to provide counselling;**
- to prepare and collate required documentation;**
- to forward adoption documentation to the overseas authority;**
- to liaise and negotiate with the overseas authority;**
- to receive allocation notifications;**
- to arrange for the preparation of post-placement reports by an appropriate professional;**
- to provide to DOCS and the overseas authority post-placement reports; and**
- to obtain an adoption order in New South Wales, where applicable.**

10.190 For the reasons outlined above it would not be appropriate for accredited bodies to perform the functions listed in Recommendation 92 above, the responsibility for which should remain with DOCS.

10.191 For the reasons discussed in paragraph 10.183, the Commission makes the following further recommendation.

RECOMMENDATION 100

Legislation should provide for licensing requirements which prohibit accredited bodies being involved in fund raising, sponsorship and the sending of aid to an institution with which it has an intercountry adoption program.

Adoption information

10.192 RR 6 outlines the various approaches and attitudes of the sending countries to obtaining and providing a social and medical history on the child. Some programs provide thorough information and good records and are cooperative in the quest for all available information. They clearly see this aspect as important for the child's wellbeing. The information made available by some other programs is bordering on inadequate to make informed placement decisions.

10.193 Obtaining all available social and medical information about the child is essential for a number of reasons:

When a proposed allocation is advised, prospective adopters need sufficient information about a child to judge whether they consider themselves able to parent that particular child. The child may have physical or mental disabilities or have a background which makes them physically, mentally or emotionally vulnerable. A social worker likewise needs complete information to assess the "match" and advise the prospective adopters.

It will be material to the child's future development of identity and self-esteem to have knowledge about his or her background, roots and history.

It is important that the parents, and later the child as an adult, have access to the child's, and preferably also the birth parents', medical history. This would give an understanding of the child's current health, prognoses and predispositions. It may even have critical relevance when and if the child wishes to reproduce.

10.194 Clearly DOCS agrees with the importance of obtaining a history of both the child and the child's family. This is evidenced by its inclusion of cl 29(2) in the Adoption Regulation, which provides:

The Director-General is not to transfer or cause to be transferred the possession or control of a child from overseas to another person with a view to adoption of that child by that other person unless the Director-General has obtained a report about the child's social, developmental and medical history and the social, developmental and medical history of the child's family.

10.195 Not only does it make good sense to pursue conscientiously information on a child, but New South Wales has a duty to do so. Participation in intercountry adoption must be in accordance with Australia's international obligations. As referred to in paragraph 10.93, under Article 7(1) of UNCROC Australia arguably has a duty to seek out and preserve information on the child's birth parents. Article 30(1) of the Hague Convention requires participating countries to ensure that information concerning the child's origin and medical history is preserved.

10.196 As already outlined, another requirement of UNCROC is that intercountry adoption should enjoy standards and safeguards equivalent to those of local adoptions. Local adopters and adoptees can benefit from the provisions of the *Adoption Information Act 1990* (NSW). To the extent that children and birth parents separated by intercountry adoption can enjoy the same advantages of openness, this should be facilitated. In this regard, it is crucial for those involved in the intercountry adoption to try to obtain and preserve records and information concerning the child's and the birth parents' identities. Even if it seems at the time of the adoption that practices and values in the sending country will make an open adoption an impossibility, the potential for change cannot be ignored. For these reasons, the Commission makes the following recommendations.

RECOMMENDATION 101

Clause 29(2) of the Adoption Regulation (which provides that, before placing a child from overseas for adoption, the Director-General must obtain a report about the social, developmental and medical history of that child and his or her family) should be retained.

10.197 Prior to approving an adoption, DOCS should be satisfied that the information it has with regard to the child, including medical and social histories and psychological and emotional profiles, is sufficient to allow the applicants to make an informed decision on whether or not to accept an allocation.

10.198 As well as obtaining a report on the child in accordance with cl 29(2), the agency should make every reasonable effort to obtain all available information on a child, and either originals, if appropriate, or otherwise copies of records pertaining to the child's identity and social and medical history. This information should be preserved and made available to the adoptive parents and adoptee when appropriate.

RECOMMENDATION 102

DOCS and the accredited agency must ensure that information received by them concerning the child's origin, identity of birth parents and medical history is preserved and that access to such information is given to the adoptive

parents and to the child, in accordance with the *Adoption Information Act 1990* (NSW).

Preparation, assessment and counselling

Preparation

10.199 Because of the complex issues involved in an intercountry adoption it is particularly important for prospective adopters to have the opportunity to confront whether it is appropriate for them and to prepare themselves for what is potentially a difficult parenting task.

10.200 In addition to examining issues common to all adoptions, such as those relating to the adoptive parent/adoptee/birth parent inter-relationship, motivations for adopting and wishes and expectations, preparation for intercountry adoption should focus on a number of other issues. These should include:

psychological effects on the child of early separation, lack of positive enduring relationships with adults, and possible emotional and/or physical deprivation and/or abuse; many adopters are not fully aware that the deprivation suffered by children in early life may have a detrimental effect on emotional development and ability to "bond";

health issues: this includes the possibility that the child will have health and developmental difficulties which may require active treatment or may need ongoing care for permanent physical or mental impairment; some intercountry adoptees have been exposed to the risks of AIDS/HIV and Hepatitis B infections; applicants need to be aware that testing for HIV in young children is unreliable;

cultural heritage and cultural identity; the importance of having a commitment to preserving cultural heritage and developing in the child a positive self-identity; issues of racial discrimination;

the background of the adoptive children: this will continually play a part in the child's life and hence information about his or her heritage should be carefully collected, filed and preserved; and

the situation of the biological parents, including reasons for relinquishment, which may need to be understood in the context of the parents' culture.

10.201 Proper exploration of these concerns takes time. Currently, DOCS invites suitable enquirers into intercountry adoption to attend a preparatory seminar. This involves a total of 13 hours' attendance (over several sessions) for first-time intercountry adoption applicants and one day's attendance (being approximately eight hours) for second-time adopters. Applicants who wish to adopt a child older than 24 months attend an additional one-day seminar. This contrasts with the requirement that applicants wishing to adopt local children attend a two-day seminar and those wanting to adopt local "special needs" children attend a four-day seminar. There is no "special needs" seminar for intercountry applicants. As discussed earlier, most intercountry adoptees will have "special needs" because they are older, have health problems or disabilities or because they are suffering emotional deprivation. An applicant needs to be properly prepared for the very real possibility of being allocated a "special needs" child. The issues referred to above will all be relevant and will all require time-consuming discussion.

10.202 In the Netherlands, prospective intercountry adoptive parents have been required, since July 1989,¹⁰⁸ to attend an extensive information and preparation program, consisting of six seminars, before the home study is begun. Despite the obvious benefits of thorough preparation, other benefits have emerged. Many of the couples maintain contact with each other, offering mutual support and exchange of information and insights. Applicants are more assertive in their contact with the agencies and in expressing their wishes concerning themselves and the child. Discussions with

the social worker during the home study are more far-reaching. Some applicants self-select out of the program at this early stage.¹⁰⁹

10.203 The discrepancy, in New South Wales, between the preparation afforded adopters of local "special needs" children and adopters of intercountry adoptees is not prudent, does not give the adopters the best chance of a successful adoption and offends against Article 21(c) of UNCROC.¹¹⁰ Applicants for intercountry adoption should be required to attend a preparatory seminar equal in duration to that which adopters of local "special needs" children are required to attend. Seminars should be run by professionals qualified in adoption work with additional knowledge of problems associated with cross-cultural placements and with "special needs" children. The process would work best if applicants attended these seminars before the home study was undertaken.

Assessment

10.204 The current practice is for applicants to be assessed over a three to six month period as to their general suitability to adopt a child from overseas. DOCS must approve an allocation made by the sending country to particular applicants but there is no formal assessment of the applicants in relation to a specific allocation.

10.205 Research on the placement of "special needs" children¹¹¹ and practice papers by adoption workers in Britain¹¹² suggest that assessments of adoption applicants are best undertaken in the context of individual children. Since a large proportion of intercountry adoptions concern "special needs" children, and the incidence of breakdown is higher amongst these children, there is support for urging that applicants be assessed for their suitability to parent a particular child.¹¹³

10.206 There is already a criticism by some applicants that the present system of assessment is too long and too intrusive. However, it is justified to assess intercountry adoption applicants more stringently than for local adoptions because of the greater complexity of the placements, including the presence of cultural issues and problems identified with "special needs" children. Also, the research on successful outcomes indicates that the "intuition" of the adopters is important, and their early reactions to particular children need to be carefully thought through.¹¹⁴ This lends weight to the view that a further assessment of applicants in relation to an allocated child would increase the chances of a successful placement.

10.207 For these reasons, it would be prudent if a two-stage assessment process was instituted for intercountry adoptions: the first home study should determine the applicants' suitability generally to adopt a child from overseas; the second assessment should be in relation to the allocated child. This would accord with DOCS's policy in relation to the adoption of local "special needs" children where applicants are assessed in relation to, and approved to adopt, a particular child.

10.208 The "intuition" factor is also relevant to the question of applicants meeting the child in the country of adoption before an adoption order is made:

Research and published professional opinion would not support the practice of a "home study" being conducted to ascertain whether this is a "good" family, this study allowing them to go overseas and take over the care of a child who might be older or have special needs. Nor would it support the practice of children being adopted in the country of origin in the absence of the adopters, with the child then delivered to them by a third party.¹¹⁵

10.209 At present, once applicants accept an allocation they usually then travel to the sending country to collect their child. However, one parent support group discourages applicants travelling to a particular country and arranges for the child to be brought to Australia instead.

10.210 Article 19(2) of the Hague Convention provides that *if possible* transfer of the child to the receiving State shall take place in the company of the adoptive parents. However, for a child to be

brought to Australia by an intermediary is not consistent with New South Wales's goal to have the highest possible standards of practice in every area of intercountry adoption:

[Travelling to the sending country] serves a positive function in the adjustment process for both parents and children. For the adoptive parents, it provides the opportunity to learn first-hand about the cultural and social background of the child's country, enabling them to better understand certain behaviours and attitudes displayed by the child. The children benefit as well, since they have the opportunity to meet the adoptive parents while still in a familiar and secure environment before they have to leave for a new country.¹¹⁶

10.211 Travelling to collect the child in person is important not only in helping to understand the child but also in order to supply information to the child in later years when identity formation becomes an issue. As well as bringing away their own knowledge of the country and the child's circumstances to pass on to the child, the applicants may be in a better position to obtain records of the child's social and medical history.

10.212 Not just *if possible*, but in *every* adoption, the applicants should travel to the sending country to collect the child in person.¹¹⁷ The Commission also recommends that the applicants be urged to spend some time in the country acquainting themselves with the child's birth place and birth culture. The applicants should use this opportunity to satisfy themselves that all available information on the child has been collected and preserved.

10.213 The Commission acknowledges that enforcement of this requirement may be difficult. Collection of the child obviously occurs after the applicants have been approved to adopt, after the sending country has allocated the child to those applicants and after the allocation has been accepted. Therefore, points at which it is possible to insist on certain requirements being satisfied have passed. However, it is still possible to require that preconditions are met before the child will be given immigration clearance. While this cannot be the subject of adoption legislation, the Commission urges national cooperation to ensure collection of the adoptee by the applicants in person. The issue is sufficiently important to warrant an amendment to immigration laws.

RECOMMENDATION 103

The State Government should negotiate with the Federal Government to include in conditions for the granting of an adoption visa the requirement that applicants travel to collect their allocated child.

10.214 Further, it should be made part of the assessment process that applicants demonstrate their willingness and intention to travel to the sending country to collect their allocated child. If the social worker preparing the home study was not satisfied of such willingness and intention on the part of the applicants, this would be recorded in the home study and may affect the granting of approval to adopt.

10.215 It was proposed in DP 34¹¹⁸ that the selection criteria for intercountry 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.

10.216 Seventeen submissions were received in relation to this proposal all of which gave it unqualified support. These criteria are now covered by the requirements of the Cultural Heritage Placement Principle recommended in Chapter 8.

10.217 Some applicants seek to adopt more than one child at a time for reasons of expense or for fear that a second child may not be available at a later time. However, there are very few circumstances where this can be shown to be in the children's best interests.¹¹⁹ Applicants should be assessed and approved for placement of one child only, except where there has been an allocation of siblings, and the applicants have been assessed and approved to adopt those siblings.

Counselling

10.218 An obvious measure to maximise the chances of a successful adoption is to make counselling available to prospective adopters at all stages of the process including during preparation seminars. Most importantly, post-placement support should include free access to counsellors.¹²⁰ This is a service primarily for the protection of children who are migrants with permanent resident status, and prospective citizens. Migrant settlement services are generally provided free of charge.¹²¹ Counselling should be undertaken by professionals qualified in adoption work with additional knowledge of problems associated with cross-cultural placements and with "special needs" children. Equally, preparation seminars and the home study should be conducted by such experts.¹²²

Post-placement reports

10.219 DOCS is contacted by the adoptive parents on their return to Australia, at which time a post-placement interview is conducted and report made. Two post-placement interviews are conducted in the first six months, with reports being made following these interviews. However, the adoptive family can arrange for as many additional post-placement interviews as it feels it needs.

10.220 Studies referred to in Chapter 8 indicate that most intercountry adoptees, regardless of how well they progress in their new lives, will face initial adjustment difficulties, lasting in some cases up to two years. Evidence provided by DOCS suggests that many adoptive parents are reluctant to seek professional help with family conflict unless and until the situation has become critical. As a preventative measure, post-placement interviews with an appropriately qualified professional every three months in the first year then every six months in the second year would be judicious. While some may see the process as intrusive, the intrusion is justified by its potential for early identification and resolution of problems.

10.221 In addition, some sending countries require post-placement reports for a number of years after the adoption, in which case DOCS will seek undertakings from the adoptive parents that they will forward reports and photographs to DOCS at particular intervals. The agency should oblige adoptive parents to forward all post-placement reports that are required by the sending country.

Recognition of adoption orders

10.222 Currently, s 46 of the Adoption Act provides for the only recognition of foreign adoptions. Under that provision, recognition of an overseas adoption order is given only when, at the time of the application to adopt, the adopter has been resident for 12 months or more or was domiciled in the overseas country. Section 47 then makes provision for declarations of validity of foreign adoptions.

RECOMMENDATION 104

Sections 46 and 47 of the Adoption Act (which provide respectively for the recognition of a foreign adoptions where the adopters have been resident for at least 12 months or domiciled in the foreign country and for a declarations of validity of such foreign adoption) should be retained, although not as the only circumstances in which foreign adoptions will be recognised.

10.223 The discussion which follows sets out an argument for recognising foreign adoption orders in New South Wales in circumstances further to those covered by s 46 and 47.

10.224 As discussed in paragraph 10.110, when and if Australia ratifies the Hague Convention, it will have an obligation to recognise, by operation of law, an adoption order made in a treaty country in accordance with the Hague Convention.¹²³ Regulations to be enacted under the Family Law Act¹²⁴ are in the process of being drafted in anticipation of Australia ratifying the Hague Convention. One of the regulations is likely to provide that an adoption order made in a Contracting State in accordance with the Hague Convention will be recognised and effective in each State and Territory of Australia. Although, at this stage, it is intended that compliance with Article 23 (recognition of the overseas adoption order) will be dealt with at a Federal level, it is still possible for adoption legislation to anticipate Article 23 coming into force by providing that an adoption order made in a "designated country" be given automatic recognition under New South Wales law.

10.225 The Northern Territory has legislated for recognition of overseas adoption orders in that Territory. Section 51 of the *Adoption of Children Act 1994* (NT) provides that:

[w]here the Minister is satisfied that proceedings for adoption in the overseas country are fair, the Minister may, by notice in the Gazette, determine that an adoption of a child in that country, in accordance with the law of that country ... shall have the same effect ... as an adoption made in a State or another Territory of the Commonwealth.

10.226 The United Kingdom has also made provision to recognise adoption orders made in (mainly European and Commonwealth) countries specified in a schedule.¹²⁵ Irish legislation makes provision for "designating" countries for the purposes of recognition of adoption orders but requires that the adopters have received prior approval from the Irish authorities to adopt from overseas and that the adoption process must involve inquiries in relation to the child's interests.¹²⁶

10.227 The Commission recommends that New South Wales's adoption legislation provide for recognition of overseas adoption orders for the following reasons:

If Australia does ratify the Hague Convention, and if regulations under the Family Law Act have not been passed dealing with the issue, the legislative framework is in place for "designating" those countries who have also ratified the treaty, ensuring New South Wales's laws comply with international obligations.

Pending ratification of the Hague Convention, New South Wales has the opportunity to "designate" countries who have already ratified and who have thereby demonstrated a commitment to internationally accepted adoption standards.

If Australia does not ratify the Hague Convention, New South Wales still has the opportunity to "designate" countries in respect of which it is satisfied that there are high adoption practice standards and safeguards. This would do away with the requirement of obtaining an adoption order in New South Wales, when an adoption order has already been made by an appropriate country.

If Australia does ratify the Hague Convention, and if regulations under the Family Law Act have been passed dealing with the issue, New South Wales retains a discretion to "designate" other countries in addition to treaty countries.

10.228 There is an important proviso to be made to the above. Recognition of an adoption order made by a "designated" country must only be in respect of adoptions which also comply with New South Wales adoption law. Applications to adopt must therefore have proceeded through DOCS and adoptive parents must be approved to adopt by DOCS. The exception to this will be if, at the time of the application, the adoptive parent had been resident for 12 months or more or was domiciled in the "designated" country. In that case, s 46 of the Adoption Act would apply. Similarly, if a country is not

a "designated" country, recognition of the foreign adoption order will nonetheless be available if the criteria of s 46 are met.

RECOMMENDATION 105

Legislation should give to the Director-General the power to "designate" countries which have ratified the Hague Convention and/or which conduct intercountry adoption in accordance with the Hague Convention. An adoption order made in a "designated" country in accordance with the law of that country should have, so long as it has not been rescinded under the law in force in that country, the same effect as if it were an order for adoption made in New South Wales unless the adoption is manifestly contrary to New South Wales public policy, having regard to whether it would have complied with the law of New South Wales and whether it would have been contrary to the best interests of the child.

RECOMMENDATION 106

Where a child is adopted from a non-designated country, legislation should require that an adoption order be obtained in New South Wales.

Older-aged adoptees

10.229 DP 34 made a provisional proposal for reform that possibilities for care, other than adoption, should be considered for older children from other countries.¹²⁷ Fifteen submissions were received addressing this proposal, only one of which agreed with it.¹²⁸ Most submissions opposing the proposal did so on the basis that if a child is to be placed outside his or her own country, the child should have the security of a permanent placement in the nature of an adoption. Many submissions argued that the commitment to the child is greater with adoption and that, consequently, adoption "has a much higher retention rate, even of difficult placements such as special-needs and older children, than does foster care."¹²⁹ One submission also raised the issue of who would bear the costs of alternative care in Australia. This submission argued that:

[c]urrently alternate care services for children in this State are not adequately funded and there should be no possibility that these funds should be stretched to cover children from other countries.¹³⁰

10.230 The Commission sees the merits of the views expressed in these submissions. Furthermore, it is unlikely that a sending country would authorise a child's departure from that country in order to be placed in foster care in New South Wales, rather than in an adoption placement. This is particularly so when there will always be other countries who will be prepared to offer the child an adoption placement. There would also be problems with Australia's immigration laws as they currently stand. The laws would need to be amended to allow immigration clearance to a child who was not an adoptee, a prospective adoptee or sponsored in some other way. Accordingly, the Commission does not recommend that possibilities for care, other than adoption, be considered for older children from other countries.

Birth names

10.231 Under Article 8 of UNCROC, Australia has undertaken to "respect the right of the child to preserve his or her identity, including nationality, name and family relations". Clearly intercountry adoption, which involves a child losing his or her nationality and family relations, is not consistent with Article 8. However, Australia should honour this undertaking at least to the extent that can be accommodated within the practice of intercountry adoption. Accordingly, the right of a child to preserve his or her first name should be respected.

10.232 Even apart from obligations under UNCROC, it would rarely be in a child's best interests for his or her names to be formally changed in the adoption process. The intercountry adoptee endures enormous change and dislocation in the process of being adopted overseas. The child is uprooted from all that is familiar, including relationships and language. The child's name is one of the few remaining links with his or her birth culture. To change this involves further dislocation and disorientation for the child. More importantly, though, the child's name is an integral part of his or her identity:

Abandoned children are often renamed ... by their adoptive parents who wish to encourage integration into their new culture so that the little they bring with them is taken away. For older children this may be especially painful since it suggests that who they are, which is so often defined by their name, is not acceptable and must be changed. In addition, a name often reflects cultural connectedness and contributes to the establishment of racial identity.¹³¹

10.233 Although the effects of a name change are intensified in older-aged children, the points made above can be applied to all children. A child who is only one or two years old has already learnt to identify with a particular name. The concept that "I am x and no other" can be powerful even to a very young child.

10.234 In DP 34, it was proposed that the changing of first names of intercountry adoptees should be discouraged.¹³² Nineteen submissions were received addressing this proposal, the majority of which supported the proposal but felt that the changing of names should be a matter for parents and not subject to legislation or a court order. Several submissions were unconditionally in favour of the proposal.

10.235 Two submissions pointed out that some overseas names created problems in Western society, either because of the English meaning or association or because of difficulties with pronunciation.¹³³ It should be borne in mind here that as Australia becomes an increasingly multicultural society more and more non-Anglo-Saxon names, many difficult to pronounce, will become commonplace. However, if there was a real risk that his or her name could, in Australia, cause anguish to the child or make life difficult in any way, then a name change may be justified. But such a decision should be taken in the belief that a name change is an exceptional step, with the child's best interests being paramount. A birth name should not be changed simply because adoptive parents would prefer an Anglicised name for their child.

10.236 It has also been submitted that often a child has been given his or her name by carers at an orphanage and therefore it may have no significance for the child.¹³⁴ This argument ignores the point made above that children, particularly older-aged but also young children, identify with the name by which they are addressed so that it becomes an important part of their concept of themselves.

10.237 Recommendations in relation to changing an adoptee's names are made in Chapter 5. These recommendations take into account the provisions of UNCROC, the arguments raised above and the content of submissions.

Multiple placements

10.238 The Expert Group which prepared the United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally¹³⁵ suggested that where a family adopts a number of children from overseas, ensuring that they have the same origin and background is important for their "sense of belonging and affinity".¹³⁶

10.239 The Commission sees the merit in this approach. It is compelling to argue that (unrelated) adoptive siblings will find security and comfort in shared cultural backgrounds. However, it is unlikely to be the most important factor in family dynamics nor the greatest contributor to a successful

outcome. Similar cultural backgrounds do not guarantee a "sense of belonging and affinity" and, conversely, dissimilar backgrounds do not preclude children developing that sense of belonging to and affinity with a family. The Commission is aware of a high proportion of successful "mixed" placements.

10.240 So long as certain issues are given careful and thorough consideration, and the conclusion is that a placement with a particular family of a particular child from a different background to that of siblings has every chance of success, a prohibition of "mixed" placements is unwarranted. Rather, a case-by-case approach should be taken to "mixed" placements. In evaluating a proposed allocation of a child with a different background to that of existing siblings, factors to consider should include the attitudes of the siblings towards the proposed placement, the family's collective and individual ability to cope with a diversity of cultural backgrounds, and how the issue of race is handled in the family.

Immigrants and adoption

10.241 An Australian citizen or permanent resident who has immigrated from another country ("the immigrant") may wish to adopt a child (other than a relative) from the country of his or her previous nationality. The view has been expressed that in such cases precedence should be given to the immigrant's application as he or she would be providing the adoptee with cultural continuity. Another view has been expressed that the immigrant should be able to adopt the child in the country of nationality and bring the child into Australia, bypassing DOCS.

10.242 In relation to the first view, the Cultural Heritage Placement Principle would ensure that, all other things being equal, adoptive parents of the same cultural background as the child would be preferred over other applicants. But once again, the most suitable parents must be found for the child and no immutable preference *per se* should be given to immigrant applicants.

10.243 In relation to the latter view, under present immigration laws this would not be possible. It is made impossible for the very good purpose of preventing private adoptions and to reflect specifically State and Territory adoption law.

10.244 As discussed below, DIEA have an important role to play in regulating intercountry adoption by determining in what circumstances a child adopted overseas can enter Australia.

10.245 An immigrant applying to bring his or her adopted child into Australia would require a *Class 102 (Adoption) Visa and Entry Permit* for the child. (This is discussed in paragraph 10.255.) There are two circumstances in which a Class 102 Visa will be granted. In the first category, the adoptive parent must have been residing overseas for more than 12 months at the time of the application and the residency must not have been contrived for the purposes of circumventing the requirements for entry to Australia of children for adoption.

10.246 The second category is where the adoptive parent brings the child into Australia for the purposes of adoption in Australia. This second category is applied even when adoptive parents have already obtained an adoption order in the overseas country, the reason being that a foreign adoption order is recognised only where the 12 months overseas residency criterion is met. Under this second category there are further criteria which must be met before a visa will be granted. Among these is that the relevant child welfare authority (in this case, DOCS) must have approved the adopting parents.

10.247 The situation will change when, and if, Australia ratifies the Hague Convention. DIEA anticipates amending the Migration Regulations where necessary to take into account requirements of the Hague Convention, including automatic recognition of foreign adoption orders.

10.248 In the case of an immigrant adoption, with or without amendments to the Migration Regulations, the adoptive parent will still need to be approved by DOCS. If the immigrant travels to his or her former country of nationality and is able to adopt a child through a local program, this will not be an adoption to which the Hague Convention applies.¹³⁷ Therefore, there will not be

automatic recognition in Australia of the adoption order and the adoptive parent must produce evidence of approval by DOCS in order to obtain a Class 102 Visa for the child. If the immigrant participates in an intercountry adoption program, then the procedures required to be followed by the Hague Convention will ensure government-to-government participation, and approval of the adoptive parent by the adoption authority in the receiving country.

10.249 If the adoption takes place in a country which has not ratified the Hague Convention, there will be no automatic recognition of the adoption order in Australia, subject to the discussion contained in paragraph 10.228. The possibility of "designating" countries for the purposes of automatic recognition of adoption orders was analysed in paragraphs 10.225-10.229. If this were to be introduced it would be subject to an important proviso that recognition of an adoption order made by a "designated" country would only be in respect of adoptions which had proceeded through DOCS.

DEPARTMENT OF IMMIGRATION AND ETHNIC AFFAIRS

10.250 DIEA determines whether or not an overseas adoptee will be allowed entry to Australia, pursuant to the Migration Act and the Migration Regulations. The Migration Act governs permanent entry into Australia by foreign citizens. Adoptive parents have encountered problems in trying to bring their adopted child into Australia and there are criticisms of the way in which the Migration Act and Migration Regulations operate and are applied to adoption migration.

10.251 While this review is not a review of the Migration Act, this section, examining immigration laws and practices as they relate to adoption, is included for three reasons:

it is important, and within the ambit of the terms of reference, to draw attention to difficulties in the application of migration law to adoption;

it is appropriate to comment on changes that may need to take place in order to accommodate changes in adoption law and in order to comply with international obligations; and

understanding the way in which an intercountry adoptee gains entry into, and citizenship of, Australia is integral to a complete understanding of intercountry adoption.

10.252 In relation to Australia's international obligations, the Migration Act does not contain specific reference to UNCROC.¹³⁸ DIEA has stated that international obligations would be taken into account in considering applications. The High Court decision of *Minister for Immigration and Ethnic Affairs v Teoh*¹³⁹ held that, even though UNCROC had not been incorporated into legislation, the fact that Australia had ratified it gave rise to a "legitimate expectation" in an applicant under the Migration Act¹⁴⁰ that its provisions would at least be considered in the making of a decision.¹⁴¹

10.253 DIEA 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. The Adoption Visa criteria which DIEA applies are contained in Schedule 2 Class 102 of the Migration Regulations.¹⁴²

10.254 Before travelling overseas to pick up their child, applicants apply to DIEA for a *Class 102 (Adoption) Visa and Entry Permit* which will grant their child entry into and permanent residence in Australia 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;

DOCS has approved the adoptive parents; and

the overseas authorities have approved the departure of the child, in the custody of the adoptive parents, for adoption in Australia.¹⁴³

Health criteria

10.255 If these primary eligibility criteria are met, the child's application is sent to the Migration Officer in the Australian embassy or consulate in the child's country. The child must meet health criteria set out in the Migration Regulations before a visa can be granted.¹⁴⁴ "The Minister ... decide[s] whether or not to grant a visa..., but the threshold decision as to whether the applicant satisfies the health criteria is reserved essentially to the Commonwealth medical officer."¹⁴⁶ Most of adoptive parents' criticism of the immigration process is in the area of the application of health criteria.

10.256 The Minister has a discretion to waive certain aspects of the health requirements if he or she is satisfied that the granting of a visa would be unlikely to result in undue harm or cost to the community or undue prejudice to other Australians in having access to health care or services.¹⁴⁶

Procedure

10.257 The Migration Officer arranges for a medical examination of the child by an approved panel doctor whose report is forwarded to International Health Clearance ("IHC")¹⁴⁷ in the Federal Department of Health and Community Services. IHC comprises a panel of five Commonwealth medical officers. IHC send their assessment of the report, giving opinions as required by the Migration Regulations,¹⁴⁸ to the Migration Officer. The Migration Officer then requests IHC to assess the cost of treatment or management in Australia of any disease or condition (where relevant). IHC assesses the long-term cost to society and effects on the child using four rankings from "minor" to "major significant".

10.258 Although IHC's role is usually advisory only, and no decision is made by this unit, the Migration Officer is strongly guided by its assessment. If a cost is assessed as "major significant", it is most unlikely that the Migration Officer would exercise his or her discretion to allow the child entry into Australia. The Migration Officer, in addition to IHC's assessment, can have regard to the opinion of an independent doctor on the adoptive parents' ability to cope, financially and otherwise, and on resources available in the intended area of residence. But he or she cannot have regard to independent medical evidence.

Appeal

10.259 If a child is refused a visa on health grounds the adoptive parents may seek an internal review of the decision by the Migration Internal Review Office ("MIRO").¹⁴⁹ If MIRO affirms the decision of the Migration Officer, an appeal can be made to the Immigration Review Tribunal ("IRT").¹⁵⁰ There are no formal avenues of review of the opinion given by IHC. This is because it constitutes a separate decision by persons not acting as delegates of the Minister.¹⁵¹ Both MIRO and IRT are restricted to reviewing the decision of the Minister, a decision which has itself been based on the binding opinion of IHC:

As a matter of practice, in many cases where the Commonwealth medical officer's opinion is that an applicant does not meet the health requirements, the applicant may well approach the Migration Office again with additional information which may be passed to the Commonwealth medical officer for further consideration.¹⁵²

10.260 IRT has observed that a Commonwealth medical officer would be obliged to review his or her opinion whenever fresh medical evidence comes to light, at least until the date of IRT's decision.¹⁵³ The fact that the Director of IHC reviews the opinion of one of the unit's own medical officers has been criticised as being insufficiently independent. In answer to this criticism the Health Department is establishing an independent panel within the Department to review IHC's opinions

when fresh evidence is presented. Perhaps a better solution would be to allow IRT to review IHC's opinions as it seems anomalous that IRT can review a range of expert opinions but not the expert opinion of a Commonwealth medical officer.

Criticisms

10.261 One of the main criticisms of the health criteria is that there are no clear guidelines for making decisions: parameters such as "undue harm" and "undue cost" are imprecise and open to inconsistent interpretation. In 1989, the Department of Immigration, Local Government and Ethnic Affairs (as it then was) produced guidelines both for examining doctors and the Commonwealth medical officers.¹⁵⁴ These guidelines are now out of date and are being progressively, but slowly, replaced by background briefing papers. The Joint Standing Committee on Migrant Regulations considered it of critical importance to expedite the production of these papers to assist the medical officers reach an opinion and to achieve consistency in such opinions.¹⁵⁵ The Commission endorses this position.

10.262 There are subsidiary advantages to having unambiguous health criteria guidelines. First, this would enable an allocation to be refused without any of the parties involved "losing face". The guidelines can be pointed to and an explanation given that the child would probably not be given clearance.¹⁵⁶ Secondly, the sending countries are clearer about the kinds of health problems that are unlikely to get clearance in Australia and are therefore unlikely to offer children so affected in the first place. This avoids trauma for both the child and the adoptive parent when a possible placement is thwarted. DOCS has a role to play in this regard in taking responsibility for advising the sending country of Australia's health requirements. One practical step that can be taken, for example, is for the sending country to carry out HIB and Hepatitis B testing *before* a child is allocated, rather than after.

10.263 This point leads to a far more complex criticism on a philosophical level. Adoptive parents have argued that there should be greater flexibility in the application of the health criteria to intercountry adoption to allow a greater number of children with disabilities into Australia. The view is that:

it is at best insensitive, and at worst morally culpable, for Australia to expect to take from relinquishing countries (which are necessarily among the most needy in the world) only the most healthy orphaned or abandoned children, leaving those countries with the sole responsibility for caring for the less healthy children.¹⁵⁷

10.264 This argument has as its logical foundation a view of intercountry adoption as a form of aid. The merits of this view are discussed under paragraphs 10.79 to 10.80.

10.265 A different, but related criticism is that First World health standards are being applied to Third World conditions in assessing whether a child meets health criteria, and that this is inappropriate. For example, a child residing in an institution may be anaemic, underweight and undersized by Western standards or developmentally delayed but that same child may well flourish within an adoptive family. AICAN has recommended that the Migration Regulations be amended to create separate health criteria for intercountry adoptees, while retaining the prohibition on infectious diseases.¹⁵⁸ In meeting this criticism, the Joint Standing Committee on Migrant Regulations recommended that DIEA consider the financial and other family support able to be provided by the adoptive family and the circumstances of the adoptive child. In particular, DIEA should consider whether these factors could outweigh any likely costs to the community or access to community resources in short supply.¹⁵⁹

10.266 As well as there being a need for published health criteria guidelines, adoptive parents contend that medical reports and assessments should be made available to them, without having to rely on making an application under the *Freedom of Information Act 1982* (Cth). At present, IHC's report comes under Commonwealth privacy laws and is not released to the adoptive parents.¹⁶⁰ The Commission agrees that knowledge of the guidelines which are being used to assess a child

and access to the report would allay much of the frustration which adoptive parents feel in dealing with what they currently see as "a vast faceless bureaucracy, a complicated law and a lack of direction".¹⁶¹

10.267 The current health provisions require two decisions to be made. The first is whether a person is free from certain communicable diseases, or certain other diseases or conditions. This decision is not expressly reserved to the Commonwealth medical officer and is, therefore, by implication, a decision for the Minister. The second decision, expressly reserved as an opinion of the Commonwealth medical officer, concerns whether the disease or condition is a threat to public health, a danger to the community or requires costly care or treatment. The Joint Standing Committee on Migration Regulations has criticised this drafting:

At best, the regulation is unclear and confusing. At its worst, ... it appears that the Minister is required to make an essentially medical decision, while the Commonwealth medical officer, in assessing the costs of care and treatment, is allocated a decision which appropriately could be taken by the Minister.¹⁶²

10.268 A primary criterion which must be satisfied at the time of making an application is that the laws relating to adoption of the country in which the child is normally resident have been complied with.¹⁶³ However, IRT has demonstrated a reluctance to look behind the adoption order which is granted in another country in the absence of clear evidence of fraud or contravention of Australian migration laws.¹⁶⁴ The hope is, of course, that the Hague Convention will achieve a standard of adoption practice in the countries with which Australia has programs that ensures compliance with adoption laws. And at any rate, the Hague Convention will provide for automatic recognition of overseas adoption orders.

10.269 Until such time as Australia ratifies the Hague Convention, and assuming it does ratify, the question remains as to what extent DIEA should take responsibility for examining placement of a child for intercountry adoption by the sending country. At the very least, DIEA has a legal obligation to ensure compliance with the overseas adoption laws, and this obligation needs to be emphasised. But it can be argued that DIEA is bound, in accordance with Australia's international obligations, to enquire further into overseas practices that have resulted in a particular child being available for overseas adoption.

10.270 There is a further criterion which is inherently difficult. The Minister must be satisfied that the applicant is likely to become established in Australia without undue personal difficulty.¹⁶⁵ It is not clear how and to what extent DIEA satisfies itself of this in relation to adoptees. The adjustment difficulties which an overseas adoptee experiences, particularly older-aged adoptees, are discussed in Chapter 8.

10.271 On a pragmatic level, adoptive parents have two criticisms of the visa application procedure. They complain that it is difficult for them to obtain any information from DIEA on the progress of their application; that DIEA seems to operate in a very closed fashion. IHC have introduced an enquiry line: this is an improvement which DIEA could emulate. Also, the point has been made that sending the overseas medical report to Canberra for forwarding to Sydney is an unnecessary step. Canberra is merely a transit stop; no action is taken on the application there. This delays the processing of the application and can increase the chances of the paperwork going astray. The Commission advocates the sending of overseas medical reports directly to the point at which they will be assessed.

10.272 Again on a pragmatic level, when IHC forward their assessment to the Migration Officer it should be possible to forward a costing of management and treatment of any disease or disability at the same time, thereby saving two to three weeks in the time it takes to process an application. The present practice is for IHC to wait until the Migration Officer responds to IHC's assessment with a formal request for a costing.

Guardianship

10.273 The Minister for Immigration becomes the guardian of every non-citizen child entering Australia¹⁶⁶ until the child is legally adopted under NSW law.¹⁶⁷ Guardianship is generally delegated to DOCS.¹⁶⁸ The *Immigration (Guardianship of Children) Act 1946* (Cth) has been amended to provide for "declared States and Territories", the intention being that individual States and Territories will legislate for guardianship of children so that the Commonwealth legislation need no longer apply. To date, New South Wales is not a "declared State".¹⁶⁹

Citizenship

10.274 Pursuant to the *Australian Citizenship Act 1948* (Cth), 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.¹⁷⁰

10.275 Usually, an adoptive parent must adopt their child under New South Wales law because an adoption order obtained in the sending country does not have effect for the purposes of the laws of New South Wales.¹⁷¹ However, in limited circumstances, a declaration of the validity of an overseas adoption order can be obtained through the Supreme Court.¹⁷² It is available where the adoptive parents were resident or domiciled in the overseas country for 12 months or more, and the overseas order gives them a superior custody right to that of the natural parents.¹⁷³ A declaration of validity of an overseas adoption order does not automatically confer Australian citizenship on a child. The adoptive parents must request a grant of citizenship from DIEA. 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.¹⁷⁴

RECOMMENDATIONS

10.276 In addition to internationally agreed standards and procedures for intercountry adoption, Australia has itself developed nationally agreed guidelines. New South Wales's approach to intercountry adoption should be in accordance with these guidelines. The main agreements adopted by the Council of Social Welfare Ministers are:

1986 *National Guidelines* contained in the *Report of the Joint Committee on Intercountry Adoption*,¹⁷⁵

1991 *Protocols and Procedures for the Development of Programs for Intercountry Adoption with New Countries*;

1993 *National Minimum Principles in Adoption*,¹⁷⁶ and

1995 *Draft National Minimum Principles in Adoption*.¹⁷⁷

10.278 In making the recommendations in this chapter, the Commission has had regard to the above guidelines, as well as international treaty obligations, standards and principles. The following list of recommendations assembles and places under appropriate headings all the recommendations which appear throughout the text of this chapter.

Financial aspects

87. Section 50 of the Adoption Act (which makes it an offence to make, give or receive payment or reward for the making of any arrangements for adoption, other than authorised expenses or fees, and which applies equally to local and intercountry adoptions) should be retained.

88. Payment of expenses reasonably incurred in the adoption, including reasonable legal expenses and expenses incurred by the sending country, but excluding compulsory donations, should continue to be authorised under the legislation.
89. Legislation should stipulate that unexpended monies paid in advance by applicants must be refunded at the completion of an adoption.

Consents and availability for adoption

90. Legislation should prohibit applicants from having any contact, direct or indirect, applicants have been approved to adopt the child of those birth parents.

Role of DOCS

91. DOCS should be designated by appropriate Federal laws as the Central Authority in New South Wales having the authority, within New South Wales, over intercountry adoption given to Central Authorities by the Hague Convention.
92. No person or body other than DOCS should be permitted to:
 - receive expressions of interest;
 - decide whether or not to approve an applicant;
 - issue approval/non-approval letters;
 - seal the home study as an original;
 - administer the appeal process in circumstances of non-approval; and
 - approve an allocation made by the overseas authority.

Accreditation

93. Existing parent support groups and any other non-government organisation should be eligible to apply to be accredited to undertake the arrangement of intercountry adoptions.
94. Sections 10 and 11 of the Adoption Act (which provide respectively that a charitable organisation can apply for approval as a private adoption agency and that the Director-General may grant or refuse the application) should be retained.
95. Legislation should require an accredited body to be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.
96. Legislation should explicitly give DOCS the power to supervise an accredited body's composition, operation and financial situation and to require that an accredited body provide DOCS with audited accounts.
97. Legislation should provide for licensing requirements which restrict the directors, administrators and employees of an accredited body from receiving remuneration which is unreasonably high in relation to the services rendered.
98. Legislation should provide for licensing requirements which require DOCS and accredited bodies to act expeditiously in the process of an adoption.
99. Legislation should provide for licensing requirements which authorise accredited bodies to perform the following functions:

to conduct information, preparation and education seminars;

to assess expressions of interest;

to arrange for assessment of applicants and preparation of the home study by an appropriate professional;

to provide counselling;

to prepare and collate required documentation;

to forward adoption documentation to the overseas authority;

to liaise and negotiate with the overseas authority;

to receive allocation notifications;

to arrange for the preparation of post-placement reports by an appropriate professional;

to provide to DOCS and the overseas authority post-placement reports; and

to obtain an adoption order in New South Wales, where applicable.

100. Legislation should provide for licensing requirements which prohibit accredited bodies being involved in fund raising, sponsorship and the sending of aid to an institution with which it has an intercountry adoption program.

Adoption information

101. Clause 29(2) of the Adoption Regulation (which provides that, before placing a child from overseas for adoption, the Director-General must obtain a report about the social, developmental and medical history of that child and his or her family) should be retained.
102. DOCS and the accredited agency must ensure that information received by them concerning the child's origin, identity of birth parents and medical history is preserved and that access to such information is given to the adoptive parents and to the child, in accordance with the *Adoption Information Act 1990* (NSW).

Preparation, assessment and counselling

103. The State Government should negotiate with the Federal Government to include in conditions for the granting of an adoption visa the requirement that applicants travel to collect their allocated child.

Recognition of adoption orders

104. Sections 46 and 47 of the Adoption Act (which provide respectively for the recognition of a foreign adoptions where the adopters have been resident for at least 12 months or domiciled in the foreign country and for a declarations of validity of such foreign adoption) should be retained, although not as the only circumstances in which foreign adoptions will be recognised.
105. Legislation should give to the Director-General the power to designate countries which have ratified the Hague Convention and/or which conduct intercountry adoption in accordance with the Hague Convention. An adoption order made in a "designated" country in accordance with the law of that country should have, so long as it has not been rescinded under the law in force in that country, the same effect as if it were an order for adoption made in New South Wales unless the adoption is manifestly contrary to New South Wales public policy, having

regard to whether it would have complied with the law of New South Wales and whether it would have been contrary to the best interests of the child.

106. Where a child is adopted from a non-designated country, legislation should require that an adoption order be obtained in New South Wales.

FOOTNOTES

1. "Agency" and "agencies" is used to refer to both the New South Wales Department of Community Services and private adoption agencies unless the context requires otherwise.

2.

	Overseas born adoptees	Australian born adoptees
1990-91	162	158
1991-92	145	151
1992-93	95	110
1993-94	89	98
1994-95	85	127

[\[Link to text only version of table\]](#)

Source: Australian Institute of Health and Welfare *Child Welfare Series: Adoptions Australia* Nos 1, 4, 7, 11, 14 (AGPS, Canberra).

3. J Harper "Intercountry Adoption of Older Children in Australia" (1986) 10 *Adoption and Fostering* 27 at 27. Of the 292 children, 119 were adopted by NSW families.
4. This came into effect on 1 September 1995. It removed some clauses which were specific to intercountry adoption so that the same clauses could apply to intercountry and local adoption alike. This was to meet the requirement of UNCROC that intercountry and local adoption enjoy equivalent safeguards and standards.
5. *Adoption of Children Regulation* 1995 (NSW) cl 6(2)
6. The procedure outlined in this paragraph is the same for local adoptions.
7. *Adoption of Children Regulation* 1995 (NSW) cl 8.
8. cl 7.
9. *Adoption of Children Act* 1965 (NSW) s 65A; *Adoption of Children Regulation* 1995 (NSW) cl 12.
10. See New South Wales Law Reform Commission *Intercountry Adoption and Parent Support Groups* (Research Report 6, 1997).
11. This change was introduced following the Commission's proposal in NSWLRC DP 34.
12. *Adoption of Children Act* 1965 (NSW) s 46.
13. *Adoption of Children Act* 1965 (NSW) s 21.

14. Australia is not a signatory to the Hague Convention because, as a matter of policy, Australia does not sign treaties. Becoming a signatory has no legal or binding effect and is really a symbolic gesture of support for the treaty. Australia fully intends to reify the Hague Convention.
15. In 1986, the General Assembly of the United Nations adopted 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 intercountry 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". This principle was incorporated into Article 21(d) of the *United Nations Convention on the Rights of the child*.
16. H Bayes "Let's consider the Issues" in *Intercountry Adoption in Tasmania* (Discussion Paper, 1993) at 2.
17. Bayes at 2.
18. "Racial and ethnic identity is extremely important in intercountry as well as transracial adoptions. Much more research is needed to assess the evolution and long-term adjustment and identity of children who have been placed internationally": R G McRoy "Significance of Ethnic and Racial Identity in Intercountry Adoption within the United States" (1991) 15 *Adoption and Fostering* 53 at 59.
19. J Harper "A Bit of Me Will Always be Lost' - Adoption Losses in Intercountry Adoption" in Proceedings of the fifth Australian Adoption Conference *Has Adoption a Future?* (Post Adoption Resource Centre, Sydney, 1995) at 367.
20. J Harper (1986) at 27. Cities studies by A Kadushin and W Seidl "Adoption Failure: a Social Work Post-mortem" (1971) 16 *Social Work* 32; C Bass "Matchmaker-Matchmaker: Older Child Adoption Failure" (1975) 54 *Child Welfare* 505.
21. D Ngabonziza "Intercountry Adoption: In Whose Best Interests?" (1988) 12 *Adoption and Fostering* 35 at 35.
22. B Tizard " Intercountry Adoption: A Review of the Evidence" (1991) 32 *Journal of Child Psychology and Psychiatry* 743 at 747: "But such gestures [that is, sponsorship and donations by adoptive parents], and intercountry adoption itself, make a negligible impact on the problems of poverty and war in Third World countries".
23. "[A]ttention should be given to improving, where possible, the situation of birth parents and families in other foreign countries to eventually reduce the need for intercountry adoptive placements": R G McRoy "Significance of Ethnic and Racial Identity in Inter-country Adoption within the United States" (1991) 5 *Adoption and Fostering* 53 at 59-60; "In developing countries there are various means of children's welfare services, and intercountry adoption is considered as a last resort": I Utaryo "Adoption as a Means of Children's Welfare Services in Developing Countries" paper presented at the public seminar *The Year of the Child: International Responsibilities* (Adelaide, May 1979) in G P Mullins (ed) *publication No 67* (Department of Continuing Education, University of Adelaide, 1979) at 3.
24. Ngabonziza at 38-39; Australian Catholic Social Welfare Commission *Intercountry Adoption* (Discussion Paper, August 1991) at 10: "The international acceptance of intercountry adoption reduces the need for positive and determined action to develop support services for children and their parents in their own country".
25. J Harper " Love is Not Enough: Breakdown in Intercountry Adoption" paper presented at the *Intercountry Adoption Workshop* (NSW Committee on Adoption, Sydney, October 1985); D S Kim "Issues in Transracial and Transcultural Adoption" (1978) 59 *Social Casework* 477; S Z Moss and M S Moss "Surrogate Mother-Child Relationships" (1975) 45 *American Journal*

- Orthopsychiatry* 381; L R Melina *Raising Adopted Children* (Harper Perennial, New York, 1986) at 170.
26. J Harper (1985) at 5.
 27. P Kirton and J Kirton "Every Child Deserves a Family" (1991) *Adoption Australia* (Autumn) 12 at 14.
 28. Home established by Pearl Stevens: information supplied by Ms V Alterman in conference (31 March 1995).
 29. At the start of 1990, 104,000 children were in institutions of which only 2-3% of these were orphans: D Reich "Children of the Nightmare" (1990) 14 *Adoption and Fostering* 9 at 11.
 30. Defence for Children International and Service Social International *Report with Regard to the Implementation in Romania of the Hague Convention on the Rights of the Child in the Field of Intercountry Adoption* (April 1991) quoted in A Zugravescu and A Iacovescu "The Adoption of Children in Romania" in E D Jaffe (ed) *Intercountry Adoption: Laws and Perspectives of "Sending" Countries* (Martinus Nijhoff, Dordrecht, 1995) 39 at 42: Law No 11 was passed in August 1990 with serious ramifications which had not been foreseen. In effect, it removed conditions and restrictions from the operation of intercountry adoption, resulting in this number of 10,000 children leaving the country. "The system created by Law 11/1990 had, in effect, deprived the act of adoption of its character of social protection of the minor".
 31. J Maxwell, B Lewis and L Crisp "The New Routes to Happiness" *The Bulletin* (4 June 1991) 38 at 43.
 32. J Triseliotis "Closing Remarks" a paper presented at the *Intercountry Conference on Adoption* (Athens, 6-9 July 1987) in J Cauchi (ed) "International Conference on Adoption" (1987) 14 *Family Research Bulletin* 16 at 16.
 33. P Mussen, J Conger and J Kagan *Child Development and Personality* (4th ed, Harper and Row, New York, 1969) at 193.
 34. E Leung "Intercountry Adoption: An Independent Social Worker's Viewpoint" paper presented at the public seminar *Intercountry Adoption* (Adelaide, 9-10 July 1977) in G P Mullins (Ed) *Publication No 58* (Department of Adult Education, University of Adelaide, 1977) 48 at 49.
 35. Reich "Children of the Nightmare" at 12.
 36. Reich at 10.
 37. I Freckelton "Clamp-Down of Baby Snatching" (1986) 60 *Law Institute Journal* 840 at 840; Maxwell, Lewis and Crisp "The New Routes to Happiness" at 41-43; H C Kennard "Curtailling the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions" (1994) 14 *University of Pennsylvania Journal of International Business Law* 623; B Cook "Adoption From Overseas: Trading in Lives or Turning the Tables on Tragedy?" (Dec 1988-Jan 1989) *Migration* 11 at 11; R Waterstone "Black-Market Babies: For Sale: One Baby \$12,000 O N O" *New Woman* (June 1993) at 44-49; J Prent "Hague Convention on Intercountry Adoption" paper presented at *The First World Congress on Family Law and Children's Rights* (Sydney, July 1993); Ngabonziza at 37: "In the context of...a vulnerable population, [intercountry adoption] lends itself to many abuses including prostitution and child trafficking....The practice of trafficking in children had developed to such alarming levels that ECOSOC is urging all governments to address the issue and take the action necessary to stem this immoral and illegal trend, which is an offence not only against the child but a denial of every aspect of human rights".

38. H Bayes "Protecting Children in Intercountry Adoption" (1993) *Adoption Australia* (Summer) 9 at 21. See also a study of the trafficking of children in Bolivia, evidence emerged of a woman who had abducted five babies in three months and sold to a lawyer for an average of \$US5 each: Defence for Children International *Protecting Children's Rights in International Adoptions: Selected Documents on the Problem of Trafficking and Sale of Children* (Geneva, 1989) at 6.
39. "Unfortunately there was a market for a while in Brazil for illegal adoptions....There have been people interested in making money from illegal adoptions and scandals have taken place. Biological mothers have been paid to give up their children for adoption...The Federal Police estimate that for every 1,500 children legally adopted in Brazil, around 3,000 leave the country illegally": D Carvalho da Silva " The Legal Procedures for Adopting Children in Brazil by Citizens and Foreign Nationals" in Jaffe (1995) 121 at 128, 129.
40. Carvalho da Silva at 128.
41. Brazilian Code of Minors, Article 31.
42. Carvalho da Silva at 128.
43. C R Duenas "Legal and Social Aspects of the Adoption of Chilean Children" in Jaffe (1995) at 176.
44. Z M Moncada and C A Sanabria "Adoption in Costa Rica" in Jaffe (1995) 139 at 148.
45. E W de Sztrancman and I Sztrancman Waisblack "Peruvian Foreign Adoptions" in Jaffe (1995) 185: in 1992 six adoption judges were removed from office for corrupt behaviour.
46. The Regional expert meeting on *Protecting Children's Rights in Intercountry Adoptions and Preventing Trafficking and Sale of Children* organised by Defence for Children International in Co-operation with the Department of Social Welfare and Development of the Government of the Republic of the Philippines (Manilla, Philippines, April 1992) at 6.
47. "[W]hat is presented as voluntary relinquishment may not be so. At the recent Meetings of Experts in Manilla, the Indian Association for the Promotion of Adoption presented details of two cases where an apparently legal and voluntary relinquishment had been made under duress": Bayes (1993); The Australian Catholic Welfare Commission argues that intercountry adoption endorses the oppression of relinquishing mothers: *Intercountry Adoption* (1991) at 10; "Certainly, many mothers ended up signing documents permitting the adoption of their children without even knowing that they were doing": Carvalho da Silva at 129.
48. See UNCROC Articles 21 and 35; The Hague Convention Articles 4 and 29.
49. Ngabonziza at 37; Carvalho da Silva at 129.
50. J M Becker "The Pressure to Adandon" (1988) 5 *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* at 24-25.
51. Sztrancman and Sztrancman Waisblack at 186.
52. "Some agencies keep a newborn baby for months, saying that there is a local family planning to come for the child, thereby turning away any local applicants, until they can eventually offer the child overseas". Bayes (1993) at 10; Carvalho da Silva at 128.
53. A Loenen and R Hoksbergen "Intercountry Adoption: the Netherlands; Attachment Relations and Identity" (1986) 10 *Adoption and Fostering* 22 at 23.

54. See, for example, M D S Ainsworth, M Blehar, E Walters and S Wall *Patterns of Attachment: A Psychological Study of the Strange Situation* (Erlbaum, Hillsdale, NJ, 1978).
55. Loenen and Hoksbergen at 23.
56. K Choularton "Intercountry Adoption-Some Psychological Problems" paper presented at the public seminar *Intercountry Adoption* (Adelaide, 9-10 July 1977) in G P Mullins (ed) *Publication No 58* (Department of Adult Education, University of Adelaide, 1977) at 41.
57. R Baker "Parentless Refugee Children: The Question of Adoption" in P Bean (ed) *Adoption: Essays in Social Policy, Law and Sociology* (Tavistock, London, 1984).
58. B Joe "In Defence of Intercountry Adoption" (1978) *Social Sciences Review* at 1 quoted in Australian Institute of Family Studies *About Intercountry Adoption: AICAN Information Paper No 1* (May 1992) at 9.
59. It is interesting to note that Argentina, like most South American countries, has ratified UNCROC, but has placed a reservation on Article 21. The sub-sections on intercountry adoption do not apply in areas within its jurisdiction because, before they can be applied, a strict mechanism must exist for the legal protection of children in matters of intercountry adoption, in order to prevent trafficking in and the sale of children: C P Grosman and D B Inigo "Adoption of Children in Argentine by Local Citizens and Foreign Nationals" in Jaffe (1995) 153 at 158.
60. Article 21(a).
61. Article 21(b).
62. Article 21 (c).
63. NSWLRC DP 34, Proposal 1 at 298.
64. Article 21 (d).
65. Article 21(e).
66. R Morgan "Intercountry Adoptions: The New Convention and its Development of the Principles of the UN Convention on the Rights of the Child" paper presented at *First World Congress on Family Law and Human Rights* (Sydney, 4-9 July 1993) at 953-971.
67. In the Final Act of the 17th Session of the Hague Conference on Private International Law.
68. As at 30 July 1996 the following countries had ratified the *Hague Convention on Protection of Children and International Co-operation in Respect of Intercountry Adoption*: Mexico, Romania, Sri Lanka, Cyprus, Poland, Spain, Peru, Ecuador, Costa Rica, Burkina Faso; and Philippines. A further 15 countries are signatories to the treaty.
69. *Hague Convention on Protection of Children and International Co-operation in Respect of Intercountry Adoption*, Article 1.
70. L R Melina "Hague Treaty Hopes to Solve Problems in Intercountry Adoptions" (1993) *Adopted Child* 1 at 2.
71. R Morgan at 957.
72. Contact in compliance with conditions established by the competent authority in the State of origin is permissible.
73. Article 5.

74. Article 6.
75. Article 6(2).
76. Article 8.
77. Article 14-22.
78. Article 22.
79. Article 11(a) and (b).
80. Australian Society for Intercountry Aid for Children (NSW) Inc *Submission* (31 August 1994) at 2 and 6.
81. Adoptive parents who have lived in their child's country of origin for more than one year prior to the adoption are exempted from this requirement.
82. Article 23.
83. Article 24.
84. Article 30(1).
85. NSWLRC DP 34, para 12,17 outlines some of the ambiguities.
86. M D Kirby "The United Nations Convention on the Rights of the Child and the Declaration of the Rights of the Child as Part of International Law and Municipal Law" paper presented at *First World Congress on Family Law and Human Rights* (Sydney, 4-9 July 1993) at 17.
87. The Hague Convention Article 8; UNCROC Article 21(d).
88. RR 6 sets out details of contributions of aid and sponsorship of children in each of the parent support groups. A number of submissions from adoptive parents who are or have been members of parent support groups stressed that, while they are encouraged to fund-raise and voluntarily wish to do so, they have never felt pressured into this by the parent support groups.
89. In Ecuador, and some other South American countries "the Classic method used in illegal adoptions...begins when a private couple locates a pregnant woman willing to give up her child, and the woman registers herself into the hospital under the name of the adoptive mother. Subsequently, after childbirth, the civil Registry issues a birth certificate bearing the name of the "adoptive" mother rather than the birth-mother". C Maldonado, A Marques, L Hayes Vertulfo, B Cordero and C Valdez "Adoption in Ecuador" in Jaffe (1995) 199 at 208.
90. Duenas, senior attorney in the Adoption Department of SENAME, in analysing the problem with Chile's adoption legislation says "one problem concerns the great number of private persons mediating in the adoption process, thus compromising the technical and ethical demands inherent in such a sensitive procedure": Duenas at 173.
91. *Submission* (Confidential) (29 July 1974).
92. They include a requirement of confidentiality of all adoptive documents and obligations to notify DOCS of all allocations for its approval and to provide it, and all applicants, with details of programs.
93. *Adoption of Children Act 1965* (NSW) s 13.

94. Victorian Family and Children's Services Council *The Intercountry Adoption Services in Victoria - A Follow up Review* (July 1991) (the "Fogarty Report") at 39.
95. Fogarty Report at 39.
96. NSWLRC DP 34, Proposal 2 at 298.
97. Centacare (Newcastle) *Submission* (29 July 1994).
98. Adoptive Families Association of the ACT Incorporated *Submission* (11 July 1994); J and G Leslie *Submission* (28 July 1994); International Children's Aid Ltd. *Submission* (3 August 1994); P Cussinnet and N Toumi *Submission* (29 July 1994).
99. W Morgan and T Edwards *Submission* (19 October 1994).
100. Australian Society for Intercountry Aid for Children (NSW) Inc. *Submission* (31 August 1994); Friends of FANA *Submission* (Oral) (31 March 1995).
101. The Fogarty Report at 48.
102. *Family Law (Convention on Protection of Children and Intercountry Adoption) Regulations*.
103. Intercountry Adoption Working Party *Report to the Protection and Care of Children Sub-Committee of the Health and Community Services Ministerial Council Secretariat* (1995).
104. Article 14.
105. G Parra Aranguren *Report on the Parliamentary Draft Convention for the International Co-operation and Protection of Children in Respect of Intercountry Adoption Adopted by the Special Commission* (Preliminary Document No 7, Permanent Bureau of the Conference, September 1992) at 124-125.
106. Parra Aranguren at 126.
107. Section 137 of the *Adoption Act 1995* (WA) allows the Minister to make arrangements on behalf of the State with a representative of the government of another country for an intercountry adoptions. Arrangements cannot be made unless they are approved by the government of the other country. Section 115 of the *Adoption Act 1984* (VIC) permits arrangements for intercountry adoption to be made by or on behalf of the Director-General or an approved agency and can only be made with a "prescribed" person or organisation.
108. *Act on Intercountry Adoption 1988* (Netherlands).
109. L van Tuyl "Intercountry Adoption in the Netherlands - Compulsory Preparation Classes for New Adoptive Parents" (1994) 18 *Adoption and Fostering* 14 at 19.
110. "The child concerned by intercountry adoption must enjoy safeguards and standards equivalent to those existing in the case of national adoption.
111. C Macaskill *Against the Odds: Adopting Mentally Handicapped Children* (BAAF, London, 1985); National Children's Bureau *Parents for Children: Some Findings from a Research Project* (London, 1985); J Thoburn, A Murdoch and A O'Brien *Permanence in Child Care* (Oxford, Basil Blackwell, 1986) quoted in J Thoburn and M Charles "A Review of Research which is Relevant to Intercountry Adoption" (University of East Anglia, Norwich, September 1991) in United Kingdom - Department of Health, Welsh Office and Scottish Office *Interdepartmental Review of Adoption Law - Intercountry Adoption* (Background Paper No 3, January 1992) at 9.

112. See P Sawbridge "Seeking New Parents: A Decade of Development" in J P Triseliotis (ed) *New Developments in Foster Care and Adoption* (Routledge and Kegan Paul, London, 1980); P Sawbridge *Parents for Children: Twelve Practice Papers* (BAAF, London, 1983) quoted in Thoburn and Charles "Review of Research Relating to Intercountry Adoption" at 9.
113. In a study of overseas adoption disruption by Hoksbergen, certain risk factors were isolated. One of these factors was identified as negative first encounter with the child: R Hilsbergen "Understanding and Preventing 'Failing Adoptions'" in E Hibbs (ed) *Adoption: International Perspectives* (International University Press, Madison, 1991).
114. Thoburn and Charles "Review of Research Relating to Intercountry Adoption" at 9.
115. Thoburn and Charles at 9.
116. Moncada and Sanabria "Adoption in Costa Rica" at 149.
117. Draft regulations under *Family Law Act 1975* (Cth) are in the process of being prepared in anticipation of Australia ratifying the Hague Convention. One of the draft regulations proposes to provide that the State Central Authority (presumably DOCS) ensures that the child's entry into Australia must be carried out in the company of at least one of the applicants to adopt.
118. NSWLRC DP 34, Proposal 4 at 298.
119. Child Care and Social Policy Division, Department of Health and Social Services (Northern Ireland) *Circular* (April 1992) para 24 at 5.
120. DOCS has introduced free access to post-placement support following the Commission's proposal in NSWLRC DP 34.
121. H Bayes "Intercountry Adoption in Tasmania" *Report of the Ministerial Review of Intercountry Adoption* (April 1993) at 31.
122. J Phillips and J Thoburn identify a number of factors influential in the success of an intercountry adoption. One of these is the nature and quality of the professional services involved before, during and after the adoption process: Social Work Development Unit, UEA *The Work of the Essex Adoption Agency* (1989) quoted in J Horne-Roberts "Intercountry Adoption" (1992) 142 *New Law Journal* 286 at 288.
123. Article 23(1).
124. *Family Law (Convention on Protection of Children and Intercountry Adoption) Regulations*.
125. Schedule to the *Adoption (Designation of Overseas Adoptions) Order 1973* (UK).
126. *Adoption Act 1991* (Ireland) s 4.
127. NSWLRC DP 34, Proposal 7 at 299.
128. Australian Society for Intercountry Aid for Children (NSW) Inc. *Submission* (31 August 1994).
129. Adoptive Families Association of the ACT Inc. *Submission* (11 July 1994 at 6; see also O and S Smith *Submission* (25 July 1994); T and L O'Keefe *Submission* (21 July 1994).
130. Centacare Catholic Community Services (Adoption Services) (Newcastle) *Submission* (29 July 1994) at 3.
131. Harper (1994) at 368.

132. NSWLRC DP 34, Proposal 6 at 298.
133. M Cunningham *Submission* (14 July 1994); V Osborne *Submission* (29 July 1994).
134. O and S Smith *Submission* (25 July 1994).
135. Ratified in 1986 but not binding on member States.
136. This was noted without comment in Western Australia Adoption Legislative Review Committee *Final Report: A New Approach to Adoption* (February 1991) at 126. No recommendation was made by the Western Australian Report following this suggestion.
137. Article 2.
138. Obviously there would be no reference as yet to the Hague Convention.
139. (1995) 183 CLR 273.
140. The principle is applicable to any domestic law under consideration.
141. On 10 May 1995 the Minister for Foreign Affairs and the Attorney General issued a joint Ministerial statement attempting to nullify the *Teoh* decision. The purpose of the statement was described as being "to restore the position to what it was understood to be prior to the *Teoh* case". The *Joint Statement* foreshadowed legislation to clarify the position. The *Administrative Decisions (Effect of International Instruments) Bill 1995* (Cth) was introduced into Parliament but was not passed and has now lapsed.
142. These principles were decided on by the Council of Social Welfare Ministers and the Minister for Immigration and Ethnic Affairs in 1986, acting on a report from the Joint Committee on Intercountry Adoption.
143. *Migration Regulations 1994* (Cth) Schedule 2, Reg 102.211(3).
144. Under these criteria the adoptee must be free from
 - tuberculosis; or
 - any other fatal/serious communicable disease that would be a threat to public health; or
 - any other disease or condition that would be a danger to the community; require significant care or treatment; involve community resources in short supply; or result in a significant charge on public funds (Schedule 4, Reg 4007).
145. Australia - Joint Standing Committee on Migration Regulations *Conditional Migrant Entry: the Health Rules* (AGPS, Canberra, December 1992) at 23.
146. *Migration Regulation 1994* Schedule 4, Reg 4007(2).
147. Until recently, known as the Migrant Medical Clearance Unit.
148. *Migration Regulations 1994* Schedule 4, Regs 4007 and 4008.
149. *Migration Act 1958* (Cth) s 339.
150. s 347.
151. *Re Norin* (Immigration Review Tribunal, 22 November 1991) at 7.8.

152. Submission by Department of Immigration, Local Government and Ethnic Affairs (DIGLEA) to Joint Standing Committee on Migration Regulations *Submission to Joint Standing Committee on Migration Regulations* Vol 1 at 75-77 quoted in *Conditional Migrant Entry: the Health Rules* at 61.
153. *Re Norin*.
154. *Health Requirements - Notes for the Guidance of Doctors and Radiologists Examining Applicants For Visa and Entry Permits* (DIGLEA, 1989).
155. *Conditional Migrant Entry: the Health Rules* (December 1992) at 44-45.
156. This point was made by Susan Priest, Executive Officer, Australians Aiding Children (SA) in conference with the New South Wales Law Reform Commission (15 June 1995).
157. Australian Society for Intercountry Children (ASIAC) NSW Submission in *Submissions to Joint Standing Committee on Migration Regulations* Vol 1 at 111 quoted in *Conditional Migrant Entry: the Health Rules* at 84. Similar arguments have been put by AICAN and individual adoptive parents: *Submissions to Joint Standing Committee on Migration Regulations* at 84 and 85.
158. *Submission to Joint Standing Committee on Migration Regulations* Vol 3 at 2 and 3 quoted in *Conditional Migrant Entry: the Health Rules* at 85.
159. Recommendation 18, *Conditional Migrant Entry: the Health Rules* at 87.
160. This was identified as a problem by the Fogarty Committee in its inquiry into the Victorian Intercountry Adoption Service in 1989: Fogarty Report at 63. If the adoption agency or parent support group has a good relationship with the Embassy involved the report may be handed over.
161. J Rollings "The Intercountry Adoptee and Immigration Health Requirements" (1994) *Adoption Australia* (Winter) at 8.
162. *Conditional Migrant Entry: the Health Rules* at 23.
163. *Migrant Regulations 1994* Schedule 2, Reg 102.213.
164. *Re: Samgeeta Roshni and Yogeeta Roshni* (Immigration Review Tribunal, 31 July 1992).
165. *Migration Regulations 1994* Schedule 4, Reg 4010.
166. *Immigration (Guardianship of Children) Act 1946* (Cth) s 6. In 1994, the Act was amended to exclude children entering Australia for adoption from the operation of the Act, by changing the definition of a "non-citizen child": s4AAA. It was the intention of Parliament that, in accordance with an understanding reached in 1990, the States and Territories would enact complementary legislation to provide for the guardianship of non-citizen children entering Australia.
167. *Immigration (Guardianship of Children) Act 1946* (Cth) s 11.
168. *Immigration (Guardianship of Children) Act 1946* (Cth) s 5. The adoptive parents have no legal rights over the child until an adoption order is made in NSW. *Re Adoption of S* (1977) 28 FLR 427 held that it is legally possible of the status of adoptive parents to coexist with the Minister's status as guardian.
169. *Immigration (Guardianship of Children) Amendment Act 1994* (Cth) s 3(b), 4AAA and 5. New South Wales is intending to become a declared State in the near future.
170. *Australian Citizenship Act 1948* (Cth) s 10A.

171. *Adoption of Children Act 1965* (NSW) s 46(5). This will change under the Hague Convention.
172. *Adoption of Children Act 1965* (NSW) s 47.
173. *Adoption of Children Act 1965* (NSW) s 46. See *Re M and the Adoption of Children Act* (1989) 13 FamLR 333 and *Lowe v Minister for Immigration, Local Government and Ethnic Affairs* (1988) 12 FLR 513 for a discussion of s 46 and 47.
174. Department of Immigration and Ethnic Affairs *Submission to IP9* (6 September 1993) at 2.
175. Joint Committee on Intercountry Adoption *Report to the Council of Social Welfare Ministers and the Minister for Immigration and Ethnic Affairs* (September 1986).
176. Council of Social Welfare Ministers, *National Minimum Principles in Adoption*, June 1993.
177. Council of Social Welfare Ministers, *Draft National Minimum Principles in Adoption*, July 1995.

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

11. Surrogacy, Donor Reproduction Technology and Adoption

INTRODUCTION

11.1 The terms of reference require the Commission to consider the relevance of surrogacy and reproduction technology to adoption law. The implications of surrogacy and donor reproduction technology for our society are wider than their relevance to adoption.¹ However, the Commission's review is limited to issues relevant to an analysis of adoption law reform. Although the Commission was requested in many submissions to DP 34 to take a position on this wider issue, the terms of reference do not extend to this.²

11.2 Consequently, the Commission has not considered the value or moral status of surrogacy, donor reproduction technology or embryo donation, nor looked at access to or regulation of these processes. Rather, the Commission has considered whether or not adoption should be used to meet the needs of children born in these circumstances, and if so, how adoption law should be amended. The analysis has been made within the context of a lack of legislation in some of these areas,³ where regulation is absent and legal rights are unclear.⁴

11.3 The relevance of surrogacy and reproduction technology to adoption legislation can be divided into two main areas:

the use of adoption to resolve the legal status of a child born as a result of these processes and confirming legal parental rights and responsibilities; and

the use of adoption to secure access to information on genetic and cultural heritage which may be relevant to the development of a child's identity and or well-being.

SURROGACY ARRANGEMENTS

11.4 In IP 9 a surrogate motherhood arrangement was defined as one in which a woman agrees to bear a child for a commissioning couple, conceiving and carrying the child through the pregnancy, and agrees to transfer all her parental rights and responsibilities to the couple upon the birth of the child.⁵ The child may or may not have been born as a result of carrying out an artificial conception procedure.⁶ For example, conception may or may not have involved the use of an ovum⁷ from the commissioning mother, or sperm⁸ from the commissioning father.

11.5 Many of our laws reflect the importance of the birth process to the determination of motherhood. It is only technology that has recently allowed the separation of genetic and gestational mothering. The woman who carries the child through pregnancy to birth is described as the birth mother.⁹ A surrogacy arrangement may be made on a commercial basis, where the birth mother is paid for bearing and transferring the child, or on an altruistic basis where no payment is made.¹⁰

11.6 Surrogacy impacts on adoption when people try to use adoption law to resolve permanently relationships, rights and responsibilities between parties in a surrogacy arrangement in the absence of specific legislation on surrogacy. When a commissioning couple enter into a surrogacy arrangement, it is more than likely that they will want to establish the strongest legal relationship between themselves and the child. Similarly, it may also be very important to them to have their names appear on the child's birth certificate.

Current law and practice

11.7 Although there is no legislation in New South Wales supporting or prohibiting¹¹ either commercial or altruistic surrogacy,¹² private surrogacy arrangements are still taking place in this State.¹³ Surrogacy contracts are unlikely to be enforceable in New South Wales.¹⁴

11.8 Submissions and the Commission's own research indicate that children born as the result of surrogacy contracts require specific legislative protection. An important aspect of this protection is that of their right to access information about their biological origins.

Surrogacy and parentage

11.9 It is necessary to explain how the general law identifies the parents of children born through surrogacy arrangements, since some commissioning couples seek an adoption order to make either or both of them the legal parents of a child who is not otherwise legally recognised as their child.

11.10 Ordinarily, the biological parents of a child automatically have legal rights and responsibilities in relation to that child. However, the situation is different when parents have a child through donor reproduction technology: that is, using donated genetic material such as sperm, ova or embryos.¹⁵

11.11 At present in New South Wales,¹⁶ where a child is conceived by a fertilisation procedure, either through donor insemination or in vitro fertilisation using an *ovum from the woman who becomes pregnant* and donor sperm, parentage is determined under the *Artificial Conception Act 1984* (NSW) ("the Artificial Conception Act").¹⁷ The Artificial Conception Act has three main implications for a surrogacy arrangement. First, where a woman (either married or in a de facto relationship) acting as a surrogate becomes pregnant by either of the above fertilisation procedures, with the consent of her married or de facto male partner, the law conclusively presumes her partner to be the father of the child.¹⁸ The presumption can be rebutted.¹⁹ Secondly, if the partner refuses to consent to the fertilisation procedure, the child may be fatherless, as the sperm donor may be conclusively presumed *not* to be the father.²⁰ Thirdly, where a woman acting as a surrogate (without a married or de facto male partner) conceives by either of the above fertilisation procedures, the child may be presumed to be hers alone, with a conclusive presumption against the paternity of any sperm donor. However, under the second and third situations above, the sperm donor can acknowledge his paternity.²¹

11.12 The position of the woman who becomes pregnant and delivers a child by the use of a donated ovum or donated embryo is unclear. The *Children (Equality of Status) Act 1976* (NSW) ("the Children (Equality of Status) Act") does not provide the woman with the opportunity to acknowledge her maternity, but she can seek a declaration of maternity from the Court.²²

11.13 Consequently, the *Status of Children Act 1996* (NSW)²³ ("the Status of Children Act"), which is not yet proclaimed to commence, is intended, among other things, to clarify the situation of a woman using a donated ovum and also to bring parentage presumptions in line with the *Family Law Act 1975* (Cth) ("the Family Law Act").²⁴ This change accords with the Commission's recommendation in its report *Artificial Conception: In Vitro Fertilization*.²⁵

11.14 Under the Status of Children Act, if a woman (either married or in a de facto relationship) becomes pregnant as the result of the use of *another woman's ovum* she will be presumed conclusively to be the legal mother of the resulting child²⁶ and the woman who provided the ovum will be presumed conclusively *not* to be the legal mother.²⁷ A man who consents to his married or de facto partner being artificially inseminated with another man's sperm is conclusively presumed to be the legal father of the resulting child.²⁸ Conversely, the man who provided the sperm for that insemination is conclusively presumed *not* to be the father of the resulting child.²⁹ These four presumptions are irrebuttable.³⁰

11.15 The Family Law Act contains similar presumptions as to legal parentage for children born as a result of artificial conception procedures.³¹ These presumptions are designed to remove parental responsibilities (including financial) from the gamete³² donors and transfer them to the woman who has undergone the procedure and her (consenting) male partner.

Surrogacy and adoption

11.16 Usually a child has been living with the commissioning couple (often referred to as the social parents) for a period of time and has developed a parent-child relationship with them before the couple

seeks an adoption. In most cases, the social parents' care of the child is not contested by the birth parents.

11.17 As discussed in Chapter 4, adoption procedures differ, depending on whether or not one of the prospective adoptive parents is related to the child.³³ Normally, adoption arrangements can only be made with the support of an agency³⁴ unless one of the applicants is a parent³⁵ of the child, or one or both of the applicants is a relative³⁶ of the child.³⁷ Non-related applicants require an agency report,³⁸ while applicants who are step-parents or relatives³⁹ require an accredited social worker's report.⁴⁰

11.18 A surrogacy arrangement made with the intention of later adopting the child potentially involves several breaches of the Adoption Act. Offences under the Adoption Act for arrangements leading to adoption include making payments,⁴¹ advertising for adoption,⁴² and negotiating an adoption or transferring a child with a view to adoption without the permission of the Director-General.⁴³ These offences apply to birth parents, prospective adoptive parents and intermediaries who breach them.⁴⁴

11.19 In particular, it is an offence to arrange privately the adoption of a non-related child. Section 51 states that an offence has been committed if any person, other than the Director-General, the principal officer of a private adoption agency or someone authorised to act on their behalf:

- (a) conducts negotiations or makes arrangements with another person with a view to the adoption of a child by that other person; or
- (b) except in accordance with arrangements made by or on behalf of, or with the written permission of, the Director-General, transfers, or causes to be transferred, the possession or control of a child to another person with a view to the adoption of that child by that other person.

11.20 Section 50 sets out the offence of giving or receiving payments or reward for, or in consideration of, an adoption. This applies to both intrafamily and non-related adoptions. Section 52 states that it is an offence for persons to advertise or publish the fact that they wish to have a child adopted, or wish to adopt a child, or that they are willing to make arrangements with a view to the adoption of a child.⁴⁵

11.21 A surrogacy arrangement could be in breach of these legislative prohibitions because participants may:

- enter the relationship with the intention that the child be adopted by the commissioning couple;⁴⁶ and/or
- make a payment or give a reward in relation to conducting surrogacy negotiations or transferring the care and control of a child.

11.22 Legal requirements discussed elsewhere in this report would also apply to any surrogacy arrangement leading to adoption, such as consent of the birth parents (or its dispensation) and those relating to persons who may adopt.

11.23 The means by which the child came under the daily care and control of the applicants is a factor when considering the issue of the suitability and advantages of the adoption for the child. If it is clear a surrogacy arrangement has taken place, DOCS refers applicants to the range of parenting orders available in the Family Court of Australia.⁴⁷

11.24 In practice, social parents may often prefer to seek Family Court parenting orders⁴⁸ conferring parental responsibility on them rather than seeking adoption orders through the Supreme Court.

Discussion Paper 34

11.25 In DP 34, the Commission proposed that DOCS should only facilitate an adoption by the social parents of a child born as the result of a surrogacy arrangement 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.

11.26 The Commission believed this approach would bring adoption through a surrogacy arrangement within usual adoption procedures and safeguards, but maintain enough flexibility to allow an adoption to take place if it promotes the best interests of the child. In this way, people would not be encouraged to circumvent the legislative prohibition of private adoption arrangements.

11.27 The criteria would apply to all surrogacies and would ensure that an adoption, whether intrafamily⁴⁹ or non-related, could not take place until the child was of an age to understand his or her biological origins. Once a child had reached such an age it would be easier to determine whether or not adoption would be in the child's best interests. It would also discourage people entering into surrogacy arrangements merely for the purpose of quickly circumventing the adoption legislation.

11.28 Apart from complying with the above criteria, the Commission acknowledged that all general requirements, such as birth parent consent (or its dispensation) and the eligibility prerequisites of adoptive parents under adoption law should also be fulfilled.

11.29 The Commission further considered that where a birth mother wanted to relinquish her child, born in circumstances where there was a surrogacy arrangement, for adoption, if the above criteria had not been fulfilled the birth mother should only be able to give a general consent to adoption. That is, the birth mother would be unable to nominate specific adoptive parents outside an agency pool unless the adoption was intrafamily. The Commission also suggested that in this case, social parents who have no genetic link with the child that they are applying to adopt should be considered equally with all other adoptive parents in the pool.

Submissions and response

11.30 Submissions generally supported the Commission's proposal, although it was suggested that the criteria should refer to both birth parents and not just to the birth mother.⁵⁰ Criticisms of the proposal covered three main areas:

Adoption law does not permit individuals to make their own adoption arrangements. Therefore, in so far as a surrogacy arrangement results in a private adoption placement, it should not be facilitated at all.

If adoptions of children placed with applicants as a result of surrogacy arrangements are allowed, this may diminish the deterrent value of the offences under the Adoption Act.

Adoption law should not regulate surrogacy arrangements or donor reproduction technology, or determine issues of social and biological parentage. Specialised legislation should cover these different issues. Such legislation should also cover access to information on the child's biological background and his or her ability to contact biological family members.

11.31 Some submissions argued that facilitating the adoption of children born under surrogacy arrangements conflicts with a fundamental principle of adoption legislation, namely, that the adoption process must be controlled by a government department or an approved agency.

11.32 Furthermore, allowing couples to adopt after a surrogacy arrangement had been made, even with the limitation of criteria proposed by the Commission, was said to be a dangerous encouragement of surrogacy. As one submission commented:

[s]urrogacy must be discouraged by legislation. Cases should be dealt with as any other relinquishing mother and child. Any perception of legality would encourage a very damaging and socially unacceptable use of women and children....Surrogacy treats women as disposable and children as commodities to be bought and sold, or even altruistically acquired at someone else's expense, and cannot be part of a just society.⁵¹

11.33 The New South Wales Committee on Adoption and Permanent Family Care stated it could not endorse the facilitation of private surrogacy arrangements even under the criteria outlined in DP 34.⁵²

11.34 Some submissions suggested that the option of adoption should be denied to all children where there is an established or suspected surrogacy arrangement. However, this argument places the needs of the child in a secondary position to a perceived need to regulate a controversial practice for which there are no legislative controls or even a developed moral philosophy.

Recent New Zealand approach to adoption and surrogacy

11.35 Two recent New Zealand cases⁵³ give some indication of the approach which a court may take in surrogacy matters, in the absence of specific legislative direction. In those cases, the Court considered applications where the commissioning couples wished to adopt children who had been placed with them as the result of private surrogacy arrangements. In both cases, payments had been made in relation to the transfer of the child. In both cases, the parties were found to be suitable adoptive parents and it was judged to be in the best interests of the child that the adoption proceed.

11.36 Both cases strained to avoid findings that breaches of the *Adoption Act 1955* (NZ), in particular, breach of the prohibition against payments for adoption, had occurred.⁵⁴ It is not clear from these cases if s 6, prohibiting the placing or receiving of a child under 15 in the home of any person for the purpose of adoption, had been breached. In *In Re G* His Honour said there was a "possible breach of section 6".⁵⁵ If there had been a breach of s 6, as to the effect of that breach the judgment is ambiguous:

[T]he *Adoption Act 1955* does not contain a prohibition on an adoption order being made if there are breaches of the Act ...⁵⁶

11.37 Stewart summarises the judicial direction these cases signal:

Re P indicated a definite reluctance to find that breaches of the Adoption Act had occurred ... despite arguably strong evidence to that effect. Counsel had successfully argued that those sections went to the suitability of the adopting parents, and one might assume that the finding of no breach was based on a reservation that a contrary finding would preclude the making of an adoption order. *In re G* is at times ambiguous on this point, but the judgment makes it clear, in the end, that breaches of the Act will not preclude the making of an adoption order; they will simply be weighed along with all other

relevant evidence. That said, *In re G* still indicates a marked reluctance to find that breaches have occurred.⁵⁷

11.38 Stewart puts forward the proposition that the New Zealand Courts are reluctant to find breaches to have occurred because, while that will not preclude the making of an order, it might hinder it, and in cases where an order is clearly the desirable outcome, any hindrance should be avoided.⁵⁸

11.39 What emerges from these cases is that a possible outcome in a New South Wales adoption application is that the commission of an offence in relation to the original placement of the child through a surrogacy arrangement could be just one of several factors to be considered. A breach of s 50 or 51 of the Adoption Act may not necessarily prevent an adoption application proceeding, but would be a factor relevant to the question whether the applicants were suitable to adopt and whether the adoption was in the child's best interests.⁵⁹

Distinction between placement intrafamily and placement with unrelated applicants

11.40 A further issue is whether or not to treat differently cases where the child born of the surrogacy arrangement is placed with relatives and where he or she is placed with unrelated applicants. The adoption procedures for each are different, as discussed in Chapter 4. Where the application is brought as an intrafamily adoption, because the application to adopt can be made privately,⁶⁰ the issue of the surrogacy arrangement may not come to light even if there is no intention by the applicants to conceal it.⁶¹ Without another party before the Court to contest the application, the matter may simply be viewed in terms of the child's interests without considering the effect of the surrogacy on those interests.

Conclusion

11.41 The presence of a surrogacy arrangement should not be an automatic bar to an application to adopt a child born of such an arrangement.

11.42 Surrogacy issues should be considered in the course of adoption practice rather than dealt with specifically in adoption legislation. The particular surrogacy arrangement and its effect on the best interests of the child is an important matter to be determined in the process leading to adoption.

11.43 The regulation of adoption in relation to surrogacy can be compared with the regulation of other unauthorised private placements (where the child and adults are unrelated) and intrafamily adoptions (where the child and at least one of the adults are related). In consequence, the recommendations on procedures regulating an adoption following the placement of a child with social parents under a surrogacy arrangement should substantially follow those of other non-related unauthorised placements⁶² and intrafamily adoptions⁶³ set out in Chapter 4.

11.44 In particular, similar to the adoption of unrelated children discussed in Chapter 4, an agency or the Court should facilitate adoptions under surrogacy arrangements (whether the adoption is intrafamily or not) only where all the following circumstances exist:

other orders would not make adequate provision for the child and an order for adoption would be in the particular child's best interests;

the child has an established relationship with the applicants;

the child is aware of his or her genetic relationships with any of the following: the birth parents, the applicants, and any gamete or embryo donors;

the child has access to information about his or her birth parents and birth family;

the child has an understanding, commensurate with his or her age, of the reasons why the adoption might take place;

requirements as to the birth parents and child's views, wishes and consent as recommended in this Report have been complied with; this includes: that the child be consulted and actively involved in any adoption plans according to his or her level of maturity and understanding; that the birth parents be given early notice of any plans to proceed to an adoption; and that the birth parents be fully informed of the consequences of the adoption for the child and themselves; and

other requirements recommended in this Report have been complied with.

11.45 The Court should retain the discretion to decide whether or not an adoption order should be granted in the particular case. As recommended in Chapter 4, generally for intrafamily and non-related private placements, an agency should support an application for adoption resulting from a surrogacy arrangement and provide a report to the Court. Other requirements of adoption legislation and practice should also apply, such as obtaining proper consents and being satisfied as to the suitability of the applicants to adopt.

11.46 The advantage of this approach is that it avoids having to make special mention of surrogacy in adoption legislation in a way that may be construed as promoting it. It allows a degree of flexibility in determining whether a particular surrogacy arrangement should proceed to adoption, while ensuring the child's best interests predominate in the process. In this manner, the deterrent value of the offences under the Adoption Act prohibiting unauthorised private arrangements for adoption should not be lessened.

11.47 A diminution in the value of the offences is unlikely for several reasons:

First, the circumstances mentioned above and all general requirements under the adoption legislation (such as consent and eligibility) have to be fulfilled. The circumstances require the child to be of sufficient maturity to understand the genetic and social relationship with all the adults involved and to participate in the adoption process. Thus a commissioning couple would not be able to organise a surrogacy arrangement and then quickly bypass the legislative requirements for adoption.

Secondly, under the present legislation, DOCS has supported some adoptions in circumstances where a child has been placed privately with a non-related couple who then wished to adopt the child.⁶⁴ In these cases, the intentions of the adults involved was clearly a factor in deciding whether the adoption was in the child's best interests. These cases involved people who had acted outside the legislative structure of adoption for a variety of reasons. The decision as to whether to support such an adoption depended on an assessment of the best interests of the child. DOCS refer to this category as special case adoptions; they are not large in number. Supporting adoptions in these limited circumstances has not led to a diminution in the value of the offence in s 51 of the Adoption Act or the principle against private adoptions. The small degree of flexibility in this area is exercised so as to be able to act in the child's best interests.

Thirdly, recognition should not be given to the surrogacy agreement reached between the parties, whether it is contractual or not. The assessment of whether the commissioning couple are suitable adoptive parents and whether the placement is in the best interests of the child should be approached on the same basis as any other adoption, without reference to the agreement between the parties. Thus, if in a particular case, consent has not been given freely and on an informed basis, the transaction has been for financial gain, or the commissioning couple are not considered to be suitable adoptive parents, then no order for adoption will ordinarily be made. The principles underpinning the adoption legislation⁶⁵ will not have been diminished.

11.48 The present offences relating to private placements contained in the Adoption Act should be maintained⁶⁶ and any breaches that have occurred should be assessed as going to the suitability of the commissioning couple to undertake the task of adoptive parenting.

RECOMMENDATION 107

Legislation should neither specifically prohibit nor specifically allow social parents to adopt a child born of a surrogacy arrangement.

RECOMMENDATION 108

The general provisions of the legislation should apply to applications to adopt following a surrogacy arrangement, in accordance with the recommendations in Chapter 4 of this Report relating to intrafamily and private placements.

DONOR REPRODUCTION TECHNOLOGY

11.49 Donor reproduction technology refers to the birth of a child with the aid of technology and donated genetic material. If a couple uses its own gametes, and technology merely assists the combining of the sperm and the ovum or the implantation of the embryo in the genetic mother, this has nothing to do with adoption legislation and is not referred to in this discussion.

11.50 Donor reproduction technology includes technological processes such as in vitro fertilisation (IVF),⁶⁷ gamete intra-fallopian transfer (GIFT),⁶⁸ and artificial insemination by a donor (AID).⁶⁹ These are used to treat infertile couples at various fertility assistance units around Australia.

11.51 The main issues to be resolved are whether adoption legislation should deal with the following issues in donor reproduction technology:

access to information; and

generally, using adoption legislation to meet the needs of the children born of donor reproduction technology.

Current law and practice

11.52 Technology makes 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”.

11.53 As discussed above, who are considered the legal parents of a child born as a result of a fertilisation procedure depends on various presumptions, both rebuttable and irrebuttable, under legislation.⁷⁰

11.54 The Artificial Conception Act goes some way to establishing legal parentage. It sets up a presumption of legal fatherhood in the situation where a woman has undergone an artificial insemination procedure by donor sperm. This presumption is intended to remove any parental responsibilities from the sperm donor and instil legal parental rights in the male partner of the woman who has undergone the procedure. As stated above, legal motherhood is unclear in relation to donated ova. It seems more appropriate to amend the Artificial Conception Act to resolve legal parentage in fertilisation procedures rather than use adoption legislation to resolve these issues. This is the approach taken under the Status of Children Act. The presumptions of parentage under the Status of Children Act are set out in paragraph 11.14.

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11.55 Adopted children and children conceived through donor reproduction technology share common ground in so far as they are not genetically related to one or both of their social parents. However, the Commission considered that there are many difficulties in applying the adoption model to the legal status of children conceived through donor reproduction technology.

11.56 Usually, the process of adoption begins with an assessment of the best interests of a child in need of care and then tries to promote those interests in the placement of the child. By contrast, donor

reproduction technology does not begin with this focus. Instead, its focus is on fulfilling the needs (or desires) of infertile couples. In these circumstances, adoption legislation could be used to consolidate private arrangements that are not in the best interests of the child. This was expressed by the New South Wales Committee on Adoption and Permanent Family Care as follows:

Whereas adoption is seen as a means of providing families for children, reproduction technology and surrogacy provide children for families. Consequently, in reproduction technology and surrogacy arrangements, the interests of the child are superseded by the interests of the infertile parents.⁷¹

11.57 The Commission proposed 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.⁷²

11.58 However, the Commission noted in passing that it would be possible for specialised legislation on donor reproduction technology to incorporate the lessons that have already been learned in adoption with regard to access to information. In the past, the practice of adoption involved secrecy and the alteration of birth records. Donor reproduction technology, involving the use of donated gametes or embryos is currently carried out in a similar atmosphere of secrecy and restricted information. 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.⁷³ Suggestions included social parents entering into undertakings to tell their children of their genetic status and exchange information with genetic parents in a similar manner. Identifying and non-identifying information⁷⁴ about donors and children could be stored on a central register.⁷⁵

Submissions and response

11.59 Many submissions expressed concern that children born with the aid of donor reproduction technology are presently being denied information about their genetic identity that is fundamental to their sense of identity. It was widely felt that they should be provided with more comprehensive information.⁷⁶ One submission pointed out that

[r]esulting from the current lack of legislation, there is:

No central registry of donor births

No uniform practice of record keeping for donors or children

No rights to basic non-identifying information of donors, which extends to medical histories

No regulation with regard [to] the number of children per donor

No mandatory counselling of [either] donors or potential parents

No opportunity for contact between children and donors, should both parties consent

No regulation concerning access to donor programs.

In spite of this the number of children born through these programs is far greater than the number of adoptions.⁷⁷

11.60 Submissions addressed the issue of whether the required information should be provided in separate legislation or in adoption legislation. One group of submissions considered that adoption legislation should be amended to provide for information rights for children born using donor embryos but not to regulate any other aspects of this area. The following submission represents this view:

Whilst I believe that the legal system should cover the issue of *reproduction technology* within a different legislation, I believe that the legislation should incorporate the information provisions outlined in the *Adoption Information Act 1990* ... The children born of donor reproduction technology will have many issues to face, probably of more concern than we adoptees. Many of those issues will be the same, however there will be the added questions relating to the planned and clinical processes through which they were conceived.⁷⁸

11.61 The above submission went on to suggest that adoption legislation should cover the information rights for the children of donor reproduction technology but not the issues stemming from the processes and procedures of the technology. Another submission proposed that the similarities between adoption and donor reproduction technology were so strong on the issue of the secret identity of the genetic parents, that

adoption legislation has a responsibility to the children conceived through these methods to ensure that they have access to their genetic histories and family information.⁷⁹

This submission was otherwise of the view that issues associated with donor reproduction technology, other than access to information, should be addressed by specialised legislation.

11.62 Alternatively, other submissions supported the Commission's view that specialised legislation should cover all issues in donor reproduction technology, including genetic identity and access to information.⁸⁰

11.63 A further category of submissions strongly supported the notion of using adoption legislation to control the process of donor reproduction technology. One submission commented that:

[g]enetic material is, and remains the means for the production of a child of the persons from whom the material was taken ... If donated gametes continue to be used, the same eligibility should apply as with adoption.⁸¹

Conclusion

11.64 The question to be resolved here is whether adoption legislation is the suitable mechanism for resolving the legal status of children born as a result of donor reproduction technology and/or for ensuring their access to information.⁸²

11.65 With respect to both the giving of consent and the applicants' eligibility to adopt, two difficulties arise in so using adoption legislation. First, it is difficult to envisage how consent provisions could be applied. In adoption, birth parents are not allowed to consent until a set time after the birth of the child. Intended recipients of donor gametes may not wish to receive them until donors had consented to the transfer of legal rights and responsibilities. Secondly, the recipients of donated gametes may need to exhibit a different set of parenting skills from that generally sought in adoption, to take account of the fact that they have experienced the pregnancy themselves and the child may be genetically related to one of the parents.

11.66 More fundamentally, adoption is about the legal transfer of parental responsibility. However, with respect to children born through donor reproduction technology, because of various statutory presumptions, donors (the genetic parents) are not usually the legal parents. Who then is to give consent to the transfer of legal parental rights and responsibilities? Who are to be assessed as suitable recipients of these rights and responsibilities?

11.67 At a philosophical, rather than practical, level, it is inappropriate to link reproduction technologies, which aim to "cure" the problem of infertility, with adoption:

In the past, adoption has been seen as an alternative for couples who couldn't have their own biological child. However, many adopted people and representatives of state welfare

agencies feel that adoption and infertility are inappropriately linked. The primary concern of Community Services Department is to consider the best interests of the child. Children exist in their own right and adoption is no longer about providing childless couples with babies. The emphasis is placed on finding a home for the child rather than finding a child for a couple. Adoption does not necessarily solve the anxieties associated with infertility and in fact it may exacerbate these problems - an adopted child may be a constant reminder to the adoptive parents of their infertility.⁸³

11.68 For the above reasons, specialised legislation, rather than adoption legislation, should cover all legal issues arising from the use of donor reproduction technology.

11.69 Nonetheless, there are ways in which the field of donor reproduction technology could learn from the experience of adoption. These were highlighted by several submissions. As one submission to IP 9 noted

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.⁸⁴

11.70 The development of specialised legislative provisions governing donor reproduction technology should provide children with an assurance of their legal status and access to information about their biological history similar to that which is provided to adoptees.

RECOMMENDATION 109

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. The issues of any required consents, suitability for such procedures, or the keeping of, and access to, information surrounding donor reproduction technology should be the subject of a separate review and dealt with in specific legislation.

EMBRYO DONATION AND ADOPTION

Current law and practice

11.71 People may decide to donate embryos when they have fulfilled their own reproductive needs and wish to help other couples in the fertility program; or when they find the alternatives of destruction or indefinite storage of the embryos unacceptable.

11.72 As discussed above, the Artificial Conception Act sets up a presumption of fatherhood in the situation where a woman has undergone a fertilisation procedure using donor sperm or in vitro fertilisation, using an ovum produced by the woman and donor sperm. Presumptions of motherhood in the case of donated ova or embryos remain unclear in New South Wales.

11.73 However, as discussed in paragraph 11.14, the Status of Children Act sets out presumptions of motherhood and fatherhood for a child born as the result of a fertilisation procedure, including the procedure of transferring to a woman's body an ovum (whether or not produced by her) fertilised outside her body or any other prescribed procedure for the assisted conception of children.⁸⁵ The Family Law Act currently sets out who are the legal parents of a child born as the result of the implantation of an embryo in the body of a woman.⁸⁶

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11.74 The Commission raised for further discussion whether or not adoption legislation could be used to resolve some of the problems currently surrounding the donation of frozen embryos by one couple to another.

Submissions and response

11.75 Some submissions to DP 34 argued that people may feel pressured into donating excess embryos. Concern was expressed about the possibility of consanguineous relationships and the absence of protective legislation for donors. It was argued that using adoption legislation to control the transfer of embryos would be the most effective way of preventing consanguineous relationships from occurring and of protecting couples and clinics from potential legal liability.

11.76 It was further argued in submissions that, if embryo donation was controlled by adoption law, this would protect the best interests of the child and preserve information and records on the child's genetic history. Of all the different types of donor reproduction technology, embryo donation has the closest affinity with adoption. 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 and brothers growing up in other families. They are likely to be curious about their genetic identity and they may have an emotional or a practical need to access updated information concerning their genetic background.

11.77 However, most submissions felt that the adoption of a child and the adoption of an embryo were sufficiently different to warrant separate legislative controls.⁸⁷ Part of this difference stems from the fact that in circumstances involving the donation of gametes or embryos, the process begins with the assessment of the needs of the adults involved whereas adoption should begin with the assessment of the needs of the child once it has been born. The purpose of adoption is to provide permanent care for children who cannot be raised by their birth parents. It focuses on the physical and emotional needs of children and aims to secure information for them in relation to their birth family. Embryo donation was also seen to be incompatible with adoption because it does not contain any possibility for the consideration of the child to be a part of the decision making process.

Conclusion

11.78 On the one hand, applying adoption principles to embryo donation would provide for counselling of, and giving information to, donating parents, assessing the needs of the child, and assessing the suitability of the receiving couple prior to a donation. Donating parents could take part in the selection of the receiving couple from a pool of those assessed as suitable adoptive parents. Social parents could be required to enter into an open adoption arrangement with genetic parents so that updated information could be exchanged.

11.79 However, if adoption legislation were a suitable mechanism for transferring parental rights and responsibilities of children born as a result of embryo donation, and ensuring their access to genetic information, this would require the legal parents of the child to be the donors of the embryo in order to establish who is required to give consent.⁸⁸ Reaching such a conclusion is difficult because it relates directly to the question of when life begins. Have the couple who created the embryo already created a new life over which they have parental rights and responsibilities or does the new life only begin upon implantation into the receiving couple or at the birth of the child?⁸⁹ The process of adoption does not serve to discover who is the legal parent, but is a transfer of legal parentage from someone who is clearly identified as the legal parent before the process begins.

11.80 It is not within the scope of this review to examine the issue of legal parentage in the situation of donated embryos. Separate State and Federal legislation already make, or propose to make, presumptions about who are the legal parents of such children.⁹⁰ Adoption legislation operates to confirm the legal status of the social parents because they have not given birth to the child, whereas in the case of embryo adoption, the social parent would give birth to the child and is thus, in many cases, already the child's legal parent.

11.81 Furthermore, it would be an extremely cumbersome procedure to define and regulate information rights in adoption legislation for children born as a result of embryo donation where no adoption has taken place. The information rights upheld by adoption legislation relate to the legal rights and responsibilities created by the adoption process. As for donor reproduction technology discussed

above, it would be more appropriate to use the adoption model and develop specific legislation to address the child's right and need to access biological information in embryo donation. The issues of any required consents, suitability for such procedures, or the keeping of and access to information surrounding embryo donation should be the subject of a separate review and dealt with in specific legislation.

RECOMMENDATION 110

Issues of genetic identity and access to information for children born as a result of embryo donation should not be dealt with in adoption legislation. The issues of any required consents, suitability for such procedures, or the keeping of, and access to, information surrounding embryo donation should be the subject of a separate review and dealt with in specific legislation.

FOOTNOTES

1. For example, see National Health and Medical Research Committee *Ethical Guidelines on Assisted Reproduction Technology* (AGPS, December 1996) which replace those issued in October 1982 entitled "In Vitro Fertilisation and Embryo Transfer" as Supplementary Note 4 (SN4) to the *NHMRC Statement on Human Experimentation*.
2. The New South Wales Law Reform Commission has already undertaken such a review: see New South Wales Law Reform Commission *Artificial Conception: Surrogate Motherhood* (Report 60, 1988) and *Artificial Conception: In Vitro Fertilization* (Report 58, 1988).
3. For example, unlike Victoria, Tasmania, South Australia, Queensland and the Australian Capital Territory, there is no legislation in New South Wales relating specifically to surrogacy arrangements. In Victoria, the *Infertility Treatment Act 1995 (Vic)*, which has been assented to but is yet to be fully operational, regulates the use of fertilisation and donor insemination procedures, access to information about these treatment procedures, research into these procedures and infertility, and surrogacy agreements. The Act establishes an Infertility Treatment Authority to administer (among other functions) a central register of information of interest to the parties to these procedures and the licensing of procedure centres.
4. Many of the submissions to IP 9 and DP 34 agreed that there is a need for a legal framework to protect the rights and meet the needs of the children who have already been born as a result of reproduction technology and/or surrogacy arrangements, irrespective of the current legal status of these practices.
5. NSWLRC IP 9 at para 8.2.
6. Such fertilisation procedures include artificial insemination or in vitro fertilisation (IVF) procedures.
7. An *ovum* (plural *ova*) is the mature female sex cell, produced in the ovary. When fertilised by a spermatozoon, it is capable of developing into a new individual.
8. A *sperm* or *spermatozoon* is the mature male sex cell, produced in the testicle.
9. 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 in this chapter:

biological parents - 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 (also known as the gestational mother); and

social parent - the parents who raise the child and have the care of and responsibility for the child.

10. Although in altruistic surrogacies, costs such as medical expenses may be borne by the commissioning couple: P W Janu "Surrogacy Arrangements in Australia: Analysis of the Legal Framework" (1995) 9 *Australian Journal of Family Law* 200.
11. In general terms, in all States which have surrogacy legislation, being Victoria, Tasmania, South Australia and the Australian Capital Territory (Queensland presently prohibits all surrogacy), commercial surrogacy is prohibited and non-commercial surrogacy is permissible, although all surrogacy contracts are void and unenforceable: Janu "Surrogacy Arrangements in Australia: Analysis of the Legal Framework" at 204-207.
12. However, in New South Wales, the commissioning couple may commit an offence under the *Births, Deaths and Marriages Registration Act 1995* (NSW) s 57 if they try to register the birth of a child born through a surrogacy arrangement as their own child. They may also breach the *Children (Care and Protection) Act 1987* (NSW) s 42 and 44 which prohibit unauthorised long-term fostering of unrelated children.
13. CONCERN for People with Infertility Problems NSW Inc has received many inquiries from people interested in surrogacy arrangements and is aware of a number of arrangements that have taken place in recent years: *Submission* (2 August 1994) at 6.
14. Janu "Surrogacy Arrangements in Australia: Analysis of the Legal Framework" at 203-4: "Although there are no reported decisions of Australian courts relating to surrogacy arrangements it would be likely to be found by the courts, at common law, that any surrogacy contract is unenforceable as being contrary to public policy, although terms of a contract could be indirectly upheld if this was thought to be in the best interests of the child."
15. See T Goulding (ed) *The Law Handbook* (5th ed, Redfern Legal Centre Publishing Ltd, Sydney, 1995) at 1097.
16. Being to 31 December 1996.
17. *Artificial Conception Act 1984* (NSW) s 5.
18. s 3 and 5.
19. s 5(4).
20. s 6.
21. *Children (Equality of Status) Act 1976* (NSW) s 11. But the presumption arising under s 6 of the *Artificial Conception Act 1984* (NSW) prevails over any conflicting presumption arising by virtue of a Supreme Court declaration of paternity in s 13 of the *Children (Equality of Status) Act 1976* (NSW): *Children (Equality of Status) Act 1976* (NSW) s 18A(3).
22. *Children (Equality of Status) Act 1976* (NSW) s 15(1). While the Supreme Court declaration is in force, the woman named in the declaration as being the mother of the child is conclusively presumed to be the mother of that child: s 15(4). For presumptions of parentage (both rebuttable and irrebuttable) generally see *Children (Equality of Status) Act 1976* (NSW) and *Artificial Conception Act 1984* (NSW) both intended to be repealed by the *Status of Children Act 1996* (NSW): see *Status of Children Act 1996* (NSW) s 37.
23. The *Status of Children Act 1996* (NSW) was assented to on 29 October 1996, but has not yet been proclaimed.

24. New South Wales - *Parliamentary Debates (Hansard)* Legislative Council 29 May 1996 at 1639-1640, The Hon J W Shaw Attorney-General and Minister for Industrial Relations Second Reading speech on the *Status of Children Act 1996* (NSW): "The purpose of the *Status of Children Bill* is to improve the current system for determining a child's parentage which currently exists under the *Artificial Conception Act 1984* and the *Children (Equality of Status) Act 1976* ... First, by bringing the provisions of the *Children (Equality of Status) Act 1976* relating to parentage presumptions and parentage testing procedures into conformity with the *Family Law Act 1975*, by bringing those parentage presumptions which apply in relation to children born as a result of artificial conception procedures up to date with current medical technology ... All Australian jurisdictions, apart from New South Wales, currently provide that when a woman gives birth to a child following an artificial inception procedure using donated ova, the birth mother is presumed to be the mother of that child. In New South Wales the position of a child born from donor ova is unclear."
25. See NSWLRC Report 58 Recommendation 37: "Where IVF involves the use of donated ova, legislation should be enacted to determine conclusively the issue of maternity by stating that the woman who gives birth to a child will be presumed at law to be its mother."
26. *Status of Children Act 1996* (NSW) s 14(1)(b), (4), and (6); contrast *Artificial Conception Act 1984* (NSW) s 5(1)(b).
27. s 14(3).
28. s 14(1)(a). His consent is presumed, although the presumption can be rebutted: s 14(5), 15.
29. s 14(2).
30. cl 14(4).
31. *Family Law Act 1975* (Cth) s 60H and 60D.
32. A *gamete* is any germ cell, whether ovum or sperm. Sperm and ova donors may be known or unknown to the recipients. Donors are often relatives or may be other women on IVF programs who have collected surplus gametes during the course of the program.
33. See Chapter 4, in particular, step-parent and relative adoptions and private placement adoptions.
34. For the purposes of this discussion, "agencies" will refer to both the New South Wales Department of Community Services and the private adoption agencies, unless the context otherwise requires.
35. For presumptions of parentage (both rebuttable and irrebuttable) generally see *Artificial Conception Act 1984* (NSW) s 5 and 6; *Children (Equality of Status) Act 1976* (NSW) Part 3; and *Status of Children Act 1996* (NSW) Part 3.
36. "Relative" is narrowly defined as grandparent, uncle or aunt of the child: *Adoption of Children Act 1965* (NSW) s 6.
37. See *Adoption of Children Act 1965* (NSW) s 18(2).
38. s 21(1) and (1A).
39. Referred to as "intrafamily" adoptions.
40. *Adoption of Children Act 1965* (NSW) s 21(1A) and *Supreme Court Rules* (NSW) Pt 73 r 7A. Where no accredited social worker is available a report is prepared by a District Officer of the New South Wales Department of Community Services.

41. *Adoption of Children Act 1965* (NSW) s 50; except for legitimate legal expenses, approved medical expenses or other payments authorised by the Director-General or the Court: s 50(2).
42. *Adoption of Children Act 1965* (NSW) s 52; unless approved by the Director-General: s 52(2).
43. *Adoption of Children Act 1965* (NSW) s 51. However, the offence under s 51 does not apply to intrafamily adoptions: s 51(2).
44. See *Adoption of Children Act 1965* (NSW) s 54-58 for other possible offences. See further, Chapter 3 at paras 3.86-3.89.
45. Unless approved by the Director-General: *Adoption of Children Act 1965* (NSW) s 52(2).
46. The argument has been put that parties to a surrogacy agreement always contemplate the eventual adoption of the child by the commissioning couple or, in the case of conception by intercourse, the birth father's partner. Surrogacy arrangements have been classified as a form of independent adoption: see B Atwell "Surrogacy and Adoption: A Case of Incompatibility" [1988] 20 *Columbia Human Rights Law Review* 1 at 15.
47. See NSWLRC DP 34 at para 10.14.
48. See, generally, *Family Law Act 1975* (Cth) Part 7 and, in particular, s 61D, 64B, 64C, 65C, 65D and 65E.
49. Including step-parent adoptions where the conception took place by intercourse between the commissioning father and the birth mother, and where the commissioning father is already named on the birth certificate as the child's legal father.
50. It is possible to imagine a situation where the child's birth mother has conceived the child without intercourse with the intended social father of the child. For example, the birth mother and her partner could have deliberately conceived the child with the idea that the child would be raised by the commissioning couple. In this case, the child's birth father is not the same person as the child's social father and it is important to acknowledge the relationship between the child and his or her birth father.
51. Presbyterian Women's Association of Australia in New South Wales, Social Issues Committee, *Submission* (22 July 1994) at 8. Cardinal E Clancy, Archbishop of Sydney *Submission* (5 August 1994): "[L]egislation should prevent any circumventing through surrogacy arrangements of the present prohibition on private adoptions."
52. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 37.
53. *Re P* [1990] NZFLR 385 and *Re G* (District Court, Invercargill, 3 February 1993, Adopt 6/92, unreported).
54. G Stewart "Adoption and Surrogacy" [1994] *New Zealand Law Journal* 384 at 384.
55. *In Re G* at 5.
56. *In Re G* at 5.
57. Stewart "Adoption and Surrogacy" at 384. Like the *Adoption of Children Act 1965* (NSW), the *Adoption Act 1955* (NZ) does not contain a clear prohibition on making an adoption order where the applicants have been found to have breached s 25 (prohibition against payments). C Rotherham "Baby C: An Adoption Following a Surrogacy Arrangement" [1991] *New Zealand Law Journal* 18-19.

58. Stewart "Adoption and Surrogacy" at 386.
59. In Australia, a recent approach to the surrogacy issue is the *Substitute Parent Agreements Act 1994* (ACT). This Act provides that any "substitute parent agreement" is void (s 9). However, if a child is born as the result of such an agreement, then the welfare and the interests of the child will be paramount (s 10). Parties who enter into substitute parent agreements that are non-commercial and involve no intermediaries or advertising are not liable for penalties under the Act, even though the agreement itself is rendered void.
60. Unlike non-related adoptions, there is currently no requirement under the *Adoption of Children Act 1965* (NSW) for an agency to support an intrafamily application to adopt: s 18(2). Further, the Court may generally dispense with the making of a report by the Director-General on the proposed adoption before exercising its discretion to make an order for adoption: s 21(1A)(c).
61. Although a report by an accredited social worker is required by the Court: see *Supreme Court Rules* (NSW) Pt 73 r 7A.
62. See "Adoption of Children in Private Placements" Chapter 4.
63. See "Adoption by Step-parents and Other Relatives" Chapter 4.
64. Although not in surrogacy arrangements: see NSWLRC DP 34 at para 10.14.
65. See further, Chapter 2 generally.
66. See further, Chapter 3.
67. 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 the collection of oocytes (ova) from the ovaries. The ova are then fertilised outside the body. A resulting embryo is then placed inside the woman's uterus to enable implantation and pregnancy.
68. Gamete intra-fallopian transfer (GIFT) is an alternative method to IVF which minimises the length of time gametes are outside the body. 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.
69. Artificial insemination by a donor (AID) is a procedure by which a woman is artificially inseminated with the sperm of a man other than her husband or partner. The sperm is usually obtained from an anonymous donor by means of masturbation and frozen in liquid nitrogen until required. When the sperm is to be used, it is then thawed. It is inserted into the upper vagina using a syringe: R Rowland "Women and Infertility Part 2: Infertility and Reproductive Technology: Some Issues" paper commissioned by the Victorian Women's Advisory Council (predecessor to the Victorian Women's Consultative Council) (Victoria, June 1988) at 37.
70. See *Artificial Conception Act 1984* (NSW) s 5 and 6 and *Status of Children Act 1996* (NSW) s 3 definition of "fertilisation procedure" and s 14.
71. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 36.
72. Since 1985, New South Wales clinics have had to retain donor information sheets for ten years, but there is no legislation to say records must be kept longer, or indefinitely. Recipients of donor sperm, eggs and embryos are given non-identifying information about the donor, such as build, hair and eye colour, but not details about medical history, ethnic background, occupation or interests.

73. However, guidelines issued by the National Health and Medical Research Committee in December 1996 recommend that “[c]hildren born from the use of ART [assisted reproductive technology] procedures are entitled to knowledge of their biological parents. Any person ... donating gametes and consenting to their use in ART procedure ... must be informed that children may receive identifying information about them”: *Ethical Guidelines on Assisted Reproduction Technology* (AGPS, December 1996).
74. 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.
75. NSWLRC DP 34 at para 10.35.
76. ACCESS Australia’s National Infertility Network Ltd *Submission* (5 August 1994) at 4.
77. K Quail and L Marles *Submission* (25 June 1994) at 1-2.
78. E Berzins *Submission* (27 July 1994) at 15.
79. New South Wales Committee on Adoption and Permanent Family Care *Submission* (30 August 1994) at 37.
80. The Law Society of New South Wales *Submission* (24 August 1994) at 12; CONCERN for people with Infertility problems NSW Inc *Submission* (2 August 1994) at 6.
81. Presbyterian Women’s Association of Australia in New South Wales, Social Issues Committee, *Submission* (22 July 1994) at 7-8.
82. Rather than solely applying the *Artificial Conception Act 1984* (NSW) or *Status of Children Act 1996* (NSW).
83. C Ewing *Manufacturing Babies: What Reproductive Technologies Mean to Women* (National Women’s Consultative Council, Canberra, 1993) at 9.
84. Centacare Catholic Community Services (Adoption Services) *Submission* to Issues Paper 9 (31 August 1993) at 22.
85. *Status of Children Act 1996* (NSW) s 3 and 14. New South Wales - *Parliamentary Debates (Hansard)* Legislative Council, 29 May 1996 at 1640, The Hon J W Shaw Attorney-General and Minister for Industrial Relations noted on the second reading of the Status of Children Act: “The definition of “fertilisation procedure” in the bill has ... been broadened to include fertilisation procedures involving the use of both donor ovum and donor sperm, as well as the latest fertilisation procedures ... The definition has been drafted in such a way as to be wide enough to cover all children conceived as a result of fertilisation procedures.”
86. *Family Law Act 1975* (Cth) s 60D(1) definition of “artificial conception procedure” and s 60(H).
87. For example, ACCESS Australia’s National Infertility Network Ltd *Submission* (5 August 1994) at 3; CONCERN for people with Infertility problems NSW Inc *Submission* (2 August 1994) at 6.
88. Compared with the presumptions of parentage under *Artificial Conception Act 1984* (NSW) and *Status of Children Act 1996* (NSW).
89. For a discussion of opposing points of view see S Watson “The Rashomon of Science: the Legal Position of the Foetus in New Zealand” [1994] *New Zealand Law Journal* 388-392.
90. *Artificial Conception Act 1984* (NSW) s 5 and 6 and *Status of Children Act 1996* (NSW) s 3 and 14; *Family Law Act 1975* (Cth) s 60D(1) and 60(H).

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Appendix A: Submissions Received

1. Access, Australia's National Infertility Network Ltd (5 August 1994)
2. Adamson, Mr C (23 May 1994)
3. Adamstown Uniting Church Fellowship (20 August 1994)
4. Adoption Jigsaw WA Incorporated (29 September 1994)
5. Adoptive Families Association of the ACT Incorporated (22 July 1994)
6. Aid for the Children of Brazil (5 July 1994)
7. Anglican Adoption Agency (26 August 1994)
8. Anglican Church of Australia, Diocese of Riverina (27 July 1994)
9. Antonia, Mr P (11 May 1994)
10. Archer, Mr J (10 July 1994)
11. Armstrong, Mrs S (10 May 1994)
12. Australia for Children Society (18 August 1994)
13. Australian Families for Children (21 July 1994, 27 July 1994, 3 August 1994 and 19 January 1994)
14. Australian Family Association (Coffs Harbour-Woolgoolga Branch) (29 June 1994)
15. Australian Society for Inter-Country Aid for Children (NSW) (13 September 1994 and 31 August 1994)
16. The Australian Society of Social Workers Ltd (New South Wales Branch) (11 August 1994)
17. Balzanelli, Mr and Mrs (13 July 1994)
18. Barnard, Mr and Mrs (11 July 1994)
19. Barnardos Australia (26 July 1994)
20. Barrham, Mr (12 May 1994)
21. Beasley, Mr and Mrs (12 July 1994)
22. Belling, Ms P (25 July 1994)
23. Bellomo, Ms L (16 May 1994)
24. Benevolent Society of New South Wales (5 August 1994)
25. Benson, Mr A W (22 June 1994)
26. Benson, Mr G G (26 July 1994)

27. Benson, Mr J (26 July 1994)
28. Berzins, Ms E (27 July 1994)
29. Bezzina, Mrs K (16 June 1994)
30. Blair, Mr J (14 February 1995 and 27 February 1995)
31. Bobbin, Mr P (27 May 1994)
32. Boldiston, Ms P (12 May 1995 and 30 June 1995)
33. Booth, Ms M (9 May 1994)
34. Bosman, Mr P (17 June 1994)
35. Bott, Ms J (9 May 1994)
36. Brackenberg, Mrs E (14 July 1994)
37. Brackenberg, Ms J (12 July 1994)
38. Brady, Ms R (6 June 1994)
39. Braithwaite, Ms B (27 June 1994)
40. Brierley, Ms S (27 July 1994)
41. Brown, Mrs R (17 June 1994)
42. Bryson, the Hon Justice J (3 August 1994)
43. Burden, Mr R J (12 February 1995)
44. Burrows, Ms J (9 May 1994)
45. Burt, Mrs E (29 July 1994)
46. Cahill, Ms E (26 July 1994 and 17 September 1994)
47. Cairns, Mrs L (26 July 1994)
48. Call to Australia (Southern Highlands Branch) (29 May 1994)
49. Call to Australia Citizens' Movement (29 July 1994)
50. Carroll, Mrs (19 May 1994)
51. Cavanagh, Mr and Mrs (27 June 1994)
52. Centacare Catholic Community Services (Adoption Services) (11 August 1994)
53. Centacare Catholic Community Services (Adoption Services) (Newcastle) (29 July 1994)
54. Chadwick, Mr and Mrs (29 July 1994)
55. Clancy, Cardinal E, Archbishop of Sydney (5 August 1994)

56. Clingleffer, Mrs S (17 August 1994)
57. Cloran, Mr F V (4 June 1994)
58. Cohen, the Hon Justice B J K (2 August 1994)
59. Colebrook, Mrs C (25 July 1994)
60. Concern NSW Incorporated (2 August 1994)
61. Confidential (13 July 1994)
62. Confidential (16 July 1994)
63. Confidential (18 July 1994)
64. Confidential (20 July 1994 and 25 July 1994)
65. Confidential (21 July 1994 and 4 January 1994)
66. Confidential (26 July 1994)
67. Confidential (26 July 1994)
68. Confidential (2 August 1994)
69. Confidential (3 August 1994, 25 January 1994, 28 January 1994, 29 January 1994) and 9 January 1994)
70. Confidential (8 August 1994)
71. Confidential (22 September 1994)
72. Confidential (1 May 1995)
73. Constable, Mrs M (16 June 1994)
74. Croucher, Mr and Mrs (8 July 1994)
75. Cunningham, Ms M (14 July 1994)
76. Curtin, Mr and Mrs (27 July 1994)
77. Cussinnet, Mr P and Toumi, Ms N (29 July 1994)
78. Daly, Ms S and Sinclair, Mr J (29 July 1994)
79. Dancey, Mrs R (27 July 1994)
80. Davey, Mr A (13 June 1994)
81. de Jong, Mrs P (17 May 1994)
82. de Liseo, Mrs F (29 June 1994)
83. Desmond, Mr (9 May 1994)
84. Dickson, Dr J (26 July 1994)

85. Dinel, Mr Y (20 June 1994)
86. Dixon, Mr and Mrs (30 June 1994)
87. Donnelly, Mr A M and Mrs S E (12 January 1994)
88. Duch, Mr M (26 July 1994)
89. Edgar, Mrs B (20 June 1994)
90. Edwards, Mrs P (14 June 1994)
91. Edwards, Ms T and Morgan, Mr W (29 July 1994)
92. Ellsmore, Ms M (10 May 1994)
93. Emmanuel Anglican Church (24 July 1994)
94. Emmerton, Ms P (11 July 1994)
95. Erlik, Mr W (8 July 1994)
96. Evans, Mr P (6 June 1994)
97. Evans, Ms L (11 July 1994)
98. Fitzgerald, Mr B (29 July 1994)
99. Fitzpatrick, Ms E (4 June 1994)
100. Fleming, Ms A (2 August 1994)
101. Freemantle, Mrs J (2 July 1994)
102. Fuller, Mr and Mrs G (5 August 1994)
103. Gallagher, Mr A (26 June 1994)
104. Garvey, Mr J (9 May 1994)
105. Gay and Lesbian Rights Lobby Incorporated and the Lesbian and Gay Legal Rights Service (29 July 1994)
106. Georgas, Mr and Mrs (12 July 1994)
107. Gerland Mrs M (15 June 1994)
108. Graham, Mrs M (11 July 1994)
109. Grant, J (20 June 1994)
110. Gullo, Dr C (15 July 1994)
111. Guy, Ms P (19 July 1994)
112. Hahn, Ms D (13 September 1994)
113. Haley, Mr and Mrs (24 July 1994)

114. Hall, Prof B M (17 August 1994)
115. Hallahan, Mrs V (10 May 1994)
116. Hancock, Mr and Mrs (2 August 1994)
117. Hannaford, Mr D C (9 May 1994)
118. Hansen, Mr G (29 July 1994)
119. Harvey, Ms L (2 August 1994)
120. Hastie, Mr and Mrs L (20 July 1994)
121. Hendry, Mrs S (16 September 1994)
122. Hernage, Mr F (8 June 1994)
123. Hickie, Ms K (2 June 1994)
124. Highland, Ms M (9 May 1994)
125. Hobson, Mr and Mrs (12 July 1994)
126. Holder, Mr J R (18 June 1994)
127. Holley, Mr and Mrs (28 June 1994)
128. Homan, Mr S (14 June 1994)
129. Hopkin, Mr D (15 June 1994 and 24 July 1994)
130. Howard, Mrs D (25 July 1994)
131. Howells, Mr J, Heckendorf, T W, Jackson, V, Browne, C, Donnelly, M, Sinclair, E and Sproats, J (26 July 1994)
132. Hynd, Mr and Mrs (13 June 1994)
133. Illawarra Adoptive Parents Association Incorporated (20 July 1994)
134. Illgner, Mr and Mrs (7 July 1994)
135. Inter-Country Adoptive Parents Working Party (8 July 1994 and 2 September 1994)
136. International Childrens Aid Ltd (3 August 1994 and 9 August 1994)
137. Jacobs, Ms W (26 July 1994)
138. James, Mrs A (15 July 1994)
139. Jessep, Mrs J (25 May 1994)
140. Jones, Mr D (9 May 1994)
141. Kelly, Mr and Mrs (25 July 1994)
142. Kelly, Ms D (18 July 1995)

143. Kendall, Mr I (9 May 1994)
144. Kerkhoff, Mr S (10 May 1994)
145. Kinnaird, Mr and Mrs (6 July 1994)
146. Korner, Dr A J (25 July 1994)
147. Kubowicz, Mrs N (19 July 1994)
148. Law, Ms J (5 June 1994)
149. The Law Society of New South Wales (24 August 1994)
150. Lawyers Reform Association (9 May 1994)
151. LDS Social Services (Sydney Agency) (5 January 1994)
152. Lemon, Mr N (27 July 1994)
153. Lennie, Mr J (2 July 1994)
154. Leslie, Mr and Mrs (28 July 1994)
155. Lewis, Mr G A (29 July 1994)
156. Liberal Party of Australia (Gosford Branch) (24 June 1994)
157. Liernaw, Mr M (10 May 1994)
158. Limbers, Dr P (9 May 1994)
159. Lodge, Mrs N (18 June 1994)
160. Lopez, Mr J (27 May 1994)
161. MacCaffrey, Mrs M (9 May 1994)
162. Marles, Ms L and Quail, Mr K (25 June 1994)
163. Marshall, Mrs A (1 August 1994)
164. Marshall, Mrs H (8 July 1994)
165. McColl, Mr E (14 July 1994)
166. McCrea, Mrs J (1 September 1994)
167. McCutcheon, Mr A (29 July 1994)
168. McInerney, Mr. J (5 August 1996)
169. McKerrow, Mr and Mrs (13 June 1994)
170. McLelland, the Hon Justice M H (4 August 1994)
171. McPhee, Ms M (26 July 1994)

172. McPhillips, Mr J (22 June 1994)
173. Merriman, Mr and Mrs (11 July 1994)
174. Milham, Ms (2 June 1994)
175. Morris, Ms M (22 July 1994)
176. Mulcahy, Mr and Mrs (14 June 1994)
177. Murray, Mrs D J (10 July 1994)
178. Musson, Ms J (28 July 1994)
179. National Children's and Youth Law Centre (29 July 1994)
180. Navaratnam, Mr D (1 July 1994)
181. The New South Wales Bar Association (16 September 1994)
182. New South Wales Committee on Adoption and Permanent Care Incorporated (22 July 1994 and 30 August 1994)
183. New South Wales Department of Community Services (5 September 1994)
184. Nichols, Ms R V (29 July 1994)
185. Nixon, Mrs L (25 July 1994)
186. NSW Council of Churches (11 July 1994)
187. O'Hara, Ms C (26 July 1994)
188. O'Keefe, Mr T and Mrs L (21 July 1994)
189. O'Neill, Ms C (12 September 1994)
190. Orange, Mr G (15 June 1994)
191. Osborne, Ms V (29 July 1994)
192. Page, Ms B (13 May 1994)
193. Parish, Mr A S (11 July 1994)
194. Parker, Mrs (26 May 1994)
195. Passfield, Mr G (17 June 1994)
196. Paton, Mrs R (15 June 1994)
197. Patterson, Mr and Mrs (25 July 1994)
198. Paul, Mrs J (26 July 1994)
199. Pearce, Ms B (18 July 1994)
200. Pearn, Mrs N (17 June 1994)

201. Pereira, Mrs C (29 June 1994)
202. Perriam, C A (15 June 1994)
203. Peterie, Mr B and Mrs F (14 July 1994)
204. Porter, Ms J (16 July 1994)
205. Poyton, Mrs N (8 July 1994)
206. Poyton, Mr G E (15 July 1994)
207. Presbyterian Women's Association of Australia (22 July 1994)
208. Presbyterian Women's Association of Australia (Cootamundra Branch) (13 July 1994)
209. Pryce, Mr and Mrs (10 June 1994)
210. Puffett, Mr and Mrs (26 July 1994)
211. Ratmac, Ms R (11 May 1994)
212. Readdie, Mrs S (14 September 1994)
213. Reid, Mr J E (7 July 1994)
214. Residents of the Central Coast (May 1994)
215. Rickard, Mr and Mrs (14 July 1994)
216. Rietveld, Mr H T C (13 May 1994)
217. Robinson, Mr and Mrs (7 July 1994)
218. Robinson, Mr G (26 July 1994)
219. Ronai Lenn, Ms C J (26 July 1994)
220. Roughley, Ms A, Honorary Consultant to Adoption Review (22 September 1994)
221. Saliba, Ms M (11 June 1994)
222. The Salvation Army (29 July 1994)
223. Samartzopoulos, Mr and Mrs (11 July 1994)
224. Saunders, Prof D (22 July 1994)
225. Sauzier, Mr and Mrs (26 April 1995)
226. Sayer, Mrs M R (21 July 1994)
227. Scheuner, Mrs J L (16 July 1994)
228. Schipper, Mr and Mrs (27 July 1994)
229. Schrader, Mrs L J (18 May 1994)

230. Scott, Ms B (29 July 1994)
231. See, Mr D (17 June 1994)
232. Seiffert, Ms F (27 July 1994)
233. Shaddock, Mr and Mrs (20 July 1994)
234. Sherrard, Mr D (29 July 1994)
235. Shumack, Mrs E (27 July 1994)
236. Single Adoptive Parents Support (20 July 1994)
237. Smith, Mr M (19 June 1994)
238. Smith, Mr and Mrs (25 July 1994)
239. Steel, Mr R (8 June 1994)
240. Strachan, Mrs P (9 September 1994)
241. Suters, Mrs N (23 July 1994)
242. Szacsvey, Mr P (22 July 1994)
243. Thomas, Ms D (24 July 1994)
244. Threw, Mr J (9 May 1994)
245. Toongabbie Baptist Church (Pastors and Deacons) (24 July 1994)
246. The TRIAD Society for Truth in Adoption of Canada (29 July 1994)
247. Trowbridge, Mr J (15 August 1994)
248. Trowbridge, Ms A (17 August 1994)
249. Turner, Mr J A (7 June 1994)
250. United People Power (16 June 1994)
251. Uniting Church in Australia (Leeton Parish) (17 July 1994 and 29 July 1994)
252. Van Der Werff, Mr and Mrs (23 August 1994)
253. Vandenberg, Mrs J (15 September 1994)
254. Walker, Mr B (19 May 1994)
255. Walsh, Mr T (26 June 1994)
256. Walton, Mr and Mrs (10 May 1994)
257. Weinberg, Mr G and Mrs V (14 July 1994)
258. Welfare, Ms D (9 May 1994 and 6 January 1994)

259. Westblade, Mrs J (24 July 1994)
260. Westman, Mr P (16 June 1994)
261. Whitebridge Church of Christ (24 August 1994)
262. Whitfield, Mr J (9 May 1994)
263. Wicks, Mr J (28 June 1994)
264. Wilcock, Ms P (16 May 1994)
265. Wilhelm, Ms P (16 September 1994)
266. William, Mrs B and Griffin, Ms G (14 May 1994)
267. Williams, Masters J and J (17 January 1994)
268. Williams, Mr and Mrs (12 July 1994)
269. Williams, Mr R (11 July 1994)
270. Williams, Mrs E (9 June 1994)
271. Wood, Ms K (12 July 1994)
272. Woodley, Mr and Mrs (15 July 1994)
273. Woodley, Mr W (20 June 1994)
274. Yexley, M and R (9 July 1994)

REPORT 81 (1997) - REVIEW OF THE ADOPTION OF CHILDREN ACT 1965 (NSW)

Adoption Bill 1997

[STATE ARMS]
New South Wales

Adoption Bill 1997

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to reform the law relating to the adoption of children, and in particular:

- (a) to emphasise that the paramount consideration in adoption law and practice is to act in the best interests of the child concerned,
- (b) to make it clear that adoption is to be regarded as a service for the child concerned,
- (c) to ensure that adoption law and practice assist a child to know and have access to his or her birth family and cultural heritage,
- (d) to recognise the changing nature of practices of adoption and to ensure and to apply the same safeguards and standards to children adopted from overseas as apply to children from New South Wales,
- (e) to ensure that adoption law and practice regarding intercountry adoptions in the State comply with Australia's obligations under treaties and other international agreements,
- (f) to make provision for adoption of relatives, wards, foster children and children with special needs,
- (g) to encourage openness in adoption,
- (h) to allow access to certain information relating to adoptions.

For the purposes of comparison, a number of clauses contain bracketed notes in headings, drawing attention ("cf") to equivalent or comparable (though not necessarily identical) provisions of Acts and other laws. Abbreviations in the notes include:

AC Act: *Adoption of Children Act 1965*

AC Reg: *Adoption of Children Regulation 1995*

AI Act: *Adoption Information Act 1990*.

Outline of provisions

Chapter 1 - Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 provides that expressions used in the Dictionary at the end of the proposed Act have the meanings given in the Dictionary. Expressions defined in the Act are listed in the Table of Provisions to the Act.

Clause 4 sets out the objects of the proposed Act (as stated in the Overview above).

Clause 5 provides that explanatory notes in the proposed Act do not form part of the Act.

Chapter 2 - Adoption principles

Clause 6 states the principles that should guide the Supreme Court and the Director-General of the Department of Community Services and other adoption service providers in making decisions about the adoption of a child, including the paramount principle set out in clause 7. The principles stated recognise the importance of having regard to needs of the child, including taking into account the ascertainable wishes of the child and the child's cultural heritage or Aboriginality.

Clause 7 states that the paramount principle to be taken into account is the best interests of the child, both in childhood and in later life. The clause sets out the things to be considered in determining what will be in the best interests of the child.

Clause 8 requires adoption service providers to take all reasonable steps to identify the cultural heritage of a child who is to be adopted.

Chapter 3 - Adoption service providers

Part 1 Authority to provide adoption services

Clause 9 makes the Director-General of the Department of Community Services responsible for the provision, and for authorising the provision, of adoption services. Adoption service (as defined in the Dictionary) means arrangement for or towards or with a view to the adoption of a child (whether citizen or non-citizen), negotiations for or towards or with a view to the adoption of a child or arranging or assisting in the transfer of the care and custody of a child.

Clause 10 makes it an offence for a person other than the Director-General or a person authorised by the Director-General to provide any adoption service in respect of the adoption in New South Wales of a child. The section also makes it an offence for persons other than the Director-General or an accredited intercountry adoption agency to make arrangements for or towards or with a view to the intercountry adoption of a child and for persons other than the Director-General to provide specified other adoption services in respect of the intercountry adoption of a child. (Intercountry adoption of a child is defined in the Dictionary as the adoption by a person resident or domiciled in New South Wales of a non-citizen child from a country outside Australia.)

Part 2 Private adoption agencies and accredited intercountry adoption agencies

Clause 11 provides for the Director-General to approve charitable organisations as private adoption agencies. A private adoption agency is an authorised adoption service provider for the purposes of the proposed Act and may provide adoption services with a view to the adoption of children from New South Wales. Charitable organisations that are private adoption agencies under the *Adoption of Children Act 1965* on the commencement of clause 11 will automatically be private adoption agencies for the purposes of the proposed Act (see clause 3 of Schedule 2 to the Bill). (The organisations that are

currently private adoption agencies are Centrecare Catholic Community Services, Anglican Adoption Agency and Barnados Australia.)

Clause 12 provides for the Director-General to approve a non-profit organisation as an accredited intercountry adoption agency. An accredited intercountry adoption agency may make arrangements for or towards or with a view to the intercountry adoption of a child.

Clause 13 enables the Director-General to refuse to approve an organisation as a private adoption agency or accredited intercountry adoption agency if it appears to the Director-General that the organisation is not suited to the provision of adoption services.

Clause 14 enables the Director-General to impose conditions on the approval of organisations as private adoption agencies and accredited intercountry adoption agencies. It also imposes a condition on all approvals of accredited intercountry agencies that prevents the agencies from being involved in fund raising, sponsorship or the sending of aid to institutions with which they have intercountry adoption programs.

Clause 15 requires the Director-General to give notice of his or her decision concerning approval of an organisation as a private adoption agency or accredited intercountry adoption agency.

Clause 16 provides for the appointment of principal officers of private adoption agencies and accredited intercountry adoption agencies. Anything done by a principal officer or with the officer's approval is treated, for the purposes of the proposed Act and the regulations, as being done by the agency that appointed the officer.

Clause 17 provides for the revocation of the approval of an organisation as a private adoption agency or accredited intercountry adoption agency in certain circumstances.

Clause 18 enables an organisation to appeal against the Director-General's refusal to approve it as a private adoption agency or accredited intercountry adoption agency or to revoke such an approval or impose conditions on it.

Clause 19 requires notice of an approval of an organisation as a private adoption agency or accredited intercountry adoption agency to be published in the Gazette.

Clause 20 enables regulations to be made in respect of private adoption agencies and accredited intercountry adoption agencies and their representatives.

Chapter 4 - The adoption process

Part 1 General

Clause 21 provides for the Supreme Court ("the Court") to hear and determine proceedings for the making of adoption orders and other orders under the proposed Act.

Clause 22 confers power on the Court to make an order for the adoption of a child who is present in New South Wales in favour of one person, or a couple of persons, who are resident or domiciled in the State. For the purposes of the proposed Act, a couple includes a man and woman who are married, two persons of different or of the same sex who have a de facto relationship and Aboriginal and Torres Strait Islanders who are living in relationships recognised as marriages by their respective communities.

Clause 23 enables an adoption order to be made in respect of a child who is less than 18 years of age, or a child who is 18 or more years of age, when the application for the adoption order is made. A child who is 18 or more may be adopted only if the child has been cared for by the applicant or applicants for a period of 5 years in total before the application is made.

Clause 24 makes it clear that a child may be adopted even if he or she has been adopted in the past and whether or not he or she is married.

Clause 25 enables one person solely, or a couple jointly, to apply for the making of an adoption order and sets out the prerequisites that sole and joint applicants for adoption orders must satisfy before an order may be made.

Clause 26 prevents the making of an adoption order in favour of one person who is married or who has a de facto relationship and who is living with his or her spouse or partner unless the spouse or partner has consented to the adoption.

Clause 27 prevents the making of an adoption order in favour of a couple unless they have lived together for a continuous period of not less than 3 years. An adoption order can be made in favour of a couple even if one or both of them are birth parents of the child.

Clause 28 prevents the making of an adoption order in favour of a relative unless specific consent to the adoption of the child by that relative has been given and the child has established a relationship of at least 5 years' duration with the relative.

Clause 29 prevents the making of an adoption order in favour of a step parent unless the step parent has been living with the child's birth or adoptive parent for at least 3 years before the application for adoption and consent to the adoption has been given by the appropriate persons.

Clause 30 prevents the making of an adoption order in respect of a non-citizen child unless arrangements for the adoption of the child have been made by the Director-General or an accredited intercountry adoption agency and the Court is satisfied that the Cultural Heritage Placement Principle has been properly applied.

Part 2 Placement of prospective adoptees

Clause 31 sets out the Aboriginal Child Placement Principle. The Principle provides that an Aboriginal child should if possible be placed with an applicant or applicants from the same Aboriginal community as the child's birth parents or another Aboriginal community. An Aboriginal child is to be placed with a non-Aboriginal only if the person has the capacity, and is able and willing to maintain, the child's heritage. An Aboriginal child is not to be placed unless the principle is properly applied and the applicant has the capacity, and is able to maintain, the child's cultural identity and heritage. The section also requires an adoption worker who is Aboriginal and a member of an Aboriginal agency to be consulted before an Aboriginal child is placed.

Clause 32 provides for the approval of organisations as Aboriginal agencies for the purposes of the proposed Act.

Clauses 33 and **34** make similar provisions in respect of Torres Strait Islander children.

Clause 35 sets out the Cultural Heritage Placement Principle. A child should if possible be placed with an applicant or applicants of the same cultural heritage as the child. If this is not possible, the child should be placed with applicants who are of a similar or compatible cultural heritage or who have the capacity, and are able and willing to maintain, the child's cultural heritage. A child (other than an

Aboriginal child or Torres Strait Islander) is not to be placed unless the principle has been properly applied.

Part 3 Selection of adoptive parents

Clause 36 provides for the making of applications to the Director-General and to private adoption agencies to be approved as suitable, and to be selected, to adopt children. A person who is approved as suitable and is selected to adopt a child may be invited to apply for an adoption order.

Clause 37 provides for the negotiation of adoption plans for the care of a child who is to be adopted.

Part 4 Consents to adoptions

Clause 38 requires the consent of the parents or guardians of a child to be obtained before the making of an adoption order in respect of a child who is less than 18 years of age.

Clause 39 sets out the circumstances in which the consent of a parent or guardian will not be required.

Clause 40 requires the consent of a child who is 12 or more but less than 18 years of age to be obtained before the making of an adoption order unless the Court orders otherwise in exceptional circumstances.

Clause 41 provides that consent to the adoption of a child can be general or specific and defines the meaning of general and specific consent.

Clause 42 states the requirements that must be met for consent to be effective for the purposes of the proposed Act. The requirements include supply of mandatory information to, and counselling of, the person whose consent is required.

Clauses 43 and 44 state certain additional requirements that must be met if consent to the adoption of Aboriginal and Torres Strait Islander children is to be effective.

Clause 45 provides for the birth father to be given the opportunity to consent.

Clause 46 describes the circumstances in which the Court may dispense with the requirement for consent.

Clause 47 enables consent to be revoked within 30 days after it is given.

Clause 48 provides for persons who have consented to an adoption to be notified before the end of the period in which consent may be revoked.

Part 5 Guardianship of children awaiting adoption

Clause 49 provides for the Director-General to be the guardian of citizen children in the period between the giving of consent to adoption (or the dispensing of consent) and the making of the adoption order or taking of certain other action in respect of the child.

Clause 50 enables the Director-General to renounce guardianship in certain circumstances if the child leaves New South Wales.

Clause 51 provides for the Director-General to be the guardian of non-citizen children who are awaiting adoption in certain circumstances.

Clause 52 requires the Director-General to report to the Court concerning the Director-General's guardianship of a child if the Director-General is guardian of the child for a year or more.

Clause 53 provides that the Director-General's guardianship ceases on the making of an adoption order or occurrence of certain other events (for example, revocation of consent to the adoption or the placing of the child in the care of another person).

Part 6 Preliminary hearings

Clause 54 provides for the preliminary hearing of applications for the making of adoption orders.

Part 7 Interim orders

Clause 55 enables the Court to postpone the determination of an application for an adoption order and to make interim orders concerning the care and custody of the child concerned.

Clause 56 limits the duration of interim orders to a period in total of 2 years.

Clause 57 provides for the discharge of interim orders.

Part 8 Adoption orders

Clause 58 prevents the making of an adoption order unless application has been made by the applicant with the consent of the Director-General, on behalf of the applicant by the Director-General or a private adoption agency, by a child who is more than 18 years of age or by a birth parent.

Clause 59 prevents the making of an adoption order unless the Court is satisfied that the best interests of the child will be promoted and that the wishes and feelings of the child have so far as possible been considered.

Clause 60 requires the making of certain reports to the Court before an adoption order in respect of a child who is less than 18 years of age may be made.

Part 9 After application

Clause 61 [50] prevents the making of an adoption order unless the requisite notice of the application for the making of the order has been given.

Clause 62 provides for the Court to permit persons (including, in certain circumstances, the birth father) to appear or be joined as parties to the proceedings for an adoption order.

Clause 63 enables the Court to make orders for the care of a child when it refuses an application for an adoption order.

Clauses 64 and 65 provide for the discharge of adoption orders.

Part 10 Effect of adoption orders

Clause 66 describes the general effect of the making of an adoption order and the legal status of the adopted child and parents.

Clause 67 sets out the effect of the making of an adoption order on the existing guardianship and any previous adoption of the child concerned.

Clauses 68 and 69 describe the effect of the making of an adoption order on property rights and dispositions of property.

Clause 70 describes the effect of the making of an adoption order on the relationship of the adopted child to other children of the adoptive parent or parents.

Clause 71 provides for the Court to specify the names by which a child is to be known after the making of an adoption order when making the order. The Court is required to take into account the wishes of the child in this respect. The Court is not to approve a change in a given name of a child who is more than one year old or a non-citizen child unless there are special reasons relating to the best interests of the child for doing so.

Clause 72 describes the liability of trustees and personal representatives in respect of adopted persons.

Chapter 5 - Recognition of adoptions

Part 1 Definition

Clause 73 contains a definition of **country** for the purposes of the proposed Chapter.

Part 2 Australian adoptions

Clause 74 provides for the recognition of adoptions in other States and Territories.

Part 3 Foreign adoptions

Clause 75 provides that an adoption in a country outside Australia will be recognised in New South Wales only if it complies with the requirements of the proposed Part. The Part provides 2 ways of recognising adoptions outside Australia. If the adoptive parent or parents have been resident for 12 months or more in a country that is not a “designated country”, a declaration as to the validity of the adoption may be obtained under clause 77. If the country is a “designated country”, clause 78 applies and recognition is (subject to certain conditions) automatic.

Clause 76 sets out the circumstances in which an adoption in a country outside Australia that is not a designated country for the purposes of the proposed Part will be recognised.

Clause 77 provides for the Court to make declarations as to the validity of adoptions in the countries referred to in clause 76.

Clause 78 provides for the recognition of a country as a designated country if it has ratified the Convention on Protection of Children and Co-operation in Intercountry Adoption and adoption services in that country are substantially in accordance with the Convention or if, although it has not ratified the Convention, adoption services are substantially in accordance with the Convention.

An adoption in a designated country is treated as if it were an adoption under the proposed Act unless the adoption is manifestly contrary to the principles and practices relating to adoption set out in the proposed Act.

Chapter 6 - Adoption information

Chapter 6 sets out the entitlements of adopted persons, adoptive persons, birth parents, relatives, siblings and others to access information. Two categories of information are recognised—birth certificates and prescribed information. The Chapter requires a person in most instances to obtain a birth certificate before being entitled to access information because contact vetoes are to be endorsed on the certificate. Chapter 6 substantially re-enacts the *Adoption Information Act 1990* (including amendments made by the *Adoption Information Amendment Act 1995*). Some provisions of that Act (for example, sections 4 (Definitions), 28 (Veto on contact-offences) and 36 (Appeals to Community Services Appeals Tribunal)) are located in other Chapters of this Bill.

Part 1 Preliminary

Clause 79 sets out the objects of the proposed Chapter.

Clause 80 provides for prescribed information to be prescribed by the regulations.

Part 2 Access to birth certificates and other information

Clause 81 sets out the entitlement of an adopted person to access information.

Clause 82 sets out the entitlement of an adoptive parent to access information.

Clause 83 sets out the entitlement of a birth parent to access information.

Clause 84 enables relatives and other persons to access information concerning adopted persons and birth parents, but only after they have died.

Clause 85 specifies the procedure to be followed in applying for access to information.

Clause 86 specifies the persons who are to deal with an application for access to information.

Clause 87 enables the Director-General to give access (or to authorise an information source to give access) to information before an entitlement to it arises if disclosure of the information would promote the welfare and best interests of the parties involved.

Clause 88 enables the Director-General to refuse to supply (or to authorise an information source to supply), or supply subject to conditions, information that might, in identifying a person, cause serious harm to the person concerned. The discretion might be used, for example, if a person might be endangered if identified by the information supplied.

Clause 89 requires information sources to comply with prescribed guidelines in disclosing information from records held by them.

Clause 90 provides that a person is entitled to access information in Supreme Court records only if the Court so orders.

Clause 91 makes it an offence to disclose certain information obtained in connection with the administration or execution of the proposed Chapter without proper authority or to publish information disclosed in proceedings before a court or tribunal in contravention of an order of the court or tribunal.

Part 3 Advance notice

Clause 92 sets out the object of the proposed Part, which is to establish an advance notice system to enable the release of personal information under the Part to be delayed for a fixed period to give the person requesting the delay the opportunity to prepare for the release and any impact it might have on the person or the person's family or associates.

Clause 93 contains definitions for the purposes of the proposed Part.

Clause 94 sets out the persons who may lodge an advance notice request.

Clause 95 sets out the procedure for lodging an advance notice request.

Clause 96 provides for the establishment and maintenance of an Advance Notice Register.

Clause 97 requires an information source to delay the supply of personal information affected by an advance notice registration for a period prescribed by the regulations.

Clause 98 requires the information source to advise the applicant for the supply of the personal information that it will not be supplied for the advance notice period and the reasons for the delay.

Clause 99 provides for the expiration of an advance notice registration.

Clause 100 enables arrangements to be made with affected parties to waive an advance notice period.

Clause 101 requires the Director-General to notify a person who has lodged an advance notice request of any application for the supply of personal information affected by the registration.

Part 4 Contact vetoes

The proposed Part provides the framework for the system of vetoes against contact to protect the privacy of persons adopted before the date of assent to the *Adoption Information Act 1990* and of their birth parents. Contact vetoes may be lodged by adopted persons who are 17 years 6 months or more years of age and the birth parents of adopted persons.

Clause 102 specifies the persons who may lodge a contact veto.

Clause 103 limits contact vetoes to adoptions existing before the date of assent to the *Adoption Information Act 1990*.

Clause 104 sets out the manner of lodging a contact veto.

Clause 105 provides for the establishment of the Contact Veto Register and sets out the details to be shown on it.

Clause 106 requires the Director-General to advise the primary information source of the entry of a contact veto by an adopted person so that the adopted person's birth certificate may be endorsed to indicate the existence of the contact veto.

Clause 107 requires the primary information source to register details of the contact veto on the relevant birth certificates.

Clause 108 provides for contact vetoes to generally take effect 5 working days (or a period prescribed by the regulations) after being registered.

Clause 109 provides for the expiration of a contact veto on closure of the Contact Veto Register unless sooner cancelled or unless the person who lodged it dies.

Clause 110 enables the Director-General to approach a person who has lodged a contact veto at the request of a person who has been refused contact to determine whether the person wishes to confirm, cancel or vary the contact veto.

Clauses 111 and 112 require the Director-General to give certain notifications relating to the accessing of information.

Clause 113 requires a person obtaining a birth certificate endorsed with a contact veto to sign an undertaking against contact. Undertakings in other circumstances may also be required.

Part 5 Reunion and Information Register

Part 5 establishes a Reunion and Information Register enabling adopted persons, birth parents, adoptive parents and certain other interested persons to enter their names in the register so that reunions may be arranged with other persons whose names are so registered. Action may, in limited circumstances, be taken to locate persons whose names are not registered to ascertain their wishes concerning reunions. The Part also facilitates the leaving of messages for persons concerned in or affected by an adoption.

Clause 114 defines *register* for the purposes of this Part.

Clause 115 provides for the entry of persons' names in the register.

Clause 116 enables a person whose name is entered on the register to leave a message for another person entitled to have his or her name entered.

Clause 117 gives the Director-General a discretion to refuse to enter a name in the register or to accept a message.

Clause 118 enables the Director-General to open, inspect and copy messages.

Clause 119 enables the Director-General to delay the delivery of a message he or she considers likely to be so distressing for the recipient that it should be opened only in the presence of counsellors or other persons.

Clause 120 provides for the making of regulations relating to the delivery or receipt of messages.

Clause 121 specifies the persons eligible to have their names entered in the register.

Clause 122 provides for the Director-General to arrange for the reunion of persons with other persons whose names are entered in the register.

Clause 123 enables the Director-General (in limited circumstances) to locate persons whose names are not included on the register to ascertain their wishes concerning reunion with a person whose name is on the register.

Part 6 Miscellaneous

Clause 124 authorises fees and charges to be set.

Clause 125 enables the internal review of decisions under or for the purpose of the proposed Chapter. Internal review may be sought in relation to decisions that are not able to be appealed against to the Community Services Appeals Tribunal.

Clause 126 enables persons directed to do so by the Guardianship Board to exercise entitlements to receive information, or to lodge a contact veto or advance notice request, on behalf of persons who because of a disability are unable to do so.

Clause 127 provides for the manner of giving notice under the proposed Chapter.

Clause 128 ensures that certain information obtained in connection with intercountry adoptions is only accessed in accordance with the proposed Chapter.

Chapter 7 - Offences

Clause 129 limits the territorial application of the Chapter.

Clause 130 makes it an offence to accept payments in consideration of or in relation to an adoption.

Clause 131 makes it an offence to advertise without authority the availability of a child for adoption, a desire to adopt a child or the willingness to arrange adoptions.

Clause 132 makes it an offence to publish or broadcast without authority the names of parties to an adoption.

Clause 133 makes it an offence to make false statements in applications and other documents under the proposed Act.

Clause 134 makes it an offence to impersonate certain persons.

Clause 135 makes it an offence to present a forged consent to the Court.

Clause 136 makes it an offence to use force or threats to induce or influence parties to an adoption to offer a child for adoption or to give or revoke consent to an adoption.

Clause 137 makes it an offence to improperly witness a consent.

Clause 138 makes it an offence for an applicant to contact a birth parent before a child is allocated.

Clause 139 makes it an offence to make payment for the relinquishment of a child from outside Australia.

Clause 140 makes it an offence to contact or attempt to contact a person contrary to a contact veto. The clause also makes it an offence to use information supplied under the proposed Act to intimidate or harass a person who lodged a contact veto.

Chapter 8 - Records of adoptions

Clauses 141–143 provide for the recording of adoption orders and various other orders for the purposes of the proposed Act.

Clause 144 enables the Director-General to make reports on the suitability of applicants adopting children from overseas.

Clause 145 places restrictions on the inspection of records made for the purposes of the proposed Act.

Chapter 9 - Proceedings

Clause 146 provides for the Court hearings under the proposed Act to be in camera.

Clause 147 enables the Director-General to appear in any hearings.

Clause 148 enables the Court to require the personal attendance of any party to an adoption before the Court.

Clause 149 enables the Court to make orders to ensure that the child concerned is appropriately represented in adoption proceedings.

Clause 150 prevents disclosure of certain reports unless ordered by the Court.

Clause 151 enables the Court to take into account matters whether or not they would be admissible as evidence.

Clause 152 requires the Court to take into account the wishes of the child.

Clause 153 sets out the ways in which the Court can inform itself as to the wishes of the child.

Clause 154 makes it clear that there is no power to require a child to express the child's wishes.

Chapter 10 - Miscellaneous

Clause 155 provides for the making of appeals against certain decisions under the proposed Act to the Community Services Appeals Tribunal.

Clause 156 enables the Director-General to enter into agreements for the provision of financial assistance to persons involved in an adoption where necessitated by the needs of the child.

Clause 157 provides for the executor or administrator of an estate to transfer property to the Director-General to be held by the Director-General on behalf of the adopted person entitled to it.

Clause 158 provides for proceedings for offences.

Clause 159 enables certain persons to be excluded from hearings of proceedings for offences.

Clause 160 requires the consent of the Minister or Attorney General to be obtained to prosecute certain offences under the proposed Act.

Clause 161 enables the making of rules of court.

Clause 162 enables the making of regulations.

Clause 163 repeals the *Adoption of Children Act 1965* and the *Adoption Information Act 1990*.

Clauses 164 and **165** are machinery provisions relating to the Schedules to the proposed Act.

Clause 166 requires the Minister to review the proposed Act as soon as possible after the period of 5 years from the date of assent to the Act and to table a report of the review in Parliament.

Schedule 1 Amendment of other laws

Schedule 1 makes consequential amendments to a number of Acts and regulations.

Amendments to the *Birth, Deaths and Marriages Registration Act 1995* enable an adoptive parent of a child to register a note of the intention of another person to adopt the child jointly with the adoptive parent if the other person dies after the making of an application to adopt but before an adoption order is made. Provision is also made to enable the Registrar to issue one certificate containing information currently supplied separately on original and amended birth certificates.

Schedule 2 Savings, transitional and other provisions

Schedule 2 enacts savings, transitional and other provisions.

Dictionary

The dictionary defines various words and expressions used in the proposed Act.

[STATE ARMS]

New South Wales

Adoption Bill 1997

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Dictionary

The dictionary defines the following words and expressions

Aboriginal

Aboriginal agency

Aboriginal child

Aboriginal Child Placement Principle

accredited intercountry adoption agency

adopted brother or sister

adopted person

adoption plan

adoption order

adoption service

adoptive parent

advance notice registration

advance notice request

amended birth certificate

applicant

authorised adoption service provider

birth parent

charitable organisation

child

contact veto

Court

cultural heritage

Cultural Heritage Placement Principle

de facto relationship

decision

decision maker

designated country

designated person

Director-General

former Act

foster parent

general consent

guardian

home study

hospital

independent counsellor

information source

intercountry adoption

interim order

nominated officer

non-citizen child

original birth certificate

parental responsibility

parties

prescribed information

primary information source

principal officer

private adoption agency

Registrar

relative

revocation period

sibling

specific consent

spouse

step parent

supply authority

Torres Strait Islander

Torres Strait Islander agency

Torres Strait Islander child

Torres Strait Islander Child Placement Principle

Part 2 of the Dictionary explains the meanings of references to the following:

couples

married person

[STATE ARMS]

New South Wales

Adoption Bill 1997

No , 1998

A Bill for

An Act to reform the law relating to the adoption of children and to allow for certain persons involved in an adoption to have access to information relating to the adoption; to repeal the *Adoption of Children Act 1965* and the *Adoption Information Act 1990*; and for related purposes.

The Legislature of New South Wales enacts:

Chapter 1 - Preliminary

Introduction. This Chapter contains provisions that are helpful in understanding the Act as a whole. It also contains some machinery provisions.

1 Name of Act

This Act is the *Adoption Act 1997*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

Expressions used in this Act (or in a particular provision of this Act) that are defined in the Dictionary at the end of this Act have the meanings set out in the Dictionary.

Note. Expressions used in this Act (or a particular provision of this Act) that are defined in the *Interpretation Act 1987* have the meanings set out in that Act.

4 Object of Act (cf AI Act s 3)

The object of this Act is to reform the law relating to the adoption of children, and in particular:

- (a) to emphasise that the paramount consideration in adoption law and practice is to act in the best interests of the child concerned
- (b) to make it clear that adoption is to be regarded as a service for the child concerned
- (c) to ensure that adoption law and practice assist a child to know and have access to his or her birth family and cultural heritage
- (d) to recognise the changing nature of practices of adoption and to ensure and to apply the same safeguards and standards to children adopted from overseas as apply to children from New South Wales
- (e) to ensure that adoption law and practice regarding intercountry adoptions in New South Wales complies with Australia's obligations under treaties and other international agreements
- (f) to make provision for adoption of relatives, wards, foster children and children with special needs
- (g) to encourage openness in adoption
- (h) to allow access to certain information relating to adoptions.

5 Notes

Introductions to Chapters and other notes in the text of this Act do not form part of this Act.

Note. For the purpose of comparison, a number of provisions of this Act contain bracketed notes in headings, drawing attention (“cf”) to equivalent or comparable (though not necessarily identical) provisions of other laws. Abbreviations in the notes include:

AC Act: *Adoption of Children Act 1965*

AC Reg: *Adoption of Children Regulation 1995*

AI Act: *Adoption Information Act 1990.*

Chapter 2 - Adoption principles

6 Guiding principles in exercise of powers concerning adoption (cf AC Act s 17, AC Reg cl 35)

(1) It is the intention of Parliament that, in making a decision about the adoption of a child, a decision maker is to have regard (as far as is practicable or appropriate) to the following:

- (a) the paramount principle set out in section 7,
- (b) the principle that adoption is to be regarded as a service for the child not for adults wishing to acquire the care of a child,
- (c) the principle that an adult has no right to adopt a child,
- (d) the principle that the ascertainable wishes and feelings of the child should be considered (in the light of the child’s maturity and level of understanding),
- (e) the Cultural Heritage Placement Principle,
- (f) in the case of an Aboriginal child—the Aboriginal Child Placement Principle,
- (g) in the case of a Torres Strait Islander child—the Torres Strait Islander Child Placement Principle.

(2) This section does not limit the operation of any other provision of this Act.

7 Paramount principle (cf AC Act s 17)

(1) The paramount consideration to be taken into account is the best interests of the child concerned, both in childhood and in later life.

(2) In determining the best interests of the child the decision maker is to have regard to the following:

- (a) any wishes expressed by the child and any factors (such as the child’s maturity or level of understanding) that the decision maker thinks are relevant to the weight the decision maker should give to the child’s wishes,
- (b) the child’s age, maturity, sex, background and family relationships and any other characteristics of the child that the decision maker thinks are relevant,
- (c) the child’s physical, emotional and educational needs, including the child’s sense of personal, family and cultural identity,

- (d) the nature of the relationship of the child with each proposed adoptive parent,
- (e) the relationship that the child has with relatives, and with any other person in relation to whom the decision maker considers the question to be relevant, including:
 - (i) the value to the child of any such relationship continuing, and
 - (ii) the ability and willingness of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise meet the child's needs, and
 - (iii) the wishes and feelings of any of the child's relatives, or of any such person, about the child,
- (f) the attitude to the child and to the responsibilities of parenthood of each proposed adoptive parent,
- (g) the capacity of each proposed adoptive parent, or any other person, to provide for the needs of the child, including the emotional and intellectual needs of the child,
- (h) the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or being present while a third person is subjected or exposed to abuse, ill-treatment, violence or other behaviour,
- (i) the alternatives to the making of an adoption order and the likely effect on the child in both the short and longer term of changes in the child's circumstances caused by an adoption, so that adoption is determined among all alternative forms of care to best meet the needs of the child.

8 Duty to identify cultural heritage

The Director-General and other authorised adoption service providers are to take all reasonable steps to identify the cultural heritage of any child whose adoption is under consideration.

Chapter 3 - Adoption service providers

Introduction. This Chapter provides for the making of arrangements for the placement of children for adoption through a government department and approved private adoption agencies. It makes it clear that individuals must not make their own adoption arrangements, either personally or through private institutions. The Chapter provides for approval of charitable organisations to make arrangements for adoption of children from New South Wales and for the authorisation of other organisations to make certain arrangements for the intercountry adoption of children.

Part 1 Authority to provide adoption services

9 Adoption services to be provided by or on behalf of Director-General

(1) The Director-General is, subject to this Act, to provide, and authorise the provision by others of, adoption services.

Note. Under section 5 of the *Community Welfare Act 1987*, the Director-General may delegate this and any other function under this Act to any person.

(2) Without limiting subsection (1), the Director-General is, subject to this Act, responsible for:

- (a) the assessment of the suitability of a person or persons to adopt a child (including a non-citizen child),
- (b) the arrangements for and in relation to the allocation of a citizen child to a person or persons wishing to adopt such a child,
- (c) the transfer of the care and custody of a child to the person or persons who will adopt the child,
- (d) the giving of consent to the adoption of a child of whom he or she has guardianship,
- (e) the approval of charitable organisations as adoption service providers,
- (f) the approval of non-profit organisations as accredited intercountry adoption agencies.

10 Unauthorised arrangements for adoption (cf AC Act s 51)

(1) A person (other than the Director-General or a private adoption agency) must not provide any adoption service in respect of the adoption in New South Wales of a child (whether citizen or non-citizen).

Note. Private adoption agencies are authorised adoption service providers.

(2) A person (other than the Director-General or an accredited intercountry adoption agency) must not provide any adoption service in respect of the intercountry adoption of a child that involves the making of arrangements for or towards or with a view to the adoption of the child.

(3) A person (other than the Director-General) must not provide any adoption service in respect of the intercountry adoption of a child that involves:

- (a) the receipt of expressions of interest in adopting the child, or
- (b) the decision of whether or not to approve an applicant to adopt the child, or
- (c) the issue of letters approving the adoption or refusing to approve the adoption, or
- (d) the sealing of the home study as an original, or

- (e) the administration of the appeal process against refusal to approve the adoption, or
- (f) the approval of an allocation of the child to an adoptive parent made by the overseas authority.

Maximum penalty (subsections (1)–(3)): 10 penalty units or imprisonment for 12 months, or both.

Note. *Intercountry adoption* is defined in Part 1 of the Dictionary.

Part 2 Private adoption agencies and accredited intercountry adoption agencies

11 Private adoption agencies (cf AC Act ss 10, 11 (2), AC Reg Sch 2)

- (1) The Director-General may approve a charitable organisation as a private adoption agency.
- (2) A charitable organisation approved as a private adoption agency is an authorised adoption service provider for the purposes of this Act.
- (3) An application for approval as a private adoption agency is to be made in writing to the Director-General.
- (4) The Director-General may, at the time the application is made or at any time before it is determined, require the applicant to provide such documents and information as the Director-General considers necessary for the purpose of ascertaining whether the organisation should be approved.

12 Accredited intercountry adoption agencies

- (1) The Director-General may give approval for a non-profit organisation:
 - (a) to make arrangements with a person or organisation prescribed by the regulations or a person or organisation included in a class of persons or organisations prescribed by the regulations in places outside Australia for the adoption in New South Wales of non-citizen children, and
 - (b) to provide such other adoption services related to the adoption of children from a place outside Australia as the Director-General specifies in the approval.
- (2) An accredited intercountry adoption agency may:
 - (a) conduct information, preparation and education seminars,
 - (b) assess expressions of interest,
 - (c) arrange for assessment of applicants and preparation of the home study by an appropriate professional,
 - (d) provide counselling,
 - (e) prepare and collate required documentation
 - (f) forward adoption documentation to the overseas authority,

- (g) liaise and negotiate with the overseas authority,
- (h) receive allocation notifications,
- (i) arrange for the preparation of post-placement reports by an appropriate professional,
- (j) provide to the Director-General and the overseas authority post-placement reports,
- (k) obtain an adoption order in New South Wales, where applicable.

(3) An application for approval as an accredited intercountry adoption agency is to be made in writing to the Director-General.

13 Refusal of application (cf AC Act s 11 (2))

(1) The Director-General must refuse an application under this Part if it appears to the Director-General that the applicant is not suited to providing adoption services.

(2) Without limiting the matters that may be taken into account, the Director-General may take into account the qualifications, experience, character and number of persons taking part, or proposing to take part, in the management or control of the organisation, or engaged or proposed to be engaged, on behalf of the organisation, in the conduct of the activities of the organisation.

14 Conditions of approval (cf AC Act s 11 (3))

(1) The approval of a private adoption agency or an accredited intercountry adoption agency is subject:

- (a) to such conditions (if any) as may be prescribed by this Act or the regulations, and
- (b) to such other conditions as the Director-General may, from time to time, impose by notice in writing given to the principal officer of the private adoption agency or accredited intercountry adoption agency.

(2) Without limiting the conditions that may be prescribed or imposed, approval of an accredited intercountry adoption agency is subject to the condition that the agency must not be involved in fund raising, sponsorship or the sending of aid to any institution with which it has an intercountry adoption program.

15 Notice of decision (cf AC Act s 11 (1) (b))

The Director-General is to give notice personally or by post of the Director-General's decision to the person specified in the application as the principal officer of the organisation.

16 Principal officer of private adoption agency or accredited intercountry adoption agency (cf AC Act s 12)

(1) Before making an application under section 11 or 12, an organisation is to appoint a person resident in New South Wales to be its principal officer for the purposes of this Act in the event of the granting of the application.

(2) If the application is granted, the private adoption agency or accredited intercountry adoption agency must, within 7 days after the occurrence of a vacancy in the office of principal officer, appoint a person who is resident in New South Wales to fill the vacancy and give notice in writing to the Director-General of the appointment.

(3) An application under section 11 or 12 is to specify the name of the principal officer, and the address of the principal office in New South Wales, of the organisation making the application.

(4) For the purposes of subsection (2), the office of the principal officer is to be taken to have become vacant if the person holding the office ceases to be resident in New South Wales.

(5) Anything done by the principal officer of a private adoption agency or accredited intercountry adoption agency, or with his or her approval, is, for the purposes of this Act and any regulations relating to private adoption agencies or accredited intercountry adoption agencies but without prejudice to any personal liability of the principal officer, to be taken to be done by the private adoption agency or accredited intercountry adoption agency.

17 Revocation or suspension of approval (cf AC Act s 13)

(1) The Director-General may, at any time, revoke or suspend the approval of a private adoption agency or an accredited intercountry adoption agency under this Part:

(a) at the request of the agency, or

(b) on the ground that the agency is no longer suited to providing adoption services, having regard to all relevant considerations, including the matters referred to in section 13, or

(c) on the ground that the agency has contravened a provision of this Act or the regulations that is applicable to it or any condition to which the approval is subject.

(2) If the Director-General has revoked or suspended the approval of a private adoption agency under this section, the Director-General must give notice in writing served personally or by post on the principal officer of the private adoption agency or accredited intercountry adoption agency of the revocation or suspension.

18 Appeal against refusal, revocation or suspension (cf AC Act s 14)

(1) An organisation may appeal to the Court against the decision of the Director-General:

(a) to refuse an application by the organisation under section 13, or

(b) to approve of such an application subject to conditions referred to in section 14, or

(c) to revoke or suspend the approval of the organisation as a private adoption agency or accredited intercountry adoption agency in accordance with section 17.

(2) Subject to any rules of court, an appeal under this section may, if the organisation is unincorporate, be brought and continued by one or more of the persons comprising the organisation as representing all persons comprising the organisation.

(3) On the hearing of an appeal under this section, the Court is to review the decision of the Director-General and may order:

- (a) that the decision of the Director-General be confirmed, or
- (b) that the organisation be approved as a private adoption agency or an accredited intercountry adoption agency subject to such conditions as may be prescribed by the regulations and to such additional conditions as the Court thinks fit and specifies in its order.

Note. See also section 155.

19 Notice of approval to be published in Gazette (cf AC Act s 15)

(1) The Director-General is to cause to be published in the Gazette notice of the approval of any organisation as a private adoption agency or accredited intercountry adoption agency and of the revocation or suspension of any such approval.

(2) Every such notice is to specify the address of the principal office of the agency concerned and the full name of the principal officer of the agency.

20 Regulations relating to private adoption agencies and intercountry adoption agencies (cf AC Act s 16)

The regulations may prescribe conditions and requirements to be observed, and facilities to be provided, by private adoption agencies and accredited intercountry adoption agencies, including conditions and requirements with respect to the qualifications and experience of persons acting for or on behalf of private adoption agencies and accredited intercountry adoption agencies.

Chapter 4 - The adoption process

Part 1 General

21 Proceedings

Proceedings for the making of adoption orders and other orders relating to the adoption of children under this Act are to be heard and determined by the Supreme Court.

Note. *Child* is defined in Part 1 of the Dictionary.

22 Jurisdiction (cf AC Act ss 8 and 9)

(1) Subject to this Act, the Court may make an order for the adoption of a child (an **adoption order**) solely in favour of one person or jointly in favour of two persons who are a couple within the meaning of this Act.

Note. The effect of the making of an adoption order is described in Part 10.

(2) The Court must not make an adoption order unless, at the time when the application for the order is filed:

- (a) the child is present in the State, and

(b) the applicant, or if the application is a joint application, each of the applicants, resides, or is domiciled, in the State.

(3) For the purposes of this section, if the Court is satisfied that the child was present in, or that the applicant or each applicant was resident or domiciled in the State, on a day within 60 days before the day on which the application was filed, the Court may, in the absence of evidence to the contrary, presume that:

(a) the child was present in, or

(b) the applicant or each applicant was resident or domiciled in,

the State at the time when the application was filed.

(4) The Court has jurisdiction under this section to make an adoption order despite any rule of private international law to the contrary.

23 Who may be adopted? (cf AC Act s 18 (1))

An adoption order may be made in relation to a child who:

(a) was less than 18 years of age on the date on which the application for the order was filed, or

(b) was 18 or more years of age on that date and, before attaining the age of 18 years, and for a period or periods of at least 5 years in total before the application was made:

(i) had been brought up, maintained and educated by the applicant or applicants for the order, 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 *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.

Note. *Spouse* is defined in Part 1 of the Dictionary.

24 Previous adoption or marital status immaterial (cf AC Act s 18 (5))

An adoption order may be made:

(a) even if the child has, whether before or after the commencement of this section and whether in the State or elsewhere, previously been adopted, and

(b) irrespective of the marital status of the child.

25 Who may adopt? (cf AC Act ss 8, 19, 20, 21 (1) (c) (i) (a))

(1) An application for an adoption order may be made in accordance with this Act solely by or on behalf of one person or jointly by or on behalf of two persons who are a couple within the meaning of this Act.

(2) One person may, subject to this Act, adopt a child only if:

(a) the applicant is resident or domiciled in the State, and

(b) where the applicant is not a birth parent or relative of the child—the applicant is 21 or more years of age and 18 or more years older than the child or the Court considers that in the particular circumstances of the case it is desirable to make the order even though the applicant does not fulfil the age requirements, and

(c) the applicant is of good repute and a fit and proper person to fulfil the responsibilities of a parent, and

(d) section 26 (Adoption by one person) is complied with.

(3) A couple may, subject to this Act, adopt a child only if:

(a) each applicant is resident or domiciled in the State, and

(b) where neither of the applicants is a birth parent or relative of the child—each applicant is 21 or more years of age and 18 or more years older than the child or the Court considers that in the particular circumstances of the case it is desirable to make the order even though one or both of them do not fulfil the age requirements, and

(c) each applicant is of good repute and a fit and proper person to fulfil the responsibilities of a parent, and

(d) section 27 (Adoption by a couple) is complied with, and

(e) where one of the applicants is a step parent—section 29 (Adoption by a step parent) is complied with.

26 Adoption by one person (cf AC Act s 19 (2), (3))

The Court is not to make an adoption order in favour of one person who is living with a spouse unless the person's spouse consents in writing to the application for the adoption order.

Note. *Spouse* is defined in Part 1 of the Dictionary.

27 Adoption by a couple (cf AC Act s 19)

(1) The Court is not to make an adoption order in favour of a couple unless the couple have been living together for a continuous period of not less than 3 years immediately before the application for the adoption order.

Note. *Couples* is defined in Part 2 of the Dictionary.

(2) The Court may make an adoption order in favour of a couple jointly even if one of them is a birth parent, or they are the birth parents, of the child.

28 Adoption by a relative

The Court is not to make an adoption order in favour of a relative of a child unless:

(a) specific consent to the adoption of the child by the relative has been given in accordance with this Act, and

(b) the child has established a relationship of at least 5 years' duration with the relative.

Note. *Specific consent* is defined in section 41.

29 Adoption by a step parent

The Court is not to make an adoption order in favour of a step parent of a child unless:

- (a) the step parent has lived with the child's birth or adoptive parent for a continuous period of not less than 3 years immediately before the application for the adoption order, and
- (b) consent to the adoption of the child by the step parent has been given in accordance with this Act by the appropriate persons, and
- (c) the child has established a relationship of at least 5 years' duration with the step parent.

30 Adoption of non-citizen child

The Court is not to make an adoption order in respect of a non-citizen child unless:

- (a) the arrangements for adoption of the child have been made by the Director-General or an accredited intercountry adoption agency, and
- (b) the Court is satisfied that the Cultural Heritage Placement Principle has been properly applied.

Part 2 Placement of prospective adoptees

31 Placement of Aboriginal child

- (1) The provisions of this section are enacted in recognition of the principle of Aboriginal self-management and self-determination and that adoption is a concept that is absent in customary Aboriginal child care arrangements.
- (2) The Director-General or principal officer of the private adoption agency concerned in the adoption of a child is to make reasonable inquiries as to whether the child is an Aboriginal child.
- (3) The Aboriginal Child Placement Principle is to be applied in placing a child that the Director-General or principal officer is satisfied is an Aboriginal child for adoption.
- (4) The Aboriginal Child Placement Principle is as follows:
 - (a) The first preference for placement of an Aboriginal child is for the child to be placed for adoption with an applicant or applicants belonging to the Aboriginal community, or one of the communities, to which the birth parent or birth parents of the child belong.
 - (b) If it is not practicable or in the best interests of the child for the child to be placed in accordance with paragraph (a), the child is to be placed with an applicant or applicants of another Aboriginal community.
 - (c) If it is not practicable or in the best interests of the child for the child to be placed in accordance with paragraph (a) or (b), the child is to be placed with a non-Aboriginal applicant or applicants.

(5) An Aboriginal child is not to be placed with any non-Aboriginal applicant unless the Court is satisfied that the applicant:

- (a) has the capacity to assist the child to develop a healthy and positive cultural identity, and
- (b) is willing to learn about, and teach the child about, the child's Aboriginal heritage and to foster links with that heritage in the child's upbringing, and
- (c) that the Aboriginal Child Placement Principle has been properly applied.

(6) The Director-General or principal officer of the private adoption agency concerned in the adoption of an Aboriginal child is to ensure that both an adoption worker who is an Aboriginal and a member of an Aboriginal agency are consulted about the placement of the child.

32 Aboriginal agency

(1) The Director-General may approve an organisation as an Aboriginal agency for the purposes of this Act.

(2) The Director-General is not to approve an organisation as an Aboriginal agency unless the Director-General is satisfied that:

- (a) the organisation is managed by Aboriginals, and
- (b) its activities are carried on for the benefit of Aboriginals, and
- (c) it has experience in child and family welfare matters.

33 Placement of Torres Strait Islander child

(1) The Director-General or principal officer of the private adoption agency concerned in the adoption of a child is to make reasonable inquiries as to whether the child is a Torres Strait Islander child.

(2) The Torres Strait Islander Child Placement Principle is to be applied in placing a child that the Director-General or principal officer is satisfied is a Torres Strait Islander child for adoption.

(3) The Torres Strait Islander Child Placement Principle is as follows:

- (a) The first preference for placement of a Torres Strait Islander child is for the child to be placed for adoption with an applicant or applicants within the child's extended family.
- (b) If it is not practicable or in the best interests of the child for the child to be placed in accordance with paragraph (a), the child is to be placed with an applicant or applicants within the community, or one of the communities, to which the birth parent or birth parents of the child belongs.
- (c) If it is not practicable or in the best interests of the child for the child to be placed in accordance with paragraph (a) or (b), the child is to be placed with an applicant or applicants of another Torres Strait Islander community.

(d) If it is not practicable or in the best interests of the child for the child to be placed in accordance with paragraph (a), (b) or (c), the child is to be placed with a non-Torres Strait Islander applicant or applicants.

(4) A Torres Strait Islander child is not to be placed with any non-Torres Strait Islander applicant unless the Court is satisfied that the applicant

(a) has the capacity to assist the child to develop a healthy and positive cultural identity, and

(b) is willing to learn about, and teach the child about, the child's Torres Strait Islander heritage and foster links with that heritage in the child's upbringing.

(5) The Director-General or principal officer of the private adoption agency concerned in the adoption of a Torres Strait Islander child is to ensure that a member of a Torres Strait Island agency is consulted about the placement of the child.

34 Torres Strait Islander agency

(1) The Director-General may approve an organisation as a Torres Strait Islander agency for the purposes of this Act.

(2) The Director-General is not to approve an organisation as a Torres Strait Islander agency unless the Director-General is satisfied that:

(a) the organisation is managed by Torres Strait Islanders, and

(b) its activities are carried on for the benefit of Torres Strait Islanders, and

(c) it has experience in child and family welfare matters.

35 Cultural Heritage Placement Principle

(1) The Cultural Heritage Placement Principle is to be applied in placing a child for adoption.

(2) The Cultural Heritage Placement Principle is as follows:

When a child in need of permanent care (other than an Aboriginal child or a Torres Strait Islander child) is to be placed outside the child's birth family, the order for priority of placement should be:

(a) with an applicant or applicants of the same cultural heritage as the child,

(b) with an applicant or applicants of a similar or compatible cultural heritage as the child,

(c) with an applicant or applicants of a different cultural heritage from the child, who have demonstrated the following:

(i) the capacity to assist the child to develop a healthy and positive cultural identity,

(ii) a willingness to learn about and teach the child about the child's cultural heritage,

(iii) a willingness to foster links with that heritage in the child's upbringing,

- (iv) the capacity to help the child if the child encounters racism or discrimination in school or the wider community.

Note. See sections 31 and 33 on the placement of an Aboriginal child or Torres Strait Islander child.

- (3) A child (other than an Aboriginal child or a Torres Strait Islander child) is not to be placed with an applicant unless the Court is satisfied that the Cultural Heritage Placement Principle has been properly applied.

Part 3 Selection of adoptive parents

Note. This Part provides for the assessment of the suitability of prospective adoptive parents.

36 Application to adopt (cf AC Reg Part 3)

- (1) One person, or two persons who are a couple, may submit to the Director-General or principal officer of a private adoption agency an expression of interest in:
 - (a) being approved as suitable to adopt a child (whether citizen or non-citizen), and
 - (b) being selected, in a manner determined by the Director-General or principal officer, to adopt a child.
- (2) A submission of an expression of interest may be made only if the person or each person is resident or domiciled in the State.
- (3) If a person is approved as suitable, and is selected, to adopt a child, the Director-General or principal officer may, in accordance with the regulations, invite the person to submit an application for an order to adopt the child.
- (4) The regulations may make provision for or with respect to the assessment of the suitability of persons to adopt, and selection of persons to adopt, children under this Act.
- (5) A submission of an expression of interest or application to adopt a child under this section is to be made in accordance with the regulations.

37 Adoption plans

- (1) The parties to an adoption may negotiate an adoption plan.
- (2) If the parties negotiate an adoption plan, the plan must accompany the application for an adoption order.
- (3) The Director-General or principal officer of the private adoption agency concerned is to notify any person who has the care of the child of the terms of the adoption plan.

Note. *Parties* to an adoption is defined in Part 1 of the Dictionary.

Part 4 Consents to adoptions

38 Consent of parents and guardians (cf AC Act s 26)

An adoption order is not to be made in respect of a child who is less than 18 years of age unless consent has been given:

- (a) in the case of a child who has not been previously adopted:
 - (i) by each birth parent of the child, and
 - (ii) by any guardian of the child, or
- (b) in the case of a child who has previously been adopted—by each adoptive parent or guardian of the child.

39 When consent of parent or guardian not required (cf AC Act s 26 (4A), (5))

Consent is not required under section 38 if:

- (a) the requirement for the consent has been dispensed with by order of the Court, or
- (b) the child in respect of whom the adoption order is sought is 12 or more years of age and has consented to his or her adoption by the applicant or applicants, or
- (c) the parent whose consent would otherwise be required by section 38 is an applicant, or
- (d) the parent whose consent would otherwise be required by section 38 has as a result of a court order ceased to have parental responsibility in respect of the child.

Note. *Parental responsibility* is defined in Part 1 of the Dictionary.

40 Consent of child (cf AC Act ss 26 (4A), 33, 38 (2A))

An adoption order in relation to a child who is 12 or more but less than 18 years of age is not to be made unless:

- (a) the child consents to his or her adoption by the applicant or applicants, or
- (b) the Court is satisfied that the circumstances are exceptional and that it would be in the best interests of the child to make the order even if the child has refused to consent to the adoption or is incapable of giving consent.

41 General or specific consent (cf AC Act s 27)

- (1) For the purposes of this Act, consent to the adoption of a child may be general or specific.
- (2) **General consent** to the adoption of a child is consent given by a parent or guardian to the adoption of the child by an applicant selected by the Director-General or principal officer of a private adoption agency.
- (3) **Specific consent** to the adoption of a child is consent given:
 - (a) by a parent or guardian to the adoption of a child by:
 - (i) a specified relative of the child, or

- (ii) 2 specified persons one of whom is a parent or relative of the child, or
 - (iii) a specified step parent of the child, or
 - (iv) specified foster parents or carers who have had care of the child for not less than 2 years, or
- (b) by a child who is 12 or more but less than 18 years of age to his or her adoption by a specified applicant or applicants.

42 Effective consent (cf AC Act ss 29, 30, 31, AC Reg cl 21 (a) and (d), 22, 23, Sch 2 Forms 1, 4)

- (1) Consent to a child's adoption is not effective unless:
- (a) the consent is given at least 30 days after the child is born, and
 - (b) the consent is given at least 14 days after each person whose consent is required by this Act has received from the Director-General or principal officer of the private adoption agency concerned a copy of the consent and the mandatory written information, and
 - (c) each person whose consent is required by this Act has received independent counselling in accordance with this section, and
 - (d) the consent is in writing and is an instrument that is substantially in the form prescribed by the regulations, and
 - (e) a separate instrument of consent is signed by each person whose consent is required by this Act, and
 - (f) the consent is witnessed in the manner prescribed by the regulations, and
 - (g) the consent is accompanied by a report prepared by an independent counsellor that complies with subsection (3), and
 - (h) if the consent is consent to the adoption of an Aboriginal child or Torres Strait Islander child, sections 43 and 44, respectively, are complied with.
- (2) For the purposes of this section, a person whose consent is required has received independent counselling if a person of a class or description prescribed by the regulations (an **independent counsellor**):
- (a) has accurately explained to the person, in a way that the independent counsellor thinks will be understood by the person, the legal effect of signing the instrument of consent and the procedure for revoking consent, and
 - (b) has counselled the person on the emotional effects of the adoption and alternatives (including, in the case of birth parents, the feasibility of keeping the child) to adoption.
- (3) For the purposes of this section, the report given by an independent counsellor is a report stating that:
- (a) the person giving the consent has received independent counselling, and

(b) the person giving the report is not aware of any mental, emotional or physical unfitness of that person to provide consent, and

(c) the person giving the report is of the opinion that the person giving the consent understands the effect of signing the instrument of consent.

(4) Consent given by a person (other than the child) is not effective if it appears to the Court that:

(a) the consent was not given in accordance with this Act, or

(b) the consent was obtained by fraud, duress or other improper means, or

(c) the instrument of consent has been altered in a material particular without authority, or

(d) the person giving or purporting to give the consent was not, at the time the instrument of consent was signed, in a fit condition to give the consent.

(5) Consent is not effective if it is revoked during the revocation period.

(6) Consent to a child's adoption given in another State or a Territory under the law of the other State or Territory is an effective consent for the purposes of this Act.

(7) In this section:

mandatory written information means written information on the following:

(a) the alternatives to adoption,

(b) the community supports available whether or not the child is relinquished for adoption,

(c) the legal process of adoption, including the consent required, effect and way of revoking consent, the selection procedure, adoption plans, the role of the Court and review and appeals procedure and the legal consequences of each stage in the process,

(d) the rights and responsibilities of the parties to an adoption, including access to information about, or contact with, the other parties to the adoption,

(e) any other matter prescribed by the regulations.

43 Consent to adoption of Aboriginal child

(1) Consent to the adoption of an Aboriginal child is not effective unless:

(a) the consent is given after the person giving consent has received adoption counselling arranged by the Director-General or the principal officer of the private adoption agency concerned from an appropriate Aboriginal agency, or

(b) if the person has been offered, but has refused, adoption counselling:

(i) the person has been provided with information in writing regarding matters that would have been raised by the counsellor and at least 7 days have passed, and

(ii) the person signs an acknowledgment that he or she has read and understood the material provided.

(2) In this section:

adoption counselling means consultation that includes consideration of the possibility of a child being cared for in accordance with Aboriginal customary law.

44 Consent to adoption of Torres Strait Islander child

(1) Consent to the adoption of a Torres Strait Islander child is not effective unless:

(a) the consent is given after the person giving consent has received adoption counselling arranged by the Director-General or the principal officer of the private adoption agency concerned from an appropriate Torres Strait Islander agency, or

(b) if the person has been offered, but has refused, adoption counselling:

(i) the person has been provided with information in writing regarding matters that would have been raised by the counsellor and at least 7 days have passed, and

(ii) the person signs an acknowledgment that he or she has read and understood the material provided.

(2) In this section:

adoption counselling means consultation that includes consideration of the possibility of a child being cared for in accordance with Torres Strait Islander customary law.

45 Birth father to be given opportunity to consent (cf AC Act s 31A)

(1) This section applies when consent to the adoption of a child has been given by the child's birth mother or guardian but an adoption hearing has not been held and the Director-General or principal officer of a private adoption agency knows, or after reasonable inquiry ascertains, the name and address of the person whom the Director-General or principal officer reasonably believes to be the birth father of the child.

Note. A person may be presumed to be the father of a child under the *Status of Children Act 1996* or may be registered as the father under the *Births, Deaths and Marriages Registration Act 1995*.

(2) The Director-General or principal officer is to notify the birth father personally or by post that consent has been given to the adoption of the child and advise him of his parental responsibilities in relation to the child.

46 Court may dispense with consent (cf AC Act s 32)

(1) The following persons may apply to the Court for an order dispensing with the requirement for consent of a person (other than the child) to the child's adoption:

(a) the Director-General,

(b) the principal officer of a private adoption agency,

(c) if an application has been made to the Court for the adoption of the child by the mother, the father or a relative of the child (whether alone or jointly with another person), the applicant or applicants,

(d) with the consent of the Director-General, the applicant or applicants for the adoption of the child.

(2) The Court may make an order dispensing with the requirement for consent of a person if the Court is satisfied that:

(a) the person cannot, after reasonable inquiry, be found or identified, or

(b) the person is in such a physical or mental condition as not to be capable of properly considering the question of whether he or she should give consent, or

(c) the Court is satisfied that it is in the best interests of the child to override the wishes of the parent or guardian.

(3) The Court may, on its own initiative or on application by any person, make an order dispensing with the requirement for consent of a child who is 12 or more but less than 18 years of age to his or her adoption if the Court considers the circumstances justify the making of such an order. However, the Court must not dispense with the requirement for consent of a child who is 18 or more years of age in any circumstances.

(4) The Court must not dispense with the requirement for consent unless satisfied that to do so is in the best interests of the child.

(5) An order dispensing with the requirement for consent may be made before an application for an adoption order has been made in respect of the child or in conjunction with an adoption order in respect of the child but must not be made on the application of a person referred to in subsection (1) (c) except in conjunction with an adoption order in favour of that person or of that person and another person.

(6) Any order dispensing with the requirement for consent made before an application for an adoption order has been made in respect of the child has effect for the purposes of any application for an adoption order that is subsequently made in respect of the child.

(7) An order dispensing with the requirement for consent made before an application for an adoption order has been made may be revoked by the Court at any time before the making of an adoption order in respect of the child on the application of:

(a) the Director-General or of the person whose consent was dispensed with, or

(b) if the order was made on the application of the principal officer of a private adoption agency—the principal officer.

(8) The Court must not make an order dispensing with the requirement for consent unless notice of the application for the order has been given or sent by post to the person whose consent is sought to be dispensed with at least 14 days before the application for the order is made to the Court unless:

(a) the person cannot, after reasonable inquiry, be found or identified, or

(b) the person is in such a physical or mental condition as not to be capable of properly considering the question of whether he or she should give consent and his or her physical or mental health would, in the opinion of the Court, be detrimentally affected if he or she were to receive notice of the application, or

(c) the Court considers that in the particular circumstances of the case it is desirable to make an order without notice of the application having been given or sent.

(9) The Court must not revoke any order dispensing with the requirement for consent unless not less than 14 days' notice of the application has been given:

(a) to the Director-General (if the Director-General is not applying for the revocation), and

(b) if the order was made on the application of the principal officer of a private adoption agency and he or she is not applying for the revocation, to the principal officer.

47 Revocation of consent (cf AC Act s 28)

(1) Consent to the adoption of a child may be revoked by notice in writing given to the nominated officer before the expiration of the period of 30 days after the date on which the instrument of consent was signed (the *revocation period*).

Note. *Nominated officer* is defined in Part 1 of the Dictionary.

(2) Consent to the adoption of a child may not be revoked after the expiration of the revocation period.

(3) As soon as practicable after receiving a notice under this section, the nominated officer is to give notice of the revocation:

(a) to the Director-General, and

(b) if it appears to the nominated officer that consent was given to the principal officer of a private adoption agency—to the principal officer.

(4) If the Director-General ceases to be the guardian of a child under section 53 any consent to the adoption of the child given for the purposes of this Act is taken to be revoked and the Director-General is to give notice to:

(a) the nominated officer, and

(b) if the consent was given to the principal officer of a private adoption agency—the principal officer.

48 Notification of pending termination of revocation period

The Director-General or, if the consent was given to the principal officer of a private adoption agency, the principal officer, is to give notice 7 days before the revocation period expires to the person consenting to the adoption that on expiration of the revocation period the consent will no longer be able to be revoked and that an adoption order may be made.

Part 5 Guardianship of children awaiting adoption

Note. This Part provides for the guardianship of children between the period when consent to adoption is given and an adoption order made. Guardianship is given to the Director-General who has power to

decide, for example, whether the child should remain with a birth parent or be placed with temporary foster parents or the proposed adoptive parents in this period.

49 Guardianship of citizen child awaiting adoption (cf AC Act s 34 except (3) and (4))

(1) Guardianship following general consent or dispensing of required consent

The Director-General is the guardian of a child (for purposes other than the purposes of section 38) to the exclusion of all other persons if:

- (a) general consent to the adoption of the child has been given by every person whose consent to the adoption of the child is required under this Act, or
- (b) the requirement for consent has been dispensed with by the Court.

(2) Subsection (1) does not apply to a child unless and until the Director-General has received written notice that general consent to the adoption of the child has been given.

(3) Within 21 days after the receipt by the Director-General of a notice referred to in subsection (2), the Director-General may, by instrument in writing, decline to be the guardian of the child.

(4) If the Director-General executes an instrument in which the Director-General declines to be guardian of a child, the Director-General must, as soon as practicable, cause a copy of the instrument to be given or sent by post to each person by whom consent to the adoption of the child was given.

(5) Guardianship following renunciation of guardianship by officer of another State or Territory

If:

- (a) an officer of another State or of a Territory whose functions correspond to those of the Director-General under this Act has become the guardian of a child under a law of that State or Territory corresponding to this section, and
- (b) the consent to the adoption of the child held by that officer cannot be lawfully revoked by the person or persons by whom it was given, and
- (c) the Director-General is satisfied that the child is present in New South Wales, and
- (d) that officer has requested the Director-General to accept, and the Director-General has, by an instrument in writing forwarded to that officer, agreed to accept, guardianship of the child, and
- (e) under that law, that officer ceases, on execution by the officer of an instrument renouncing his or her guardianship of the child, to be the guardian of the child,

the Director-General is, on the execution of that instrument, the guardian of the child (for purposes other than the purposes of section 38) to the exclusion of all other persons.

(6) Subsections (1) and (5) do not apply to a child who is a ward within the meaning of the *Children (Care and Protection) Act 1987*.

50 Renunciation of guardianship

If:

- (a) the Director-General has become the guardian of a child under section 49 or 52, and
- (b) consent to the adoption of the child cannot be lawfully revoked by the person or persons by whom it was given, and
- (c) the Director-General is satisfied that the child is present in another State or Territory, and
- (d) the Director-General has requested an officer of that State or Territory whose functions correspond to those of the Director-General under this Act to accept, and that officer has, by an instrument in writing forwarded to the Director-General, agreed to accept, guardianship of the child, and
- (e) under the law of that other State or Territory, that officer will, on execution by the Director-General of an instrument in writing renouncing the Director-General's guardianship of the child, become the guardian of the child,

the Director-General may execute an instrument in writing renouncing guardianship of the child and, where the Director-General does so, must as soon as practicable forward the instrument to that officer.

51 Guardianship of non-citizen child awaiting adoption

If a non-citizen child enters or has entered the State from another State or a Territory or from an overseas country and the *Immigration (Guardianship of Children) Act 1946* of the Commonwealth no longer applies in relation to the non-citizen child:

- (a) the guardianship of the child is to be placed with the Director-General, and
- (b) section 49 is, to the extent necessary, to apply to that child as if he or she were born in a State or Territory of the Commonwealth,

for so long as the State is the normal place of residence of the child.

Note. The Minister for Immigration of the Commonwealth is the guardian of a child arriving in Australia until the making of the adoption order under section 6 of the *Immigration (Guardianship of Children) Act 1946* of the Commonwealth. The functions of guardianship are presently delegated to the Director-General under section 5 of that Act. However, if New South Wales becomes a declared State, New South Wales will be able to legislate for guardianship of children entering Australia for adoption under section 4AAB of that Act.

52 Guardianship reports—citizen and non-citizen children (cf AC Act s 34 (3), (4))

- (1) If the Director-General has become the guardian of a child under this Part and has not, within a period of one year after becoming the guardian, ceased to be the guardian, the Director-General is to make a report to the Court concerning the child.
- (2) The Court is to make such order concerning the care and control of the child as it thinks fit.

(3) Without limiting the generality of subsection (2), an order under that subsection may, if the child is less than 18 years of age:

(a) declare the child to be a ward under the *Children (Care and Protection) Act 1987*, or

(b) order that the child remain under the guardianship of the Director-General for a further period of one year.

53 Duration of guardianship

(1) If the Director-General is the guardian of a child under section 49 or 52, the Director-General is to remain the guardian of the child until:

(a) an adoption order is made in respect of the child, or

(b) in the case of any consent so given, the instrument of consent is lawfully revoked, or

(c) the Court, by order, makes other provision for the guardianship of the child, or

(d) the Director-General places the child:

(i) in the care of the parents, or one of the parents, of the child, or

(ii) in the care of a guardian of the child, under subsection (2), or

(e) the Director-General executes an instrument referred to in section 49 (3), or

(f) the Director-General, under section 50, executes an instrument in writing renouncing guardianship of the child, or

(g) the child becomes a ward within the meaning of the *Children (Care and Protection) Act 1987*.

(2) The Director-General may, on such terms and conditions as the Director-General thinks fit, place any child of whom the Director-General is guardian under section 49 or 52 in the care of any suitable person who has agreed to have the child in his or her care.

(3) The fact that the Director-General is the guardian of a child under this section does not affect the liability of any person to provide adequate means of support for the child.

Part 6 Preliminary hearings

Note. This Part enables a preliminary hearing to be held before a full adoption hearing. At such a hearing the Court may examine certain aspects of an adoption plan or other matters. Matters that might be examined are, for example, that a child may have indicated he or she does not want to be placed with the proposed family or that continued access of relatives significant to an older child has not been provided for.

54 Preliminary hearing

- (1) The Court may, on its own motion or on the application of any interested person, hold a preliminary hearing in relation to any matter concerning or arising out of an application to adopt a child that the Court considers should be considered before the adoption hearing on the application.
- (2) A preliminary hearing may be held at any time after the giving of consent to the adoption (or its dispensation) and before the making of an adoption order.
- (3) Unless the Court dispenses with notice, notice of the preliminary hearing is to be given to the child, the prospective adoptive parents and any other person to whom the Court directs the notice be given.
- (4) Rules of court may be made for and with respect to preliminary hearings.
- (5) The Court may give such directions and make any order it thinks fit at a preliminary hearing.
- (6) Without limiting subsection (5), the Court may make an order as to the care and custody of the child (including an interim order) and any order that it may make at an adoption hearing.

Part 7 Interim orders

55 Making of interim orders (cf AC Act s 41)

- (1) On application to the Court for an order for the adoption of a child, the Court may postpone the determination of the application and make an interim order for the custody of the child in favour of the applicant.
- (2) On application to the Court by the Director-General or the principal officer of a private adoption agency, the Court may make an interim order for the custody of a child in favour of the applicant.
- (3) An interim order is subject to such terms and conditions relating to the maintenance, education and welfare of the child as the Court thinks fit.
- (4) The Court must not make an interim order in respect of a child in favour of any person unless the Court could lawfully make an order for the adoption of that child by that person.
- (5) While an interim order remains in force in respect of a child, the persons in whose favour the order is made are entitled to the care and custody of the child.

56 Duration of interim orders (cf AC Act s 42)

- (1) Subject to this Part, an interim order remains in force for such period, not exceeding one year, as the Court specifies in the order and for such further periods, if any, as the Court may from time to time order.
- (2) An interim order must not be in force for periods exceeding in total 2 years.

57 Discharge of interim orders (cf AC Act s 43)

- (1) The Court may, at any time, make an order discharging an interim order made under this Part.

(2) If the Court discharges an interim order the Court may make any order for the care and custody of the child that it thinks fit, including, if the child is less than 18 years of age, an order declaring the child to be a ward under the *Children (Care and Protection) Act 1987*.

(3) An interim order in respect of a child ceases to have effect on the making of an order for the adoption of that child, whether made in New South Wales or in another State or a Territory.

Part 8 Adoption orders

58 Application to be consented to by Director-General (cf AC Act s 18 (2) and (3))

(1) The Court is not to make an adoption order unless the application is made:

- (a) by the applicant with the consent of the Director-General or on behalf of the applicant by the Director-General or by the principal officer of a private adoption agency, or
- (b) by the birth mother or birth father of the child, or
- (c) by a child who is 18 or more years of age for his or her adoption.

(2) An application for an adoption order by an applicant may be made on behalf of the applicant by the Director-General.

59 Court to be satisfied as to certain matters (cf AC Act s 21)

(1) An adoption order is not to be made in relation to a child unless the Court is satisfied:

- (a) that the best interests of the child will be promoted by the adoption, and
- (b) that, as far as practicable and having regard to the age and understanding of the child, the wishes and feelings of the child have been ascertained and due consideration given to them, and

Note. Sections 152–154 contain provisions about ascertainment of the wishes of a child.

- (c) that consent to the adoption of the child has been given by every person whose consent is required under this Act or that consent should be dispensed with, and
- (d) that the Cultural Heritage Placement Principle has been properly applied, and
- (e) if the child is an Aboriginal child—that the Aboriginal Child Placement Principle has been properly applied, and
- (f) if the child is a Torres Strait Islander child—that the Torres Strait Islander Child Placement Principle has been properly applied.

(2) In determining whether to make an adoption order, the Court is to take into account any adoption plan negotiated by the parties to the adoption under section 37.

(3) The Court must not make an adoption order if the parties to the adoption have negotiated an adoption plan unless satisfied that the arrangements proposed in the plan are in the child's best interests and are proper in the circumstances.

(4) The Court is not to make an adoption order unless it considers that the making of the order would make better provision for the best interests of the child than parenting orders under the *Family Law Act 1975* of the Commonwealth or any other order for the care of the child.

Note. Part 1 of Chapter 4 describes the persons who may be adopted and the persons who may adopt.

60 Report required before order made for adoption of child under 18 years of age (cf AC Act s 21)

(1) The Court must not make an order for the adoption of a child who is less than 18 years of age unless:

(a) the Director-General has made a report in writing to the Court concerning the proposed adoption, and

(b) if the application for the order is made on behalf of the applicant by the principal officer of a private adoption agency, that principal officer has also made such a report.

(2) The Court may dispense with the requirement for the principal officer of a private adoption agency:

(a) to make a report in respect of all applications made on behalf of applicants by that principal officer if the Court is satisfied that the standard of applications made by that principal officer justifies the dispensation, or

(b) to make a report in respect of a particular application made on behalf of an applicant by that principal officer if the Court is satisfied that the particulars of that application and the report of that principal officer justify the dispensation.

(3) The Director-General may make a report to the Court even if the Court has dispensed with the requirement to make the report.

(4) The Court must not dispense with the requirement to make a report if an applicant is a foster parent, relative or step parent of the child.

(5) The Court may require the Director-General to make a report in respect of an application made by a person other than the Director-General within a period of 6 months after the date of the making of the application or such other period as the Court may, having regard to the circumstances of the case, specify.

(6) If the regulations provide for the keeping by the Director-General of a register of persons approved by the Director-General or by the principal officer of a private adoption agency as fit and proper persons to adopt children, the Court may refuse to make an adoption order in relation to a child who is less than 18 years of age on the date on which the application was filed:

(a) if, in the case of a sole applicant, the applicant's name is not included in that register or, in the case of joint applicants, neither of their names is included in that register, or

(b) if the name of the applicant or of either applicant or the names of both of the applicants, is or are included in that register—if the Court is satisfied that some other person whose name is included in that register is entitled under the regulations to be selected by the Director-General or by the principal officer, to be an applicant for an adoption order in priority to the applicant or applicants for the adoption order and that other person is suitable to be an adoptive parent of that child.

(7) Subsection (5) does not apply if:

(a) the applicant, or either of the applicants, for the adoption order is a step parent or foster parent of the child or is a relative of the child in whose favour a consent to adopt the child has been given, or

(b) the applicant, or either of the applicants, is a relative of the child and the appropriate person, or every appropriate person whose consent to the adoption would, but for the fact that the person is deceased, be required under section 38, has died without giving the person's consent referred to in that section.

Part 9 After application

61 Notice of application for adoption orders (cf AC Act s 22)

(1) The Court must not make an adoption order unless at least 14 days' notice of the application for the order (containing the particulars (if any) prescribed by the regulations) has been given or sent by post:

(a) to any person whose consent to the adoption of the child concerned:

(i) is required under this Act and has not been dispensed with by an order made by the Court, and

(ii) has not been given, and

(b) to any person (not being a person whose consent is so required) with whom the child resides or who has the care or custody of the child.

(2) Except as the Court may otherwise determine, nothing in subsection (1) requires a notice referred to in that subsection to be given or sent to a person referred to in subsection (1) (b) if that person is:

(a) an applicant for the adoption order, or

(b) a person with whom the child resides only as a patient or inmate of a hospital of which that person is in charge or a person who has the care or custody of the child only as the person in charge of a hospital.

(3) The notice must not specify the name of, or identify, any applicant.

(4) The Court may dispense with the giving of the notice.

(5) If it appears to the Court to be necessary in the interests of justice to do so, the Court may direct that notice of an application for an adoption order be given to any person.

62 Parties (cf AC Act s 23)

(1) The Court may permit such persons as the Court thinks fit to appear in or be joined as parties to the proceedings for an adoption order.

(2) The Court must, on application by a person who is the birth father of a child and who has not been given a notice referred to in section 45 (Birth father to be given opportunity to consent), permit the person to appear in, or join the person as a party to, the proceedings for an adoption order in respect of the child for the purpose of opposing the application for the order.

Note. The Court may require the attendance of any party. See section 148.

63 Care of child after refusal of an application (cf AC Act s 24)

If the Court refuses an application for an adoption order, the Court may make such order for the care and custody of the child concerned as it thinks fit, including, if the child is less than 18 years of age, an order declaring the child to be a ward under the *Children (Care and Protection) Act 1987*.

64 Discharge of adoption orders (cf AC Act s 25)

(1) The Director-General, the Attorney-General or any other interested person may apply to the Court for an order discharging an adoption order.

(2) The Court may make an order discharging an adoption order if it is satisfied that:

(a) the adoption order, or any consent to adoption, was obtained by fraud, duress or other improper means, or

(b) there is some other exceptional reason why the adoption order should be discharged.

(3) The Court must not make an order discharging an adoption order if it appears to the Court that the making of the order would be prejudicial to the best interests of the child.

(4) If the Court makes an order discharging an adoption order that was made in reliance on a general consent that consent remains effective for the purpose of a further application for an adoption order in respect of the same child, unless the Court orders otherwise.

(5) If the Court makes an order discharging an adoption order, it may, at the same time or subsequently, make such consequential or ancillary orders as it thinks necessary in the interests of justice or to promote the best interests of the child, including orders relating to the following

(a) the name of the child,

(b) the ownership of property,

(c) the custody or guardianship of the child,

(d) the domicile of the child.

(6) On the making of an order discharging an adoption order, but subject to any order made under subsection (5) and section 66 (4), the rights, privileges, duties, liabilities and relationships under the law of New South Wales of the child and of all other persons are to be the same as if the adoption order had not been made, but without prejudice to:

(a) anything lawfully done, or

- (b) the consequences of anything unlawfully done, or
- (c) any proprietary right or interest that became vested in any person,

while the adoption order was in force.

65 Investigation of application for discharge

The Court may require the Director-General to investigate the circumstances of any application to discharge an order under section 64 and report to it.

Part 10 Effect of adoption orders

Note. This Part describes the effect of the adoption order. It recognises the change in the legal status of the child and the child's transfer from one family to another but also recognises the need for relationships with birth parents to be maintained.

66 General effect of adoption orders (cf AC Act s 35 (1) and (4))

(1) An adoption order made by the Court under this Act gives parental responsibility for a child to the person or persons named in the order (***the adoptive parent or adoptive parents***).

(2) An adoption order may not be made before the expiration of the revocation period.

Note. ***Revocation period*** is defined in Part 1 of the Dictionary.

(3) For the purposes of the law of New South Wales, if an adoption order is made:

(a) the adopted child is to have the same rights in relation to the adoptive parent, or adoptive parents, as a child born to the adoptive parent or adoptive parents,

(b) the adoptive parent or adoptive parents are to have the same parental responsibility as the parent or parents of a child born to the adoptive parent or adoptive parents,

(c) the adopted child is to be regarded in law as the child of the adoptive parent or adoptive parents and the adoptive parent or adoptive parents are to be regarded in law as the parent or parents of the adopted child,

(d) the adopted child is to cease to be regarded in law as the child of the birth parents and the birth parents are to cease to be regarded in law as the parents of the adopted child.

(4) Despite subsection (3) (d), an adopted child does not cease to be regarded in law as the child of a birth parent or adoptive parent, and the birth parent or adoptive parent does not cease to be regarded in law as the parent of the child, if an adoption order is made in respect of a step parent with whom the birth parent or adoptive parent is living.

(5) Despite subsection (1), for the purposes of any law of New South Wales relating to a sexual offence, being a law for the purposes of which the relationship between persons is relevant, an adoption order, or the discharge of an adoption order, does not cause the cessation of any relationship that would have existed if the adoption order or the discharging order had not been made, and any such relationship is to be taken to exist in addition to any

relationship that exists by virtue of the application of that subsection in relation to that adoption order or by virtue of the discharge of that adoption order.

67 Effect of adoption order on guardianship etc (cf AC Act s 35 (1) (d) and (e))

On the making of an adoption order:

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

68 Effect of orders as regards property (cf AC Act ss 35 (2) and (3) and 36)

(1) Section 66 does not have effect so as to deprive an adopted child of any vested or contingent proprietary right acquired by the child before the making of the adoption order.

(2) If:

- (a) one of the birth parents of a child, or one of 2 adoptive parents of an adopted child, has died, and
- (b) the surviving parent remarries or, if not previously married, marries, and
- (c) the child is adopted by the surviving parent and that parent's spouse,

any property of any collateral or lineal next-of-kin of the deceased parent who dies intestate is, despite section 66, to devolve in all respects as if the child had not been so adopted.

Note. *Spouse* is defined in Part 1 of the Dictionary.

69 Effect of orders as regards dispositions of property etc (cf AC Act 36)

(1) Subject to section 68 (1), section 66 has effect in relation to a disposition of property, whether by will or otherwise, and whether made before or after the commencement of this section, and to a devolution of property in respect of which a person dies intestate after the commencement of this Act. However, those provisions do not affect a disposition of property:

- (a) by a person who, or by persons any of whom, died before the commencement of this section, and
- (b) that has taken effect in possession before the commencement of this section.

(2) Section 66 does not apply in relation to an agreement or instrument (not being a disposition of property) made or executed before the commencement of this section.

(3) If:

- (a) before the commencement of this section, a person made, by an instrument other than a will, a disposition of property, and
- (b) the disposition had not taken effect in possession before the commencement of this section, and

(c) it did not appear from the instrument that it was the intention of that person to include adopted children as objects of the disposition,

that person may, even though the instrument could not, apart from this subsection, be revoked or varied, by another instrument other than a will, vary the firstmentioned instrument to exclude adopted children (whether adopted under this Act or otherwise) from participation in any right, benefit or privilege under the instrument.

(4) In relation to a disposition of property by a person who, or by persons any of whom, died before the commencement of this section, and in relation to a devolution of property in respect of which a person died intestate before that commencement, an adoption order made under this Act has the same effect as if the former Acts had continued in force and the adoption order had been made under those Acts.

(5) Nothing in section 66 or in this section affects the operation of any provision in a will or other instrument (whether made or coming into operation before or after the commencement of this section) distinguishing between adopted children and children other than adopted children.

70 Relationship of adopted child to other children of the adopter (cf AC Act s 37)

For the purposes of the application of the *Wills, Probate and Administration Act 1898* to the devolution of any property in respect of which a person dies intestate and for the purposes of the construction of any disposition of any property, an adopted child is to be taken to be related to any other person, being the child or adopted child of his or her adoptive parent or parents:

- (a) if he or she was adopted by 2 spouses jointly, and that other person is the child or adopted child of both of them, as brother or sister of the whole blood, and
- (b) in any other case, as brother or sister of the half blood.

Note. *Spouse* is defined in Part 1 of the Dictionary.

71 Names of adopted children (cf AC Act s 38)

(1) Subject to this section, on the making of an adoption order:

- (a) an adopted child who is 18 or more years old is (unless the child decides otherwise) to have as his or her surname and given name or names the surname and given name or names the child had used immediately before the order was made, and
- (b) an adopted child who is less than 18 years of age is to have as his or her surname and given name or names such name or names as the Court, in the adoption order, approves on the application of the adoptive parent or parents.

(2) Before changing the surname or given name or names of a child the Court must consider any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the Court thinks are relevant to the weight it should give to the child's wishes.

(3) If, before the making of the adoption order, the adopted child has been generally known by a particular surname, the Court may, in the adoption order, order that the child is to have that name as his or her surname.

(4) An approval of a change in the given name or names of a child who is over the age of 12 years must not be given by the Court unless:

- (a) the child has, in a consent given under section 40, consented to the change, or
 - (b) if the child is less than the age of 18 years, the Court is satisfied that there are special reasons, related to the best interests of the child, why the change should be made even though the child has refused to consent to the change or his or her consent has not been sought.
- (5) The Court is not to approve a change in the given name or names of a child who is more than one year old, or a non-citizen child, unless there are special reasons, related to the best interests of the child, to do so.
- (6) Nothing in this section prevents the changing of any name of an adopted child, after the making of the adoption order, in accordance with the law of New South Wales.

72 Liability of trustees and personal representatives in respect of adopted persons (cf AC Act s 40)

- (1) If, before conveying, transferring or distributing any property among the persons appearing to be entitled to the property, a trustee or personal representative gives the notice referred to in section 60 of the *Trustee Act 1925* or section 92 of the *Wills, Probate and Administration Act 1898* and the time fixed by the notice has expired, the trustee or personal representative is not to be liable to any person:
- (a) who claims directly or indirectly an interest in the property by virtue of an adoption, and
 - (b) of whose claim the trustee or personal representative does not have notice at the time of the conveyance, transfer or distribution.
- (2) Nothing in this section prejudices the right of a person to follow property into the hands of a person, other than a bona fide purchaser for value, who has received it.

Chapter 5 - Recognition of adoptions

Note. This Chapter provides for the recognition of adoptions in other States and Territories. It also provides two ways of recognising adoptions in countries outside Australia. If the adoptive parent or parents have been resident for 12 months or more or domiciled in a country that is not a “designated country”, section 76 applies. If the country is a “designated country”, section 78 applies and recognition is (subject to certain conditions) automatic.

Part 1 Definition

73 Definition (cf AC Act s 44)

In this Chapter, **country** includes a part of a country.

Part 2 Australian adoptions

74 Recognition of Australian adoptions (cf AC Act s 45)

An order for the adoption of a person that was made in another State or Territory (whether before or after the commencement of this section) that:

- (a) is in accordance with, and
- (b) has not been rescinded under,

a law of that State or Territory is to be treated as having the same effect as an adoption order made under this Act.

Part 3 Foreign adoptions

75 Application of Part

Except as provided by this Part, the adoption of a person (whether before or after the commencement of this section) in a country outside Australia does not have effect for the purposes of the law of New South Wales.

76 Recognition of foreign adoptions in countries other than designated countries and by certain persons (cf AC Act s 46)

(1) This section applies to an order for the adoption of a person that was made (whether before or after the commencement of this section) in a country other than Australia:

- (a) that is not a designated country, or
- (b) if, at the time at which the legal steps that resulted in the adoption were commenced, the adoptive parent:
 - (i) had been resident in that country for 12 months or more, or
 - (ii) was domiciled in that country.

(2) An order for the adoption of a person to which this section applies is to have the same effect as an adoption order made under this Act if:

- (a) the adoption is in accordance with and has not been rescinded under the law of that country, and
- (b) in consequence of the adoption, the adoptive parent, under the law of that country, has a right superior to that of the adopted person's birth parents in relation to the custody of the adopted person, and
- (c) under the law of that country the adopter or adopters were, by virtue of the adoption, placed generally in relation to the adopted person in the position of a parent or parents.

(3) Despite subsection (2), a court (including a court dealing with an application under section 77) may refuse to recognise an adoption under this section if it appears to the court that the procedure followed, or the law applied, in connection with the adoption involved a denial of natural justice or did not comply with the requirements of substantial justice.

(4) In any proceedings before a court (including proceedings under section 77), it is to be presumed unless the contrary appears from the evidence, that an order for the adoption of a person that was made in a non-designated country complies with subsection (3).

(5) Nothing in this section affects any right that was acquired by, or became vested in, a person before the commencement of this section.

77 Declarations of validity of foreign adoptions (cf AC Act s 47)

(1) Any of the parties to an adoption under an order made outside Australia may apply to the Court for a declaration that the order complies with section 76.

(2) On an application under this section, the Court may:

(a) direct that notice of the application be given to such persons (including the Attorney General) as the Court thinks fit, or

(b) direct that a person be made a party to the application, or

(c) permit a person having an interest in the matter to intervene in, and become a party to, the proceedings.

(3) If the Court makes a declaration under this section, it may include in the declaration such particulars in relation to the adoption, the adopted child and the adoptive parent or parents as the Court finds to be established.

(4) For the purposes of the laws of New South Wales, a declaration under this section binds the Crown in right of New South Wales, whether or not notice was given to the Attorney General, and any person who was:

(a) a party to the proceedings for the declaration or a person claiming through such a party, or

(b) a person to whom notice of the application for the declaration was given or a person claiming through such a person,

but does not affect:

(c) the rights of any other person, or

(d) an earlier judgment, order or decree of a court or other body of competent jurisdiction.

(5) In proceedings in a court of New South Wales, the production of a copy of a declaration under this section, certified by the nominated officer to be a true copy:

(a) if the proceedings relate to a person referred to in paragraph (a) or (b) of subsection (4), is conclusive evidence, and

(b) if the proceedings relate to the rights of any other person, is evidence,

that an adoption was effected in accordance with the particulars contained in the declaration and that it complies with section 76.

78 Recognition of adoptions in designated countries

(1) In this section:

Hague Convention means the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

(2) The Director-General may, by order published in the Gazette, recognise a country outside Australia as a designated country for the purposes of this Act if the Director-General is satisfied that the country:

- (a) has ratified the Hague Convention and that adoption services in that country are provided substantially in accordance with the Convention, or
- (b) has not ratified the Hague Convention but that adoption services in that country are provided substantially in accordance with the Convention.

(3) An order for the adoption of a person that was made in a designated country (whether before or after the commencement of this section) and has not been rescinded under the law of that country is to be treated as having the same effect as an order for adoption made under this Act unless the adoption is manifestly contrary to the principles and practices relating to adoption set out in this Act.

(4) In any proceedings before a court it is to be presumed, unless the contrary appears from the evidence, that, having regard to whether it would have complied with the law of New South Wales and whether it would have been contrary to the best interests of the child, an order for the adoption of a person made in a designated country should be treated as having the same effect as an adoption under this Act.

Chapter 6 - Adoption information

Part 1 Preliminary

79 Objects of Chapter

The principal object of this Chapter is to incorporate (without substantive change) the provisions of the *Adoption Information Act 1990* so as to retain those provisions that:

- (a) give adult adopted persons access to information concerning their origins, and
- (b) give the birth parents and adoptive parents of adult adopted persons access to information concerning their children, and
- (c) preserve controls adoptive parents have over the access of adopted children to information concerning their origins while recognising the paramount interests of adopted children, and
- (d) give the relatives of adopted persons, birth parents and other persons access to information concerning adopted persons' origins in special circumstances, and
- (e) protect the privacy of adopted persons and birth parents by establishing a system of vetoes against contact with persons identified through access to information concerning persons adopted before the date of assent to the *Adoption Information Act 1990*, and
- (f) limit the disclosure of information concerning the personal affairs of persons that might unduly intrude on their privacy, and

(g) make provision for a Reunion and Information Register to facilitate reunions between adopted persons, birth parents and other persons (if desired by the persons concerned) and to facilitate exchange of messages between persons concerned in or affected by an adoption.

80 Prescribed information (cf AI Act s 5)

- (1) For the purposes of this Act, prescribed information is information of a kind prescribed by the regulations.
- (2) Different kinds of information may be prescribed:
 - (a) for different classes of persons to whom the information relates, or
 - (b) for different classes of persons to whom the information is supplied under this Act.
- (3) Subsection (2) does not limit the different kinds of information that may be prescribed.

Part 2 Access to birth certificates and other information

81 Adopted person's rights (cf AI Act s 6)

- (1) An adopted person is entitled to receive (subject to this Act):
 - (a) the person's original birth certificate, and
 - (b) any prescribed information relating to the person's birth parents held by an information source, and
 - (c) any prescribed information relating to an adopted brother or sister of the person held by an information source.
- (2) An adopted person who is less than 18 years old is not entitled to receive his or her original birth certificate or prescribed information except with the consent of:
 - (a) his or her surviving adoptive parents and surviving birth parents (as shown on the original birth certificate), or
 - (b) the Director-General if there are no surviving adoptive parents or birth parents (as so shown) or if they cannot be found or if there is, in the opinion of the Director-General, any other sufficient reason to dispense with their consent.
- (3) An adopted person is not entitled to receive any prescribed information held by an information source unless:
 - (a) the adopted person produces to the information source his or her original birth certificate (being a certificate supplied under this Part), or
 - (b) his or her original birth certificate is held by that information source and will be supplied together with the prescribed information.

82 Adoptive parent's rights (cf AI Act s 7)

- (1) An adoptive parent of an adopted person is entitled to receive (subject to this Act):

- (a) the adopted person's original birth certificate, and
- (b) any prescribed information relating to the adopted person held by an information source.

(2) The adoptive parent is not entitled to receive the original birth certificate unless the adopted person is 18 or more years old and consents to the adoptive parent receiving it.

83 Birth parent's rights (cf AI Act s 8)

(1) A birth parent of an adopted person who is 18 or more years old is entitled to receive (subject to this Act):

- (a) the amended birth certificate of the adopted person if a memorandum of the adoption of the person is registered under the *Births, Deaths and Marriages Registration Act 1995*, and
- (b) any prescribed information relating to the adopted person or the adoptive parent or parents held by an information source.

(2) A man who claims to be the birth parent of an adopted person is entitled to receive an amended birth certificate or prescribed information if:

- (a) he is shown on the adopted person's original birth certificate as the person's father, or
- (b) he is a person whom the Director-General, Registrar or other information source is entitled to presume, under any law (including a law of another State or Territory or the Commonwealth), to be the person's father.

(3) A birth parent is not entitled to receive any prescribed information held by an information source unless the birth parent produces to the information source the amended birth certificate of the adopted person (being a certificate supplied under this Part) except as provided by subsection (4).

(4) A designated person may supply a birth parent with prescribed information held by an information source about an adopted child who is less than 18 years old without production of the amended birth certificate of the adopted person if, in the opinion of the designated person, the information could not be used to identify the adopted person or his or her adoptive parents.

Note. *Designated person* is defined in Part 1 of the Dictionary.

84 Access to adoption information by relatives and others after death of adopted person or birth parent (cf AI Act s 9)

(1) The Director-General may:

- (a) supply to a relative or spouse of a deceased adopted person or of a deceased birth parent, or to another person, the original or amended birth certificate of the adopted person or birth parent, or
- (b) supply to a relative or spouse of a deceased adopted person or of a deceased birth parent, or to another person, any prescribed information relating to, or which an adopted person or birth parent is entitled to receive relating to, the adopted person or birth parent, or

(c) after such consultation with the Registrar or other information source concerned as the Director-General considers necessary, authorise the Registrar or other information source to supply such a birth certificate or such prescribed information to a person nominated by the Director-General.

Note. *Spouse* is defined in Part 1 of the Dictionary.

(2) The Director-General must not supply a birth certificate or prescribed information to a person other than a relative or spouse (or authorise such action to be taken by an information source) unless the person had a de facto or other close personal relationship with the deceased person.

(3) The Director-General must not supply a birth certificate or prescribed information to any person (or authorise such action to be taken by an information source) unless the Director-General has taken into account any likely detriment to the welfare and best interests of any adopted person, birth parent, relative or spouse of the deceased person or the other person if the birth certificate or information is supplied.

(4) An information source so authorised by the Director-General to supply a birth certificate or prescribed information must supply that certificate or information to the person nominated by the Director-General.

(5) This section does not apply to prescribed information held by the Court.

85 Application for supply of birth certificate or prescribed information (cf AI Act s 10)

(1) An application for the supply of an original birth certificate under this Part is to be made in writing to:

(a) if the person's birth is registered under the *Births, Deaths and Marriages Registration Act 1995*—the primary information source, or

(b) if the person's birth is not so registered but his or her original birth certificate is held by an information source—that information source.

(2) An application for the supply of an amended birth certificate under this Part is to be made in writing to the primary information source.

(3) An application for the supply of prescribed information held by an information source is to be made in writing to the information source.

(4) The regulations may make provision for or with respect to the making of applications under this Part.

86 Persons designated to deal with applications (cf AI Act s 11)

(1) An application for the supply of a birth certificate or prescribed information under this Part is to be dealt with by the designated person.

(2) The designated person is required to supply the birth certificate or prescribed information if satisfied that the applicant is entitled under this Act to receive it.

(3) This section does not apply to the Supreme Court.

Note. *Designated person* is defined in Part 1 of the Dictionary.

87 Discretion to supply birth certificate or prescribed information (cf AI Act s 12)

(1) The Director-General may supply (or authorise an information source to supply) any birth certificate or prescribed information before an entitlement to the certificate or information arises under this Part if, in the opinion of the Director-General, it would promote the welfare and best interests of either or both of the parties concerned.

(2) The Director-General may act under subsection (1) in any case in which an entitlement to prescribed information has not arisen because of the failure to obtain a birth certificate under this Part.

(3) The Director-General may supply (or authorise an information source to supply) any birth certificate or prescribed information to a sibling of an adopted person or any other person who is not entitled under this Act to receive the birth certificate or prescribed information under this Part if, in the opinion of the Director-General, it is appropriate to do so because of exceptional circumstances affecting the interests or welfare of any person.

88 Discretion to withhold supply (or authorise the withholding of supply), to supply information or to supply it subject to conditions (cf AI Act s 12A)

(1) The following persons may request the Director-General to act under this section:

- (a) an adopted person who is 18 or more years old,
- (b) a birth parent,
- (c) an adoptive parent of a person who is less than 18 years old,
- (d) an adoptive parent of a person who is 18 or more years old and who has consented to the request being made.

(2) The Director-General may, at the request of a person referred to in subsection (1):

- (a) refuse to supply (or, if the regulations provide for the issue of a supply authority, to issue a supply authority authorising an information source to supply) any birth certificate or prescribed information to which an entitlement arises under this Part, or
- (b) supply such a certificate or information subject to conditions specified in writing by the Director-General, or
- (c) if the regulations provide for the issue of a supply authority, issue a supply authority authorising an information source only to supply, subject to compliance with conditions specified by the Director-General, any birth certificate or prescribed information.

(3) The Director-General may refuse to supply a birth certificate or prescribed information under this section only if, in the opinion of the Director-General, exceptional circumstances exist that make it necessary to do so to prevent serious harm to a party concerned.

(4) Conditions that may be imposed by the Director-General under this section include conditions requiring the person entitled to the birth certificate or prescribed information to undergo counselling by a person specified by the Director-General before the certificate or information is supplied.

(5) The Director-General must deal with a request under this section in accordance with any guidelines prescribed by the regulations.

(6) An information source must not supply any birth certificate or prescribed information the subject of a supply authority imposing conditions on its supply unless the conditions are complied with.

(7) The Director-General may not (despite section 5 of the *Community Welfare Act 1987*) delegate to another person the exercise of any function of the Director-General under this section.

89 Guidelines for release of prescribed information etc (cf AI Act s 13)

An information source which supplies any birth certificate or prescribed information pursuant to an application under this Act is required to comply with any relevant guidelines prescribed by the regulations.

90 Access to Court records (cf AI Act s 14)

(1) A person is not entitled to receive prescribed information under this Act from records of proceedings in the Supreme Court relating to the adoption of a person, except as provided by this section.

(2) A person may apply to the Supreme Court for the supply of the information.

(3) The Supreme Court or a proper officer of the Court may supply the information to the person.

(4) Rules of court may be made for or with respect to orders under this section.

91 Unauthorised disclosure of information (cf AI Act s 15)

(1) A person must not disclose any information relating to an adopted person, birth parent or adoptive parent obtained in connection with the administration or execution of this Chapter, except:

(a) in connection with the administration or execution of this Chapter, or

(b) as authorised or required by law.

(2) In any proceedings concerning this Chapter before any court or tribunal, the court or tribunal may make an order forbidding publication of all or any of the information mentioned in the proceedings relating to an adopted person, birth parent, adoptive parent, relative or other person.

(3) A person must not publish information in breach of an order made under this section.

Maximum penalty: 10 penalty units or imprisonment for 12 months, or both.

Part 3 Advance notice

92 Object of Part (cf AI Act s 15A)

The object of this Part is to establish an advance notice system to enable the release of personal information under the Part to be delayed for a fixed period to give the person

requesting the delay the opportunity to prepare for the release and any impact this might have on the person or the person's family or associates.

93 Definitions (cf AI Act s 15B)

In this Part:

advance notice period means:

- (a) the period after an application for personal information relating to a person is made (not being greater than 3 months) prescribed by the regulations for the purposes of this paragraph, or
- (b) if the Director-General so directs in relation to a particular advance notice request, such longer period (not being greater than the period (if any) prescribed by the regulations) after an application for personal information relating to a person is made as is specified by the Director-General.

nominated contact address means the address entered on the Advance Notice Register under section 96 (2) (b).

personal information relating to a person means:

- (a) the person's original birth certificate or amended birth certificate, or
- (b) prescribed information relating to the person, or
- (c) if the regulations authorise supply of a birth certificate or prescribed information relating to the person on issue of a supply authority—such a supply authority.

94 Who may lodge an advance notice request? (cf AI Act s 15C)

A person is entitled to lodge a request to be given advance notice before personal information relating to the person is given to another person if the person seeking to lodge the request is:

- (a) an adopted person who has reached the age of 17 years and 6 months, or
- (b) a birth parent, or
- (c) an adoptive parent.

95 How advance notice request is lodged (cf AI Act s 15D)

(1) A person entitled to lodge an advance notice request may do so by advising the Director-General in writing that he or she wishes to be notified if a particular person or a person within a class of persons entitled to receive the personal information concerned specified in the advice makes an application for personal information relating to the person lodging the advance notice request.

(2) The advice is to be in a form approved by the Director-General.

(3) An advance notice request is not duly lodged unless the person provides the Director-General with proof (to the satisfaction of the Director-General) of his or her identity.

(4) A person lodging an advance notice request may also leave a message for a person concerned in or affected by an adoption with the Director-General for placement on the Reunion and Information Register.

96 Advance Notice Register (cf AI Act s 15E)

(1) The Director-General is to establish and maintain an Advance Notice Register.

(2) There is to be entered in the Advance Notice Register:

(a) the name of each person who has duly lodged an advance notice request, and

(b) the address nominated by the person as the address at which any personal or postal contact by the Director-General with the person should be made, and

(c) the date and place of birth of the person, and

(d) the persons or class of persons affected by the request, and

(e) the advance notice period.

(3) The Director-General (unless the Director-General is the primary information source) is to advise the relevant primary information source of each entry made in the Advance Notice Register.

(4) A person whose name is entered in the Advance Notice Register is to advise the Director-General of any change in his or her nominated contact address.

97 Primary information source to delay issue of supply authority or prescribed information (cf AI Act s 15F)

The primary information source is to delay the supply of personal information affected by an advance notice registration until the expiration of the advance notice period unless the registration is waived or cancelled under section 100.

98 Endorsement of details of advance notice request (cf AI Act s 15G)

The primary information source is to advise the applicant for the supply of the personal information that it will not be supplied until the expiration of the advance notice period and of the reasons for the delay.

99 Expiration of advance notice registration (cf AI Act s 15H)

An advance notice registration expires:

(a) on expiration of the advance notice period, or

(b) if the person who lodged the request for registration cancels it by notification in writing to the Director-General, or

(c) if the person who lodged the request dies, or

(d) if a contact veto is lodged by the person who lodged the request, or

(e) if the person who lodged the request fails to notify the Director-General in writing of any change in his or her nominated contact address,

whichever is the sooner.

100 Arrangements to waive or cancel advance notice period (cf AI Act s 15I)

(1) The Director-General may, at the request of a person seeking supply of personal information that is affected by an advance notice registration, ask the person who lodged the advance notice request whether he or she wishes to waive or cancel the registration.

(2) The Director-General is not to do so unless the Director-General:

(a) is of the opinion that the personal information is required urgently and that circumstances exist that justify asking the person to waive or cancel the registration in order to promote the welfare and best interests of either or both of the parties concerned, and

(b) has consulted any person or body that the Director-General believes may be of assistance in assessing the merits of the request.

(3) The Director-General may arrange for either or both of the parties concerned in a request under this section to be provided with such counselling as the Director-General believes is necessary to assist them and the Director-General in the matter.

(4) The Director-General must deal with a request under this section in accordance with any guidelines prescribed by the regulations.

101 Notification to person who lodged advance notice request (cf AI Act s 15J)

(1) The Director-General is to notify a person who has lodged an advance notice request at the person's nominated contact address of an application under this Part for the supply of personal information affected by the registration, unless it is not reasonably practicable to notify the person.

(2) The Director-General is entitled to rely on the address shown in the Advance Notice Register for this purpose and is not subject to any action, liability, claim or demand in respect of any notification given in good faith at that address.

Part 4 Contact vetoes

102 Adopted person or birth parent may lodge contact veto (cf AI Act s 16)

The following persons may lodge a contact veto:

(a) an adopted person who has reached the age of 17 years and 6 months,

(b) a birth parent.

103 Contact veto may be lodged only for certain adoptions (cf AI Act s 17)

A person may lodge a contact veto only if:

(a) the order for adoption of the adopted person was made under the *Adoption of Children Act 1965* (or a former Act within the meaning of that Act) before the date of assent to the *Adoption Information Act 1990*, or

(b) the adoption of the adopted person in another State or Territory or in a country outside the Commonwealth and the Territories was recognised under the *Adoption of Children Act 1965* as having been effected before the date of assent to the *Adoption Information Act 1990*.

104 How contact veto is lodged (cf AI Act s 18)

- (1) A person entitled to lodge a contact veto may do so by notifying the Director-General in writing that he or she objects to contact being made with him or her by a person or any class of persons referred to in the notification.
- (2) The notification is to be in a form approved by the Director-General.
- (3) A contact veto is not duly lodged unless the person provides the Director-General with proof (to the satisfaction of the Director-General) of his or her identity.
- (4) A person lodging a contact veto may also leave a message for a person concerned in or affected by an adoption with the Director-General for placement on the Reunion and Information Register.

105 Contact Veto Register (cf AI Act s 19)

- (1) The Director-General is to establish and maintain a Contact Veto Register.
- (2) There is to be entered in the Contact Veto Register:
 - (a) the name of each person who has duly lodged a contact veto, and
 - (b) the address nominated by the person as the address at which any personal or postal contact by the Director-General with the person should be made, and
 - (c) the date and place of birth of the person, and
 - (d) the persons or class of persons with whom the person objects to contact, and
 - (e) the name and address for notification of each person who has duly requested under this Act that he or she be notified of the cancellation or variation of a contact veto.

106 Director-General to advise primary information source (cf AI Act s 20)

The Director-General is (unless the Director-General is the relevant primary information source) to advise the primary information source of the details of each contact veto entered in the Contact Veto Register.

107 Primary information source to endorse details of contact veto on birth certificate (cf AI Act s 21)

- (1) The primary information source is required to endorse details of each contact veto on the original birth certificate or amended birth certificate of the adopted person to whom the contact veto relates that is supplied by the primary information source under this Act.
- (2) An information source (other than the primary information source) which is requested to supply an original birth certificate under this Act is required:

- (a) to ascertain from the Director-General whether there is a contact veto relating to the adopted person concerned, and
- (b) if so, to endorse details of the contact veto on the original birth certificate before it is supplied under this Act.

(3) The regulations may require a primary information source to endorse details of each contact veto on any memorandum of adoption of a person or other document concerning an adopted person to whom the contact veto relates that is supplied by the primary information source.

108 When contact veto takes effect (cf AI Act s 22)

- (1) In this section, *relevant period* means the period of 5 working days or, if a different period is prescribed by the regulations, that period.
- (2) A contact veto takes effect on the expiration of the relevant period or after details of the contact veto are endorsed on the original birth certificate or amended birth certificate concerned, whichever occurs sooner.

109 Expiration of contact veto (cf AI Act s 23)

- (1) A contact veto expires if:
 - (a) the person who lodged the contact veto cancels it by notification in writing to the Director-General, or
 - (b) the person who lodged the contact veto dies.
- (2) The Director-General is (unless the Director-General is the relevant primary information source) to advise the primary information source of the expiration of a contact veto unless it is caused by a death of which the Director-General is not aware.

110 Arrangements to confirm, cancel or vary contact veto at request of person seeking contact (cf AI Act s 24)

- (1) The Director-General may, at the request of a person who has been refused contact under a contact veto, approach the person who lodged the contact veto and ask the person whether he or she:
 - (a) wishes to confirm the contact veto, or
 - (b) wishes to cancel the contact veto, or
 - (c) wishes to vary the contact veto in so far as it relates to contact with the person who has made the request.
- (2) The Director-General is not to approach the person who lodged the contact veto unless the Director-General:
 - (a) is of the opinion that circumstances exist that justify the approach in order to promote the welfare and best interests of either or both of the parties concerned, and
 - (b) has consulted the Director-General of the Department of Health and any other relevant authority the Director-General believes may be of assistance in assessing the merits of the request for the person to be approached.

(3) The Director-General may arrange for either or both of the parties concerned in a request under this section to be provided with such counselling as the Director-General believes is necessary to assist them and the Director-General in the matter.

(4) The Director-General must deal with a request under this section in accordance with any guidelines prescribed by the regulations.

111 Notification to person who lodged contact veto of request for information (cf AI Act s 25)

(1) The Director-General is required to notify a person who has lodged a contact veto of an application under this Act for the supply of a birth certificate or prescribed information made by any person with whom contact is refused, unless the Director-General is unaware of the application or it is not reasonably practicable to notify the person.

(2) This subsection applies where a person is directed by the Guardianship Board under Part 4A of the *Guardianship Act 1987* to make an application for supply of a birth certificate or prescribed information on behalf of a person with a disability with whom contact is refused. The Director-General is required to notify the person who lodged the contact veto if such an application is made.

112 Notification to person affected by contact veto of cancellation or variation (cf AI Act s 26)

The Director-General is required to notify a person of any cancellation or variation of a contact veto that affects the person if the person requests the Director-General to do so at the time the person receives a birth certificate or information subject to the contact veto.

113 Undertakings not to contact person who has lodged contact veto (cf AI Act s 27)

(1) The primary information source or other information source is not to supply an original birth certificate or amended birth certificate endorsed with a contact veto against contact by the applicant unless the applicant has signed an undertaking that the applicant will not (while the contact veto remains in force):

(a) contact or attempt to contact the person who has lodged the contact veto,
or

(b) procure another person to contact or attempt to contact the person.

(2) An information source is not to supply any prescribed information to an adopted person relating to an adopted brother or sister unless the Director-General is notified of the application for the information and is given an opportunity to ascertain whether a contact veto has been lodged in relation to contact with the adopted person.

(3) If such a contact veto has been lodged, an information source is not to supply the information unless the applicant has signed an undertaking of the kind referred to in subsection (1).

(4) The Director-General may, as a condition of the supply to a person of any certificate or information under section 87 which is subject to a contact veto, require the person to sign an undertaking of the kind referred to in subsection (1).

(5) This section does not apply to an applicant who has been directed by the Guardianship Board under Part 4A of the *Guardianship Act 1987* to make the application on behalf of a person with a disability.

Part 5 Reunion and Information Register

114 Definition (cf AI Act s 30)

In this Part:

register means the Reunion and Information Register established under this Part.

115 Reunion and Information Register (cf AI Act s 31)

- (1) The Director-General is to establish a Reunion and Information Register.
- (2) There is to be entered in the register:
 - (a) the name of every person who is eligible to have his or her name entered in the register and who has duly applied for entry of his or her name with a view to a reunion with a person from whom he or she has been separated as a consequence of an adoption, and
 - (b) the name of every person who is eligible to have his or her name entered in the register and who has duly applied for entry of his or her name with a view to leaving a message for a person concerned in or affected by an adoption.
- (3) Application for entry in the register is to be made in a form approved by the Director-General.

116 Message may be left (cf AI Act s 31A)

Any person whose name is entered in the register may leave a message for any other person entitled (subject to this Act) to have his or her name entered in the register.

117 Director-General may refuse to enter name or take message (cf AI Act s 31B)

The Director-General may refuse to enter the name of a person in the register or to accept a message from any person if, in the opinion of the Director-General, the person is not eligible to have the person's name entered in the register or has not duly applied for entry of his or her name in the register.

118 Circumstances in which Director-General may open, inspect and copy message (cf AI Act s 31C)

- (1) The Director-General may open, inspect and copy any message left under this Part for an adopted person who is less than 18 years old.
- (2) The Director-General may, at the request of a person whose name is entered in the register or of the person for whom a message has been left under this Part, open and inspect the message.

119 Director-General may delay delivery of message (cf AI Act s 31D)

The Director-General may delay giving a person a message that the Director-General has been requested to open and inspect if the Director-General is of the opinion that the content of the message is likely to be so distressing for the person that it should be made available to the

person only in the presence of appropriate counsellors or other persons able to assist the person.

120 Regulations (cf AI Act s 31E)

The regulations may make provision for or with respect to the leaving and delivery of messages under this Part.

121 Persons eligible to have their names entered in the register (cf AI Act s 32)

(1) The following persons are eligible to have their names entered in the register:

- (a) an adopted person,
- (b) a birth parent,
- (c) an adoptive parent,
- (d) any other person having an interest in an adopted person or birth parent (including a relative) who, in the opinion of the Director-General, ought to have his or her name entered in the register.

(2) A person who is less than 18 years old is not eligible to have his or her name entered in the register, except as provided by this section.

(3) An adopted person who is less than 18 years old is eligible to have his or her name entered in the register if:

- (a) the adopted person is 12 or more years old and the person's adoptive parents have consented in writing to his or her name being entered in the register, or
- (b) the adopted person is 16 or more years old and is living separately and apart from his or her adoptive parents, or
- (c) the adopted person is 12 or more years old and, in the opinion of the Director-General, special circumstances exist which make it desirable that his or her name should be entered in the register.

(4) However, the Director-General is not to enter in the register the name of an adopted person who is less than 18 years old unless the Director-General is of the opinion that to do so will promote the welfare and best interests of the adopted person.

(5) The consent of an adoptive parent is not required under subsection (3) (a) for the entry in the register of the name of an adopted person who is less than 18 years old if the adoptive parent:

- (a) is dead, or
- (b) cannot, after due search and inquiry, be found, or
- (c) is, in the opinion of the Director-General, incapable of giving consent.

(6) The name of a person may not be entered in the register by another person on his or her behalf.

122 Arrangements for reunion of registered persons (cf AI Act s 33)

(1) If the names of an adopted person and of a birth parent have been entered in the register under section 115 (2) (a), the Director-General may make arrangements for a reunion between the persons so registered.

(2) If the names of an adopted person or birth parent and of a relative or other person having an interest in the adopted person or birth parent have been entered in the register under section 115 (2) (a), the Director-General may make arrangements for a reunion between the persons so registered.

(3) The Director-General is not to arrange a reunion involving an adopted person who is less than 18 years old if an adoptive parent refused to consent to the entry of the name of the adopted person in the register under section 115 (2) (a), unless:

(a) the adoptive parent consents in writing to the reunion, or

(b) the Director-General gives the adoptive parent not less than 90 days notice of the intention to arrange the reunion.

(4) The Director-General must notify any person whose name is entered in the register under section 115 (2) (a) of the entry in the register of the name of any other person from whom that person has been separated as a consequence of adoption.

123 Location of persons not registered (cf AI Act s 34)

(1) If the name of an adopted person has been entered in the register under section 115 (2) (a), the Director-General may take such action as is reasonable in the circumstances to locate a birth parent or relative of the adopted person or any other person with whom the adopted person wishes to be reunited, so as to ascertain whether any such person wishes to be reunited with the adopted person.

(2) If the name of a birth parent has been entered in the register under section 115 (2) (a), the Director-General may take such action as is reasonable in the circumstances to locate the adopted person, so as to ascertain whether the adopted person wishes to be reunited with the birth parent.

(3) If the name of a relative or other person having an interest in an adopted person or birth parent has been entered in the register under section 115 (2) (a), the Director-General may take such action as is reasonable in the circumstances to locate the adopted person or birth parent, so as to ascertain whether the adopted person or birth parent wishes to be reunited with the relative or other person.

(4) The Director-General may take action to locate a person under this section only if the Director-General is satisfied that it will promote the welfare and best interests of the parties concerned and it is appropriate to do so:

(a) on medical, psychiatric or psychological grounds relating to one of the registered parties, or

(b) on any other ground relating to unusual or extreme circumstances affecting the interests or welfare of a party.

(5) The Director-General may take action to locate a person under this section even though the person has not, by entering his or her name in the register, expressed a desire to be reunited with the person whose name is entered in the register.

Part 6 Miscellaneous

124 Fees and charges (cf AI Act s 35)

- (1) The Director-General or other information source may demand fees or charges in respect of the supply of documents or information, or the provision of services, under this Chapter.
- (2) The Director-General is to notify, in the Gazette, the fees or charges payable under this Chapter to the Director-General and (if the Director-General has been so informed) to other information sources.
- (3) A notice under subsection (2) may specify the minimum fees or charges payable in respect of the supply of any documents or information, or provision of any service, under this Chapter.
- (4) The Director-General or other information source may waive or reduce any fees or charges (other than a minimum fee or charge referred to in subsection (3)) payable under this Chapter.
- (5) The fees or charges for the supply of a birth certificate under this Chapter are payable to the Director-General and are in addition to any fees or charges payable under the *Births, Deaths and Marriages Registration Act 1995* or to an information source which supplied the certificate.
- (6) The regulations may make provision for or with respect to fees and charges payable under this Chapter.

125 Internal review (cf AI Act s 35A)

- (1) A person who is aggrieved by a decision of the Director-General made under or for the purposes of this Chapter on or after the commencement of this section may apply for review of the decision.
- (2) An application for a review is to be in a form approved by the Director-General.
- (3) On receipt of an application to review a decision, the Director-General is to review the decision and to notify the applicant of confirmation or otherwise of the decision.
- (4) In reviewing a decision, the Director-General is to consider any material submitted by the applicant.
- (5) The Director-General is taken to have reviewed a decision if the applicant is not notified of the outcome of the review within 30 days after the application for review was duly made.
- (6) This section applies whether or not the decision concerned is one that may be the subject of an appeal to the Community Services Appeals Tribunal.
- (7) The regulations may prescribe requirements to be observed in relation to a review under this section.

126 Entitlements of disabled persons (cf AI Act s 36A)

- (1) In this section a reference to a person with a disability is a reference to a person:
 - (a) who is intellectually, physically, psychologically or sensorily disabled, or
 - (b) who is of advanced age, or

(c) who is a mentally ill person within the meaning of Chapter 3 of the *Mental Health Act 1990*, or

(d) who is otherwise disabled,

and who, because of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social rehabilitation.\

(2) If a person with a disability:

(a) has an entitlement to receive a birth certificate or prescribed information, or may lodge a contact veto or advance notice request, under this Act, and

(b) is unable, because of the disability, to do anything required by this Act that must be done if the person is to receive the birth certificate or prescribed information or lodge the contact veto or advance notice request,

another person may, if so directed by the Guardianship Board under Part 4A of the *Guardianship Act 1987*, do any such act on behalf of the person with the disability.

(3) The Director-General may:

(a) refuse to supply (or, if the regulations provide for the issue of a supply authority, refuse to issue a supply authority authorising an information source to supply) any birth certificate endorsed with a contact veto to a person acting on behalf of a person with a disability, or

(b) direct an information source not to supply any such birth certificate,

if the Director-General is of the opinion that the person will be unable to ensure that the person with the disability will not contact or attempt to contact the person who lodged the contact veto.

127 Manner of giving notice (cf AI Act s 37)

(1) Any notice required to be given to a person by the Director-General under this Chapter may be given personally or by post.

(2) If any such person has duly nominated an address at which the person is to be notified, the notice may be given to the person only at that address.

128 Duties of Director-General and accredited intercountry adoption agencies

The Director-General or accredited intercountry adoption agency must ensure that information held by them, concerning the child's origin, identity of birth parent and medical history is preserved and that access to such information is given to the adoptive parents and the child in accordance with this Chapter.

Chapter 7 - Offences

129 Territorial application of Chapter (cf AC Act s 48)

This Chapter:

- (a) does not apply to acts outside this State, and
 - (b) unless otherwise expressly provided, does apply to acts in this State in relation to:
 - (i) the adoption of a child in, or
 - (ii) a person adopted in,
- another State or a Territory or a country other than Australia.

130 Payments for NSW adoptions or intercountry adoptions and adoption services (cf AC Acts 50)

(1) Subject to this section, a person who (whether before or after the birth of the child concerned) makes, gives or receives, or agrees to make, give or receive, a payment or reward for or in consideration of or in relation to:

- (a) the adoption or proposed adoption of a child, or
- (b) the giving of consent, or the signing of an instrument of consent, to the adoption of a child, or
- (c) conducting an adoption service in relation to a child,

is guilty of an offence against this Act.

Maximum penalty: 10 penalty units or imprisonment for 12 months, or both.

(2) This section does not apply to or in relation to any of the following payments or rewards in connection with an adoption or proposed adoption under this Act:

- (a) a payment of legal expenses or fees authorised by the regulations, and
- (b) a payment made by the adopters, with the approval in writing of the Director-General or with the approval of the Court, in respect of the hospital and medical expenses reasonably incurred in connection with the birth of the child or the ante-natal or post-natal care and treatment of the mother of the child or of the child, and
- (c) in the case of an intercountry adoption—a payment made by the adopters, with the approval of the Director-General or the Court, in respect of other expenses reasonably incurred of a class or description prescribed by the regulations, and
- (d) any other payment or reward authorised by the Director-General or by the Court.

(3) This section does not apply to or in relation to a payment or reward in connection with an adoption or proposed adoption under the law of another State or a Territory if the making of the payment or the giving of the reward, or the agreeing to make the payment or give the reward, would have been lawful if it had taken place in that other State or Territory.

(4) This section does not apply to charges made by the Director-General or a private adoption agency for providing adoption services under this Act.

131 Unauthorised advertising (cf AC Act s 52)

(1) A person must not publish, or cause to be published, in a newspaper or periodical, or by means of broadcasting, television or public exhibition, any advertisement, news item or other matter indicating (whether or not in relation to a particular child, born or unborn) that:

- (a) a parent or guardian of a child wishes to have the child adopted, or
- (b) a person wishes to adopt a child, or
- (c) a person is willing to make arrangements with a view to the adoption of a child.

(2) This section does not apply in relation to an advertisement, news item or other matter that has been approved by the Director-General.

Maximum penalty: 10 penalty units or imprisonment for 12 months, or both.

132 Restriction on publication of identity of parties (cf AC Act s 53)

(1) A person must not publish, or cause to be published, in a newspaper or periodical, or by means of broadcasting or television, in relation to an application under this Act or under a law of another State or a Territory for the adoption of a child or the proceedings on such an application, the name of an applicant, the child, or the father or mother or a guardian of the child, or any matter reasonably likely to enable any of those persons to be identified.

(2) This section does not apply in relation to the publication of any matter with the authority of the Court to which the application was made.

Maximum penalty: 10 penalty units or imprisonment for 12 months, or both.

133 False statement in application etc (cf AC Act s 54, AI Act s 38)

A person who makes any statement (whether orally or in writing) that the person knows to be false for the purposes of or in connection with:

- (a) a proposed adoption or any other matter under this Act, or
- (b) an application for the supply of a birth certificate or prescribed information under , or
- (c) the lodging of a contact veto under Part 4 of Chapter 6, or
- (d) an application for entry of the person's name in the Reunion and Information Register under Part 5 of Chapter 6, or
- (e) any other request under Chapter 6,

is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 6 months, or both.

134 Impersonation (cf AC Act s 55, AI Act s 39)

(1) A person who impersonates an adopted person, birth parent, adoptive parent, relative or other person having an interest in an adopted person in connection with any matter under Chapter 6 is guilty of an offence.

(2) Without limiting subsection (1), a person who impersonates or falsely represents himself or herself to be a person whose consent to the adoption of a child is required by this Act or by the law of another State or a Territory is guilty of an offence.

(3) A person who impersonates a person engaged in the administration or execution of Chapter 6 is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 6 months, or both.

135 Presenting forged consent (cf AC Act s 56)

If a person presents, or causes to be presented, to the Court in connection with an application for an order for the adoption of a child under this Act a document purporting to be an instrument of consent, or revocation of consent, to the adoption signed by a person whose consent to the adoption is required by this Act if the signature to the document is or was, to the knowledge of that firstmentioned person, forged or obtained by fraud or duress, that firstmentioned person is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 12 months, or both.

136 Undue influence (cf AC Act s 57)

A person who uses or threatens to use any force or restraint or does or threatens to do any injury, or causes or threatens to cause any detriment of any kind to a parent or guardian of a child with a view:

(a) to inducing that parent or guardian to offer or refrain from offering the child for adoption under this Act, or

(b) to influencing the parent or guardian in the expression of any wishes contained in an instrument of consent to the adoption of a child, or

(c) to inducing the parent or guardian to revoke a consent to the adoption of the child given by that parent or guardian,

is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 12 months, or both.

137 Improper witnessing of consent (cf AC Act s 58)

A person who subscribes his or her name as a witness to the signature of a person to an instrument of consent to the adoption of a child:

(a) without being satisfied that the person signing the instrument is a parent or guardian of the child, and

(b) without taking such steps as are prescribed by the regulations to satisfy himself or herself that the person signing the instrument understands the effect of the consent, and

- (c) without being satisfied that the instrument bears the date on which it is signed by the person giving the consent,

is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 12 months, or both.

138 Prohibition on contact with birth parents of child

An applicant to adopt a child must not:

- (a) contact or attempt to contact a birth parent of the child, or
- (b) procure another person to contact or attempt to contact a birth parent,

(whether in or outside New South Wales) before the child has been allocated to the applicant and the allocation has been accepted.

Maximum penalty: 10 penalty units or 12 months imprisonment, or both.

139 No improper payments made in respect of adoption of the child

(1) A person who:

- (a) makes any payment or gives compensation of any kind to a birth parent for relinquishing a child adopted from outside Australia or for any consent to an adoption, or
- (b) gives or takes any improper financial gain,

is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 12 months, or both.

(2) For the purposes of this section, an adoption is not taken to be for financial gain if the transactions concerned cover expenses (including legal expenses) reasonably incurred or for reasonable remuneration for work done.

140 Veto on contact—offences (cf AI Act s 28)

(1) An information recipient must not:

- (a) contact or attempt to contact the person who lodged a contact veto against contact by the information recipient, or
- (b) procure another person to contact or attempt to contact that person.

(2) An information recipient must not:

- (a) use information obtained under this Act to intimidate or harass the person who lodged a contact veto against contact by the information recipient, or
- (b) procure any other person to intimidate or harass that person by the use of that information.

(3) A person is not to claim to act on behalf of or hold himself or herself out as being willing to act on behalf of another person with a view to contravening this section.

(4) In this section:

information recipient means an adopted person, adoptive parent, birth parent, relative or other person:

- (a) who has received an original birth certificate or amended birth certificate endorsed with a contact veto against contact by him or her (being a contact veto that remains in force), or
- (b) who has had disclosed to him or her prescribed information under this Act and who has knowledge that a contact veto against contact by him or her is then in force.

Maximum penalty: 25 penalty units or imprisonment for 6 months, or both.

Chapter 8 - Records of adoptions

141 Functions of nominated officer in relation to orders under this Act (cf AC Act s 61)

The nominated officer is to cause a memorandum, in accordance with the form prescribed by the regulations, of every adoption order, declaration under section 77, order under section 78 and order for the discharge of an adoption order, to be sent to the Registrar and is to cause a copy of the memorandum to be sent to the Director-General.

Note. *Nominated officer* is defined in Part 1 of the Dictionary.

142 Sending of memoranda of orders to other States and Territories (cf AC Act s 62)

If the Court makes an adoption order, or an order discharging an adoption order, and the nominated officer has reason to believe that the birth or previous adoption of the child is registered in another State or a Territory, the nominated officer is, as soon as practicable, to cause a memorandum, in the form prescribed by the regulations, of the adoption order, or a copy of the discharging order, certified in writing by the nominated officer to be a true memorandum or copy, to be sent to such officer of that other State or Territory having functions in relation to the registration of births as is prescribed by the regulations.

143 Particulars of orders received from other States or Territories (cf AC Act s 63)

If the nominated officer receives, in relation to a child whose birth or previous adoption is registered in New South Wales, a memorandum or copy of an adoption order made (whether by a court or not) under the law in force in another State or a Territory, or of an order discharging such an order, certified in writing to be a true memorandum or copy by a person authorised so to certify under the law of that other State or Territory, the nominated officer is to cause a memorandum, in the form prescribed by the regulations, of the memorandum or copy so received to be sent to the Registrar.

144 Report for applicants where child overseas (cf AC Act s 65A)

(1) If an application is made to the Director-General for a report relating to the suitability of an applicant or applicants for adopting a child from a place outside Australia (whether or not the child is identified), the Director-General may:

- (a) assess the applicant or applicants, and
- (b) prepare the report.

(2) A report under this section may contain:

- (a) information about the applicant or applicants that has been obtained from such persons as the Director-General considers appropriate, and
- (b) an assessment by the Director-General of any such information, and
- (c) such other information as the Director-General considers appropriate.

145 Restriction on inspection of records (cf AC Act s 67)

Except as provided by the regulations and Chapter 6, the records of any proceedings under this Act or the former Acts are not to be open to inspection by any person.

Chapter 9 - Proceedings

146 Hearings to be in camera (cf AC Act s 64)

(1) Any proceeding heard by the Court under this Act or the regulations must be heard in closed court.

(2) Persons who are not parties to the proceeding or their barristers, solicitors or representatives must, except as otherwise permitted by the Court, be excluded during the hearing of the proceeding.

147 Director-General may appear at hearings (cf AC Act s 68)

The Director-General may appear at the hearing of any application under this Act, and may address the Court, and call, examine and cross-examine witnesses.

148 Court may require attendance

(1) The Court may require any party to the proceedings for an adoption order to attend personally before the Court.

(2) The Court may require the child and prospective adoptive parents to attend personally before the Court at such time during the hearing of the application as the Court directs.

149 Court's powers with respect to representation for children

(1) If, in proceedings under this Act, the Court considers that a child ought to have separate representation the Court may, on its own motion or on the application of any interested person:

- (a) order that the child be separately represented, and
- (b) make such other orders as it thinks necessary for the purpose of securing that representation.

(2) The Court may, in proceedings before it with respect to the adoption of a child, appoint a person to act as guardian *ad litem* for the child.

(3) The Court may give such directions as to the exercise of the guardian's functions as it thinks fit.

150 Contents of reports not to be disclosed (cf AC Act s 66)

Except as the Court otherwise orders, a report to the Court referred to in section 52, 60 or 144 must not be made available to any person, including a party to the proceedings.

151 Matters admissible in evidence (cf AC Act s 65)

Except as otherwise provided by this Act or the regulations, the Court, in the hearing of any proceedings or in determining any application or matter under this Act or the regulations, may act on any statement, document, information, or matter that may, in its opinion, assist it to deal with the matter of the proceedings or before it for determination whether or not the statement, document, information or matter would be admissible in evidence.

152 Wishes of child (cf AC Act ss 33, 38, AC Reg cl 28)

(1) In proceedings before it, the Court is to take into account any wishes and feelings of the child (considered in the light of the child's age and understanding) that are volunteered by the child.

(2) The Court may direct that a child be provided with such counselling as the Court considers appropriate.

153 How wishes of a child are expressed

If the Court is required by this Act to consider any wishes expressed by a child, the Court may inform itself of wishes expressed by the child:

- (a) by having regard to anything contained in a report made to the Court by the Director-General or the principal officer of a private adoption agency, or
- (b) subject to rules of court, by such other means as the Court considers appropriate.

154 Children not to be required to express wishes

Nothing in this Act requires the Court or any person to require the child to express his or her wishes in relation to any matter.

Chapter 10 - Miscellaneous

Introduction. This Chapter contains various provisions relating to the general operation of the Act. The Chapter also repeals the *Adoption of Children Act 1965* and the *Adoption Information Act 1990*.

155 Appeals to the Community Services Appeals Tribunal (cf AC Act s 67A, AI Act s 36)

- (1) An appeal against a decision made under or for the purposes of this Act by the Director-General may be made to the Community Services Appeals Tribunal if the decision:
- (a) is to refuse approval of an adoption agency or accredited intercountry adoption agency, or
 - (b) is to revoke or suspend the approval of an adoption agency or accredited intercountry adoption agency, or
 - (c) is against a refusal or failure of the Director-General:
 - (i) to supply any birth certificate or prescribed information to a person, or to authorise the Registrar or another information source to do so under Chapter 6, or
 - (ii) to enter the name of any person in a register under Chapter 6, or
 - (iii) to arrange a reunion or take action to locate a person under Part 5 of Chapter 6, or
 - (iv) to approach a person who has lodged a contact veto in accordance with a request made under section 110, or
 - (d) is within a class of decisions prescribed by the regulations for the purposes of this section.
- (2) If there is a failure to make within a reasonable time a decision that, if made, could be the subject of an appeal under this section, the Tribunal may:
- (a) treat the failure as an unfavourable decision with respect to the applicant for the decision, and
 - (b) permit the applicant to appeal to the Tribunal as if the unfavourable decision had in fact been made.
- (3) An appeal may not be made under this section to the Community Services Appeals Tribunal against a decision of the Director-General under Chapter 6 until the decision has been reviewed under section 125.

156 Provision of financial and other assistance to certain children (cf AC Act s 68A)

- (1) The Director-General may, with respect to a child of a class or description prescribed by the regulations, enter into an agreement with:
- (a) a person or persons with whom the child has been placed for the purposes of adoption, or
 - (b) the applicant, or applicants, for an adoption order in respect of the child, or
 - (c) the adoptive parent, or adoptive parents, of the child,

for the provision of such financial or other assistance, on such terms and conditions as may be agreed, in order to assist or promote the best interests of the child.

- (2) Nothing in this section prevents the Director-General from entering into an agreement in relation to a child so as to provide financial or other assistance both before and after an adoption order in respect of the child is made.

157 Administration of certain estates (cf AC Act s 68B)

(1) In this section, a reference to the executor or administrator of the estate of a deceased person includes a reference to a person who is a trustee of the whole or any part of the property comprised in the estate.

(2) If:

(a) an adopted person is a beneficiary under the estate of a deceased person, and

(b) the executor or administrator of the estate does not know the name or whereabouts of the adopted person, and

(c) the Director-General certifies, in writing, to the executor or administrator that the Director-General knows the name and whereabouts of the adopted person and that the adopted person is alive,

the executor or administrator may, with the approval of the Director-General, transfer to the Director-General, on behalf of the adopted person, any property to which the adopted person may be entitled under the estate or which may be otherwise applied for the adopted person's benefit.

(3) A transfer made under this section is valid against all persons and the executor or administrator is absolutely discharged from all liability in respect of a transfer so made by the executor or administrator.

(4) The Director-General is to apply any property transferred to the Director-General under this section on behalf of the adopted person in respect of whom it was transferred in accordance with the trusts on which the property was held immediately before it was transferred as if the Director-General were the executor or administrator of the estate of the deceased person in respect of which the transfer was made.

(5) Nothing in this section affects any right of a person to claim or recover any property transferred under this section from a person other than the executor or administrator who transferred the property.

158 Proceedings for offences (cf AC Act s 60, AI Act s 40)

(1) Proceedings for an offence against this Act or the regulations are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

(2) Proceedings for an offence against this Act or the regulations may be commenced:

(a) within but not later than 12 months after the date on which the offence is alleged to have been committed, or

(b) within but not later than 6 months after the date on which evidence of the offence first came to the attention of any relevant authorised officer,

whichever is the later time.

(3) If subsection (2) (b) is relied on for the purpose of commencing proceedings for an offence, the information or application must contain particulars of the date on which evidence of the offence first came to the attention of any relevant authorised officer and need not contain particulars of the date on which the offence was committed. The date on which evidence of the offence first came to the attention of any relevant authorised officer is the date specified in the information or application, unless the contrary is established.

(4) This section applies despite anything in the *Justices Act 1902* or any other Act.

(5) In this section:

evidence of an offence means evidence of any act or omission constituting the offence.

relevant authorised officer means a person prescribed by the regulations as a relevant authorised officer for the purposes of this definition.

159 Exclusion from proceedings (cf AC Act s 60, AI Act s 40)

(1) At the hearing of any proceedings in respect of an offence against this Act or the regulations, any person not directly interested in the proceedings is to be excluded from the court, unless the court otherwise directs.

(2) A court may:

(a) direct a child to leave the court at any time during the hearing of any proceedings in respect of an offence against this Act or the regulations, or

(b) direct any person to leave the court during the examination of any witness in any such proceedings,

if the court is of the opinion that, in the interests of a child, such a direction should be given.

(3) The powers of the court under subsection (2) may be exercised even though the child or person directed to leave the court may be directly interested in the proceedings.

(4) This section applies to and in respect of the hearing of any appeal against the decision of a court in the same way as it applies to and in respect of the hearing of proceedings before the court.

160 Authority to prosecute (cf AC Act s 59, AI Act s 40)

(1) Proceedings for an offence against this Act or the regulations must not be commenced except with the written consent of the Minister.

(2) Proceedings for an offence against section 140 (Veto on contact—offences) may be instituted only with the written consent of the Attorney General.

(3) In any proceedings referred to in subsection (2), a consent purporting to have been signed by the Attorney General is, without proof of the signature, evidence of that consent.

161 Rules of court (cf AC Act s 72)

(1) Rules of court may be made under the *Supreme Court Act 1970* regulating practice and procedure in respect of proceedings under this Act.

(2) Subsection (1) does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.

162 Regulations (cf AC Act s 73, AI Act s 41)

(1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Without limiting the generality of subsection (1), regulations may be made for or with respect to the following:

(a) the exercise of any function conferred on a primary information source under Chapter 6 of this Act or any other Act (including, but not limited to, supply of a birth certificate or prescribed information by the primary information source in accordance with a supply authority issued by the Director-General),

(b) money paid in respect of adoption services provided by the Director-General or accredited intercountry adoption agencies in respect of intercountry adoptions and accounting for the expenditure of such money.

(3) A regulation may create an offence punishable by a penalty not exceeding 5 penalty units.

163 Repeals

The *Adoption of Children Act 1965* and the *Adoption Information Act 1990* are repealed.

164 Amendment of other laws

Each law specified in Schedule 1 is amended as set out in that Schedule.

165 Savings, transitional and other provisions

Schedule 2 has effect.

166 Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Schedule 1 - Amendment of other laws

(Section 164)

1.1 Births, Deaths and Marriages Registration Act 1995 No 62

[1] Section 23 Duty to register adoptions

Omit the definition of **State adoption order** from section 23 (3).

Insert instead:

State adoption order means an adoption order or order under section 77

(Declarations of validity of foreign adoptions) under the *Adoption Act 1997* .

[2] Sections 24 and 25

Omit “section 61 or 63 of the *Adoption of Children Act 1965*” wherever occurring.

Insert instead “section 141 or 143 of the *Adoption Act 1997*”.

[3] Section 24A

Insert after section 24:

24A Registration of deceased person’s intention to adopt

(1) The adoptive parent of a person in respect of whom a memorandum is registered under this Part may apply to the Registrar, in a form approved by the Registrar, for registration of the intention of a deceased person to adopt the person jointly with the adoptive parent.

(2) The Registrar registers an intention of a deceased person to adopt by making an entry about the intention to adopt in the register including the particulars required by the regulations.

(3) An application to the Registrar under this section must, if the Registrar requires verification of the information contained in the application, be accompanied by a statutory declaration verifying the information contained in the application and any other evidence that the Registrar may require.

[4] Section 49 Issue of certificate

Insert after section 49 (3):

(4) If requested to do so by an applicant, the Registrar must issue a single certificate certifying particulars contained in an entry relating to the birth of a person and particulars relating to a memorandum sent to the Registrar under section 141 or 143 of the *Adoption Act 1997* and registered under that Act.

Note. The power of the Registrar to issue such a certificate is subject to the provisions of the *Adoption Act 1997*. See section 52.

[5] Section 52 Access to adoption information to be given in accordance with Adoption Information Act 1990

Omit “*Adoption Information Act 1990*”.

Insert instead “Chapter 6 of the *Adoption Act 1997*”.

[6] Section 52, note

Omit “ *Adoption Information Act 1990* ”.

Insert instead “Chapter 6 of the *Adoption Act 1997*”.

1.2 Births, Deaths and Marriages Registration Regulation 1996

Clause 7 Registration of adoptions

Insert at the end of clause 7:

(2) For the purposes of section 24A of the Act (Registration of deceased person’s intention to adopt), the following particulars are required:

(b) the full name and last residential address of the deceased person,

(c) the date and place of death of the deceased person.

1.3 Children (Care and Protection) Act 1987 No 54

[1] Section 3 Definitions

Omit paragraph (a1) of the definition of ***protected person*** in section 3 (1). Insert instead:

(a1) a child who is under the guardianship of the Director-General pursuant to section 49 (Guardianship of citizen child awaiting adoption) or 51 (Guardianship of non-citizen child awaiting adoption) of the *Adoption Act 1997*,

[2] Section 3 (1)

Omit paragraph (c) of the definition of ***ward***. Insert instead:

(c) a child declared to be a ward under this Act by an order in force under the *Adoption Act 1997*.

[3] Section 4 Related persons

Omit “ *Adoption of Children Act 1965* ” from section 4 (c).

Insert instead “ *Adoption Act 1997* ”.

1.4 Freedom of Information Act 1989 No 5

[1] Schedule 1 Exempt documents

Omit “ *Adoption of Children Act 1965* ” from clause 20 (a).

Insert instead “ *Adoption Act 1997* ”.

[2] Schedule 1

Omit “ *Adoption Information Act 1990* ” from clause 20 (c).

Insert instead “Chapter 6 of the *Adoption Act 1997*”.

1.5 Status of Children Act 1996 No 76

[1] Section 4 Application of Act

Omit “sections 35 and 36 of the *Adoption of Children Act 1965*” from section 4 (2).

Insert instead “sections 66–69 of the *Adoption Act 1997*”.

[2] Section 8 Rights of exnuptial children and their relatives on intestacy

Omit “ *Adoption of Children Act 1965* or an adoption recognised in the State under Part 5” from section 8 (4).

Insert instead “ *Adoption Act 1997* or an adoption recognised in the State under Chapter 5”.

[3] Sections 11 and 12

Omit “section 46 (Recognition of foreign adoptions) of the *Adoption of Children Act 1965*” wherever occurring.

Insert instead “Chapter 5 (Recognition of adoptions) of the *Adoption Act 1997*”.

1.6 Youth and Community Services Act 1973 No 90

Section 3 Definitions

Omit “ *Adoption of Children Act 1965* ” from the definition of **relative** in section 3.

Insert instead “ *Adoption Act 1997* ”.

Schedule 2 - Savings, transitional and other provisions

(Section 165)

Part 1 Preliminary

1 Savings and transitional regulations

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

(2) Any such provision may, if the regulations so provide, take effect on the date of assent to the Act concerned or a later date.

(3) To the extent to which any such provision takes effect on a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on the enactment of this Act

2 Definitions

In this Part:

repealed adoption Act means the *Adoption of Children Act 1965* as in force immediately before its repeal by this Act.

repealed information Act means the *Adoption Information Act 1990* as in force immediately before its repeal by this Act.

3 Saving of existing private adoption agencies

A charitable organisation approved as a private adoption agency under the repealed adoption Act immediately before its repeal by this Act is taken to have been approved as a private adoption agency under this Act.

4 Saving of consents

A valid consent to the adoption of a child given under the repealed adoption Act and that had not, immediately before the repeal of that Act, been revoked is taken to be a consent given in accordance with this Act.

5 Saving of Advance Notice Register and Reunion and Information Register

The Advance Notice Register and Reunion and Information Register established under the repealed information Act are to form part of the Advance Notice and Reunion Information Registers established under Part 5 of Chapter 6 of this Act.

6 Saving of regulations

The regulations made under the repealed Acts and in force immediately before the commencement of this clause are, until repealed, replaced or amended by regulations under this Act, to continue in force and to be taken to have been made under this Act.

7 Saving of contact vetoes

A contact veto that is entered in the Contact Veto Register under the repealed information Act immediately before its repeal by this Act is taken to be a contact veto entered in the Contact Veto Register under this Act.

8 References to repealed Acts

In any other Act or instrument a reference to the repealed adoption Act or the repealed information Act extends to a reference to the corresponding provision of this Act.

Dictionary

Part 1

1 Definitions

Aboriginal means a person who:

- (a) is a member of the Aboriginal race of Australia, and
- (b) identifies as an Aboriginal, and
- (c) is accepted by the Aboriginal community as an Aboriginal.

Aboriginal agency means an organisation approved as an Aboriginal agency under section 32.

Aboriginal child means a child who is descended from an Aboriginal.

Aboriginal Child Placement Principle means the principle set out in section 31.

accredited intercountry adoption agency means a body for the time being approved as an intercountry adoption agency under section 12.

adopted brother or sister, in relation to an adopted person, means another adopted person who has or had at least one parent (whether biological or adoptive) who is or was a birth parent of the adopted person.

adopted person means a person:

- (a) an order for whose adoption was made before the commencement of this Act under a former Act, or
- (b) whose adoption in another State or Territory or in a country outside Australia was recognised under the *Adoption of Children Act 1965* as having the same effect as if an order for adoption had been made under that Act, or
- (c) an order for whose adoption was made under this Act.

adoption order means an order for adoption of a child under this Act or a former Act.

adoption plan means a plan agreed between the birth parent or parents and adoptive parent or parents, before the making of an order for adoption, for the exchange of information between the parties to the plan in relation to:

- (a) the child's medical background or condition, or

- (b) the child's development and important events in the child's life, or
- (c) the means and nature of contact between the parties to the plan and the child, or
- (d) any other matter relating to the child.

adoption service means:

- (a) arrangement for or towards or with a view to the adoption of a child (whether citizen or non-citizen), or
- (b) negotiations for or towards or with a view to the adoption of a child (whether citizen or non-citizen), or
- (c) arranging or assisting in the transfer of the care and custody of a child (whether citizen or non-citizen).

adoptive parent means a person who becomes the parent of an adopted person by adoption.

advance notice registration means an advance notice request registered under Chapter 6 and in force.

advance notice request means an advance notice request lodged under Chapter 6.

amended birth certificate, in relation to an adopted person, means a certificate certifying the particulars relating to the birth of the person based on the registered memorandum relating to the adoption of the person kept under the *Births, Deaths and Marriages Registration Act 1995*.

applicant means:

- (a) the person who is the sole applicant for an adoption order, or
- (b) in the case of a joint application for an adoption order by a couple—each person who is an applicant for the order.

authorised adoption service provider means:

- (a) the Director-General or a delegate of the Director-General,
- (b) the principal officer of a private adoption agency or a person authorised in writing by the principal officer to act on behalf of the principal officer,
- (c) the principal officer of an accredited intercountry adoption agency or a person authorised in writing by the principal officer to act on behalf of the principal officer.

birth parent means a biological parent of an adopted person.

charitable organisation means:

- (a) a non-profit organisation carried on primarily or principally for religious, charitable, benevolent or philanthropic purposes, or
- (b) a hospital (other than an incorporated hospital or separate institution within the meaning of the *Public Hospitals Act 1929*) carried on by an organisation otherwise than for the purpose of trading or pecuniary profit or gain to its members.

child means:

- (a) a person who is less than 18 years of age, or
- (b) a person who is 18 or more years of age and in respect of whom an adoption is sought or has been made.

contact veto means a veto against contact registered under Chapter 6 and in force.

Court means the Supreme Court of New South Wales.

cultural heritage includes beliefs, morals, laws, customs, religion, superstitions, art, language, diet, dress and race.

Cultural Heritage Placement Principle means the principle set out in section 35.

de facto relationship means:

- (a) the relationship between a man and a woman who live together as husband and wife on a bona fide domestic basis although not married to one another, and
- (b) a comparable relationship between two adult persons of the same sex.

decision, in relation to the adoption of a child, includes a decision concerning:

- (a) the assessment of the suitability of a person or persons to adopt a child,
- (b) the arrangements for or in relation to the allocation of a child to a person or persons who will adopt the child,
- (c) the transfer of the care and custody of a child to a person or persons willing to adopt the child,
- (d) the giving of consent to the adoption of a child of whom the decision maker has guardianship.

decision maker, in relation to a decision about the adoption of a child, means the Court, the Director-General, a private adoption agency, an accredited intercountry adoption agency or a principal officer of a private adoption agency or accredited intercountry adoption agency.

designated country see section 78.

designated person means:

- (a) in relation to the Department of Community Services—the Director-General, or
- (b) in relation to a hospital or other health service under the control of an area health service constituted under the *Area Health Services Act 1986*—the chief executive officer of the area health board for the area health service, or
- (c) in relation to the Department of Health or a hospital specified in the Fifth Schedule to the *Public Hospitals Act 1929*—the Director-General of the Department, or

(d) in relation to an incorporated hospital or a separate institution (within the meaning of the *Public Hospitals Act 1929*)—the chief executive officer of the hospital or institution, or

(e) in relation to a private adoption agency—the principal officer of the private adoption agency, or

(f) in relation to an accredited intercountry adoption agency—the principal officer of the accredited intercountry adoption agency, or

(g) in relation to a private hospital (within the meaning of the *Private Hospitals and Day Procedure Centres Act 1988*)—the licensee of the private hospital, or

(h) in relation to the Office of the Registrar—the Registrar, or

(i) in relation to an institution, body or person prescribed as an information source for the purposes of this Act—the person prescribed as the designated person for that institution, body or person,

and includes a person to whom a function has been duly delegated by the designated person and a person authorised by the designated person in accordance with the guidelines prescribed by the regulations.

Director-General means the Director-General of the Department of Community Services.

former Act means:

(a) the *Child Welfare Act 1923* and the *Child Welfare Act 1939* or either of those Acts, or

(b) the *Adoption of Children Act 1965*.

foster parent means any person:

(a) who has the care of a child in accordance with a fostering authority held by the person under the *Children (Care and Protection) Act 1987*,

(b) who has the care of a child that has been placed in the care of the person by, or with the written approval of, the Minister administering the *Children (Care and Protection) Act 1987* or the Director-General, or

(c) who has the care of a child that has been placed in the care of the person by an authorised private fostering agency within the meaning of the *Children (Care and Protection) Act 1987*.

general consent is defined in section 41.

guardian of a child includes:

(a) a person having the custody of the child under a court order, and

(b) a person who is or is taken to be the guardian of a child, to the exclusion of, or in addition to, any parent or other guardian, under a law of the Commonwealth or of another State or a Territory.

home study means a report assessing the suitability of an applicant to become an adoptive parent prepared by an officer of the Department of Community Services or a social worker accredited by the Director-General for that purpose.

hospital means:

- (a) a hospital or other health service under the control of an area health service constituted under the *Area Health Services Act 1986*, or
- (b) an incorporated hospital or a separate institution within the meaning of the *Public Hospitals Act 1929* or a hospital specified in the Fifth Schedule to that Act, or
- (c) a private hospital within the meaning of the *Private Hospitals and Day Procedure Centres Act 1988*.

independent counsellor see section 42.

information source means:

- (a) the Department of Community Services, or
- (b) the Department of Health, or
- (c) a private adoption agency, or
- (d) an accredited intercountry adoption agency, or
- (e) a hospital, or
- (f) the Office of the Registrar, or
- (g) the Supreme Court, or
- (h) any other institution, body or person prescribed as an information source for the purposes of this Act.

intercountry adoption means the adoption by a person resident or domiciled in New South Wales of a non-citizen child from a country outside Australia.

interim order means an order under Part 7 of Chapter 4.

nominated officer means the Registrar of the Family Law Division of the Court and includes any other officer of the Court specified by rules of court as the nominated officer for the purposes of this Act.

non-citizen child has the same meaning as in the *Immigration (Guardianship of Children) Act 1946* of the Commonwealth.

original birth certificate, in relation to an adopted person, means:

- (a) if the person's birth is registered under the *Births, Deaths and Marriages Registration Act 1995*—a certificate certifying the particulars relating to the birth of the person registered under section 18 of that Act, or
- (b) if the person's birth is not so registered—a copy of any similar document relating to the adopted person identifying the birth parents of the person and contained in records relating to the adoption of the person that are held by an information source.

parental responsibility of a child means all the duties, powers, responsibilities and authority that, by law, parents have in relation to children.

Note. Under section 61C of the *Family Law Act 1975* of the Commonwealth each of the parents of a child who is not 18 years of age has (subject to any order of a court) parental responsibility for the child. This responsibility is not affected by changes in the relationships of the parents eg if they become separated by either or both of them marrying another person.

parties to an adoption means:

- (a) birth parent or birth parents who have consented to the child's adoption, and
- (b) person or persons selected to be the prospective adoptive parent of the child, and
- (c) the child's representative (if any).

prescribed information has the meaning given by section 80.

primary information source means:

- (a) the Registrar, or
- (b) if another person is prescribed by the regulations for the purpose of the provision in relation to which the expression is used—that person.

principal officer of a private adoption agency or accredited intercountry adoption agency means the person specified for the time being in the approval under section 16.

private adoption agency means a charitable organisation for the time being approved as a private adoption agency under section 11.

Registrar means the Registrar of Births, Deaths and Marriages.

relative means a grandparent, son, daughter, grandchild, brother, sister, uncle or aunt of a person:

- (a) whether the relationship is of the whole blood or half blood or by marriage, and
- (b) whether or not the relationship depends on the adoption of a person.

revocation period means the period within which consent to an adoption may be revoked under section 47.

sibling of an adopted person means a brother or sister of the person, whether the relationship is of the whole blood or half blood.

specific consent is defined in section 41.

spouse of a person means:

- (a) a person to whom the person is married, or
- (b) a person with whom the person has a de facto relationship of at least 3 years' duration.

Note. **Married person** is defined in Part 2 of this Dictionary.

step parent means, in relation to a person, another person who:

- (a) is not a birth parent or adoptive parent of the firstmentioned person, and
- (b) is married to the firstmentioned person's birth parent or adoptive parent.

supply authority means an authority to supply a birth certificate or prescribed information issued by the Director-General in accordance with the regulations.

Torres Strait Islander means a person who:

- (a) is descended from a Torres Strait Islander, and
- (b) identifies as a Torres Strait Islander, and
- (c) is accepted as a Torres Strait Islander by a Torres Strait Islander community.

Torres Strait Islander agency means an organisation approved as a Torres Strait Islander agency under section 34.

Torres Strait Islander child means a child who is descended from a Torres Strait Islander.

Torres Strait Islander Child Placement Principle means the principle set out in section 33.

Part 2

2 Couples

In this Act, a reference to 2 persons or a couple in relation to a joint application to adopt a child under this Act is a reference to:

- (a) a man and a woman who are married,
- (b) 2 persons who have a de facto relationship.

3 Married person

In this Act, a reference to 2 persons being married is a reference:

- (a) to a man and woman who are actually married, or
- (b) to an Aboriginal or Torres Strait Islander man and woman who are living together in a relationship that is recognised as a marriage according to the traditions of an Aboriginal community or Aboriginal or Torres Strait Islander group to which they belong.

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